

Fall 2004

Defending Deference: A Response to Professors Epstein and Wells

Robert J. Pushaw Jr.

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Robert J. Pushaw Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 Mo. L. REV. (2004)

Available at: <https://scholarship.law.missouri.edu/mlr/vol69/iss4/4>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Defending Deference: A Response to Professors Epstein and Wells

Robert J. Pushaw, Jr.*

Lee Epstein and Christina Wells have made original and valuable contributions to the enduring debate over judicial review in times of international crisis. Although they apply different methodologies, Professors Epstein and Wells agree on two key points.

The first is that the Supreme Court tends to sacrifice constitutional rights and liberties during emergencies, particularly war. Epstein supports this conclusion through an empirical analysis of cases over the past sixty years, which confirms the view held by most—but not all—judges, lawyers, and scholars.¹ Wells offers a psychological explanation for this neglect of individual rights: Federal courts blindly defer to the President, even though he engages in “skewed risk assessment” by overestimating threats to national security (e.g., sabotage and espionage) and undervaluing liberty interests (e.g., due process and freedom of expression).²

The second shared proposition is that the executive should be held more accountable. Professor Epstein suggests that Congress is the only institution that realistically can perform this task.³ Professor Wells recognizes this potential legislative check, but doubts its efficacy because members of Congress are prone to the same warped risk assessment and political pressure as the executive branch.⁴ Hence, she recommends the additional safeguard of federal courts applying a “hard look” review that requires the President to account for his response to perceived security risks by setting forth a reasoned justification for his actions.⁵

The foregoing arguments are all perfectly reasonable. Indeed, I find Professor Epstein’s to be persuasive. Her rigorous empirical study establishes as a fact what I (and most other scholars) had long assumed: The Court usually under-protects constitutional rights and yields to the President during wartime. Moreover, Epstein’s observation that Congress is best suited to check

* James Wilson Endowed Professor, Pepperdine University School of Law. J.D., Yale, 1988.

1. See Lee Epstein et al., *The Effect of War on the Supreme Court*, 79 N.Y.U. L. REV. (forthcoming 2004).

2. Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903 (2004).

3. See Epstein et al., *supra* note 1.

4. See Wells, *supra* note 2, at 947-48.

5. *Id.* at 944-45.

executive excesses comports with my understanding of constitutional theory.⁶ In short, I have no major criticisms of her paper.⁷

Professor Wells's ideas are more susceptible to challenge, primarily because they are so novel. No one else, to my knowledge, has identified "skewed risk assessment" as the reason for both the President's often unduly draconian policies during wartime and the typical acquiescence of Congress and the judiciary to such actions. Wells's thesis is plausible, and I have no basis for questioning her psychological research.⁸ Nonetheless, I believe that another explanation is at least equally tenable: The Constitution creates political and institutional structures that lead to strong executive-branch initiative in military affairs and fairly circumscribed judicial review.⁹ Those same constitutional considerations, as well as precedent, cast doubt on the viability of Wells's "hard look" proposal and suggest that the Court will—and should—continue its pattern of reviewing with deference wartime claims that the President has violated individual rights.

I. THE CONSTITUTIONAL FRAMEWORK

Concededly, neither the Constitution's text nor its drafting or ratification history directly addresses the issue of what standard judges should employ in evaluating claims that the executive's exercise of military powers exceeds

6. See *infra* notes 12-15 and accompanying text.

7. My only quibble is with her contention that the Bush Administration should reconsider its strategy of maneuvering around federal courts to fight the War on Terrorism, as they will likely suppress constitutional rights anyway. Epstein et al., *supra* note 1. That claim seems doubtful in light of the Court's recent holding that the Due Process Clause requires that an American citizen, being held as an "enemy combatant" in a United States military prison, be given a meaningful opportunity to contest the factual basis for his detention before an impartial decisionmaker. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); see also *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (ruling that the federal habeas statute granted federal courts jurisdiction to consider the legality of the executive's detention of a non-citizen designated as an "enemy combatant" who had been seized abroad and imprisoned in the U.S. Naval Base in Guantanamo Bay, Cuba).

8. Although I have no background in psychology, it makes sense to me that (1) the "availability heuristic" and the excessive fear of dreaded and unknown risk would lead to irrational judgments about risk, and (2) social forces skew such assessments even further.

9. To her credit, Professor Wells recognizes that "there may be many other arguments for deference despite our understanding of cognitive principles—for example, that the Constitution requires it in this situation." Wells, *supra* note 2, at 908. See also Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004) (comparing the institutional competence of the three branches over foreign relations and concluding that federal courts should abstain from deciding constitutional questions about the allocation of foreign-affairs powers and should review with great deference government decisions in this area that affect individual rights).

constitutional bounds. To be sure, many Framers and Ratifiers maintained that the Constitution's structure and underlying political theory created a strong presumption favoring judicial review, because only independent federal courts could impartially determine whether the elected branches had complied with the written limits on their own authority and had not contravened individual legal rights.¹⁰ Yet Federalists like Hamilton recognized that this presumption could be rebutted by a few constitutional provisions that gave the political branches sole and final decision-making authority.¹¹

The general conduct of military and foreign affairs fell into that category. Such powers, which in England had been an exclusively executive prerogative, were now allocated between Congress and the President—with no share given to the judiciary.¹² Article I provides that Congress can authorize military action (through a formal declaration of war or otherwise);¹³ establish, finance, and regulate the armed forces;¹⁴ and oversee the executive branch's conduct of the war.¹⁵ Article II vests "executive power" exclusively in the President¹⁶ and makes him the "Commander in Chief" to direct the war ef-

10. The classic exposition of this argument is THE FEDERALIST NO. 78, at 524-27 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Judicial review flowed from the broader political theory that the sovereign "People" could simultaneously empower and limit their government agents through a written Constitution that would ultimately be enforced by an independent judiciary. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 407-35 (1996) [hereinafter Pushaw, *Justiciability*] (discussing this theory in detail). Both Federalists and Antifederalists recognized that courts could declare laws unconstitutional. See Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 493, 498-501 (1994).

11. See THE FEDERALIST NO. 78, at 524-25 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). I have summarized Hamilton's approach, and urged its reintroduction, in Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165 (2002).

12. See Pushaw, *Justiciability*, *supra* note 10, at 401, 430-31, 507-09.

13. U.S. CONST. art. I, § 8, cl. 11.

14. U.S. CONST. art. I, § 8, cls. 12-16.

15. Article I vests "legislative power," which has always been understood in Anglo-American law to include oversight of executive action. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *155 (emphasizing Parliament's right to investigate executive officials and hold them accountable for misbehavior); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989) (describing the Constitution's flexible approach to inter-branch relations and Congress's interaction with President Washington as to military affairs, including its conduct of investigations).

16. U.S. CONST. art. II, § 1.

fort.¹⁷ The Constitution does not delineate the extent of presidential power to meet military crises absent prior legislative authorization. Nonetheless, it seems logical to infer some emergency power, because only the unitary executive had the institutional capacity to take swift and firm action based on the expert advice of department heads who possessed relevant and confidential information.¹⁸ Whatever the precise distribution of powers between Congress and the President,¹⁹ however, it is clear that the judiciary had no role in making, implementing, or evaluating military policy itself (e.g., decisions about authorizing war, military training, strategy, committing troops, and the like).²⁰

17. U.S. CONST. art. II, § 2. Between them, Congress and the President had all powers necessary to respond to any threat to national security. See THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

18. See THE FEDERALIST NO. 70 (Alexander Hamilton) (contrasting these aspects of the executive branch with the slowness, deliberation, and compromise that characterized legislatures); see also Pushaw, *Justiciability*, *supra* note 10, at 401, 403, 416-17, 434-35. The unitary executive had unique advantages in conducting military operations.

[T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a[] usual and essential part in the definition of the executive authority.

THE FEDERALIST NO. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Professor Wells concedes that judicial review of the actual prosecution of war would undermine the executive's ability to act quickly and decisively in response to an emergency, but she contends that such speed is rarely required for domestic actions taken in the name of national security. Wells, *supra* note 2, at 948. Wells may be correct as to certain historical incidents, such as the swift suppression of speech within the United States during World War I to further the avowed goal of winning the war in Europe. In the War on Terrorism, however, domestic security measures are inextricably linked to foreign military affairs.

19. Full consideration of this debate would exceed the scope of this essay. Compare JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993) (arguing that the original Constitution gave Congress alone the exclusive control over the decision to go to war, and lamenting Congress's gradual ceding of much of its power over military affairs to the executive) with John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) (contending that the Framers intended the President to possess the power to initiate and direct war, with Congress having the "juridical" role of declaring war and the authority to control military appropriations). Here I simply note that—regardless of the original understanding—the President has become preeminent in this area.

20. See Yoo, *supra* note 19, at 174, 176, 182-88, 270, 287-90, 300-01 (emphasizing that nothing in either the Constitution or the drafting and ratification records mentions judicial review as a check on the conduct of military affairs by the President or Congress); see also Pushaw, *Justiciability*, *supra* note 10, at 507-08 (explaining that the Constitution's grant of shared power over warmaking between Congress and the

But what about situations where the exercise of war powers *allegedly violated individual constitutional rights*? Should federal courts dismiss such cases as raising political questions concerning military matters, or exercise ordinary judicial review to uphold the protections of the Constitution? The Founders never answered this difficult question. Instead, it was left to the Supreme Court, which developed the compromise position of asserting jurisdiction, yet showing extraordinary deference to the political branches.

II. JURISPRUDENCE ON WAR POWERS

The Marshall Court quickly affirmed its judicial review authority²¹ but declared certain questions to be “political,”²² including the President’s foreign policy decisions not abridging individual rights,²³ his power as Commander-in-Chief in determining whether an emergency required mobilizing the militia to defend against a threatened invasion,²⁴ and Congress’s power to declare war²⁵ and to determine the rights of foreigners during wartime.²⁶ The Court emphasized that, because such decisions concerned the nation as a whole, accountability could be achieved only through national political means—voting the President out of office or persuading Congress to oppose him.²⁷

President implicitly excluded the judiciary because the coordination of the two branches minimized the likelihood of unconstitutional action). Indeed, the Framers’ extensive discussions about the Constitution’s war powers assumed that they would be exercised without any judicial interference. *See, e.g.*, THE FEDERALIST NO. 69, at 464-65, 470 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (describing the President’s authority as Commander-in-Chief).

21. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803).

22. *Id.* at 170.

23. *Id.* at 166.

24. *See* *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28-33 (1827). The Court identified three reasons for its conclusion. First, pursuant to the Constitution, Congress had authorized the President to determine whether exigencies warranted calling forth the militia to repel an invasion. *Id.* at 28-32. Second, the President in war matters relied upon information that might require secrecy and evidence that might not meet legal standards of strict proof. *Id.* at 31. Third, the President could not be required to articulate the factual basis for his decision that would be evaluated—and perhaps second-guessed—in a court proceeding. *Id.* at 30-33.

25. *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28-29 (1801).

26. *See* *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634-35 (1818).

27. *See, e.g., Marbury*, 5 U.S. (1 Cranch) at 164-67; *Gibbons*, 22 U.S. (9 Wheat.) at 197. Critics of the political question doctrine might argue that, in all the foregoing cases, the Court did exercise judicial review, but limited its inquiry to determining *whether* the Constitution authorized Congress or the President to act (not *how* they decided to proceed, which the Constitution left to their discretion). *See, e.g.,* MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION*

Nonetheless, the Marshall Court was willing to examine claims that the President, in exercising his power over military and foreign affairs, had breached a legal duty and thereby violated individual rights.²⁸ Even then, however, the Court proceeded with caution.²⁹

Over the years, the Court has continued this pattern. In general, military decisions are political questions³⁰—unless they invade individual rights, in which case judicial review is available, albeit with all doubts resolved in favor of the government's action.³¹ Although the degree of deference to the President has varied with the facts of each case, a few considerations seem crucial: (1) the gravity and immediacy of the military crisis, and the importance of the particular presidential measure in resolving it; (2) the presence or absence of congressional authorization for the executive's action; and (3) the

AND AMERICAN POLITICAL THEORY 111-36 (1991). Even if this analysis is correct, it ultimately leads to the same result: deference to the political branches.

28. The seminal case is *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (holding that the President lacked independent power to go beyond Congress's express authorization by ordering the seizure of all ships bound from France, and therefore finding that an American officer who had captured a Danish ship pursuant to that executive order had violated the shipowner's legal rights). See also *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800) (determining that, even though Congress had not formally declared war against France, its hostile actions against that nation made France an "enemy" within the meaning of a federal statute that increased the money given to American warship commanders who had recaptured merchant ships from "enemies," as contrasted with neutral or friendly countries).

29. See, e.g., *Little*, 6 U.S. (2 Cranch) at 177-79 (recognizing the President's broad power in directing military operations and officers).

30. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 42-45 (1849) (refusing to adjudicate a claim that the original charter government of Rhode Island was not "republican" where (1) both federal political departments had determined that this government—and not a rival regime—was the legitimate one; (2) the President, with congressional authorization, had called out the militia to suppress the upstart government; and (3) overruling these political-branch decisions would require invalidating all the acts of Rhode Island's longstanding government, which would lead to anarchy); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 71-77 (1867) (declining to interfere with Congress's abolition of Georgia's government and declaration of martial law during Reconstruction); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302-04 (1918) (identifying as a political question the conduct of foreign relations, including the government's recognition of the proper sovereign in a foreign nation); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (holding that the political departments alone control military training and procedures, and thus dismissing a claim that the negligent training of the National Guard led to the killing of protestors at Kent State).

31. See Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227, 259-62, 266-74, 283-92, 304-05, 326-27 (1991) (citing voluminous evidence that the Court routinely decided cases implicating foreign policy when individual rights were at stake, but under a deferential standard that typically included accepting the legal interpretation previously offered by the political branches as the governing rule of decision).

egregiousness and magnitude of the alleged constitutional violation.³² Two critical, albeit unspoken, factors also have loomed large: the political strength of the President and the likelihood he will obey the Court's judgment.

Usually, the Justices have supported the President, even when he seems to have offended fundamental constitutional norms. For example, in the seminal *Prize Cases*,³³ the Court upheld Lincoln's unilateral order, issued in April 1861 after the attack on Fort Sumter, to blockade Confederate ports and seize all merchant vessels (even from neutral countries) and their cargoes, despite obvious due process concerns for taking property.³⁴ The Court concluded that the Constitution entrusted the President, as Commander-in-Chief, with unreviewable political power to "determine what degree of force the crisis demands"³⁵—including the blockade and attendant deployment of warships.³⁶ Nor did it matter that Congress had not declared war or specifically authorized Lincoln's action, because (a) existing federal statutes generally empowered the President to use armed forces to repel foreign invasion or domestic insurrection,³⁷ and (b) Congress cured any constitutional defects in Lincoln's order by retroactively ratifying it.³⁸

Lincoln also asserted the independent and extraordinary power to increase the size of the army, ban disloyal publications, issue the Emancipation Proclamation, and suspend the writ of habeas corpus.³⁹ When Chief Justice Taney (sitting on circuit) ruled that the Constitution prohibited the President from stripping away habeas protections, and therefore ordered the release of an alleged Confederate sympathizer from military prison,⁴⁰ Lincoln ignored this judgment and told Congress that the Constitution implicitly gave him the

32. An eloquent description and defense of the Court's flexible, contextual, politically sensitive, case-by-case approach to the President's exercise of war powers is Justice Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

33. 67 U.S. (2 Black) 635 (1862).

34. *Id.* at 665-82.

35. *Id.* at 670.

36. *Id.* at 666-70.

37. *Id.* at 668 (citing Acts of Congress).

38. *Id.* at 670-71 (setting forth the statute).

39. See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 116-70 (2003) (detailing such drastic measures and generally defending their constitutionality).

40. See *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). Chief Justice Taney concluded that Lincoln had failed to faithfully execute the laws by usurping the power of (1) Congress under Article I to suspend habeas corpus in cases of rebellion or invasion, and (2) federal courts under Article III to apply due process standards to determine whether a private citizen had been imprisoned unlawfully. *Id.* at 148-51.

authority to take any steps necessary to preserve the Union.⁴¹ Two years later, Congress approved Lincoln's suspension of habeas relief.⁴²

One lesson of the Civil War is that the President can disregard express and fundamental constitutional provisions if an armed conflict threatens the nation, if Congress supports him (even after the fact), and if the President is a forceful leader who will defy any inconvenient court decree.⁴³ This reality became especially clear during World War II, when the Court capitulated to Franklin Roosevelt's assertions (often thinly supported) that military necessity required seemingly plain violations of constitutional liberties, such as the wholesale internment of Japanese-Americans⁴⁴ and the execution of Nazi saboteurs in America after a trial by a military commission rather than a civil court.⁴⁵ FDR had indicated that he expected the Justices to support his war efforts and that he was not likely to be deterred by adverse judicial orders.⁴⁶

Despite this general record of deference, however, the Court sometimes has thwarted the President and vindicated individual rights. The classic example is *Ex Parte Milligan*,⁴⁷ decided the year after the Civil War had ended and the politically unpopular Andrew Johnson had assumed the Presidency. The Court issued a writ of habeas corpus to free an American citizen who had been sentenced to death by a military tribunal for conspiracy against the Government and held that he was entitled to an ordinary jury trial because he had never been in the military and the civil courts were open.⁴⁸ Although the Court majestically declared that "[t]he Constitution . . . is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times,"⁴⁹ it showed unusual candor in confessing that it had not always adhered to this ideal:

41. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 38-39 (1998).

42. See Act of March 3, 1863, ch. 81, 12 Stat. 755.

43. Woodrow Wilson absorbed this lesson well and successfully suppressed individual liberties, particularly freedom of expression, during World War I. See Wells, *supra* note 2, at 914-15.

44. See *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that the executive branch's judgment that the war against Japan required the forcible relocation of Japanese-Americans to prevent espionage and sabotage justified any infringements on their due process or equal protection rights). Several dissenters argued that the Court had engaged in abdication rather than deference in permitting a flagrant violation of the Constitution. See *id.* at 225-33 (Roberts, J., dissenting); *id.* at 233-42 (Murphy, J., dissenting); *id.* at 242-48 (Jackson, J., dissenting).

45. *Ex Parte Quirin*, 317 U.S. 1 (1942).

46. See Dennis J. Hutchinson, "*The Achilles Heel*" of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455.

47. 71 U.S. (4 Wall.) 2 (1866).

48. *Id.* at 118-27.

49. *Id.* at 120.

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.⁵⁰

More recently, the Court denied President Truman's claim of implied Article II power to unilaterally seize and operate domestic steel mills to ensure production of arms for the Korean War⁵¹ and invalidated President Bush's indefinite detention of suspected terrorists.⁵² The Court apparently concluded that the wars against Korea and terrorism posed less immediate and serious threats, and that in any event both Presidents had gone constitutionally overboard in their responses without specific congressional authorization. Left unsaid was that Truman in 1952 and Bush in 2004 lacked the popularity and political capital to disregard the Court's orders.⁵³

The Court's jurisprudence has been attacked on two major grounds. First, the inconsistent results suggest that the Justices have been influenced at least as much by pragmatic political considerations as by legal principle. Second, the Court has countenanced serious invasions of individual rights and

50. *Id.* at 109.

51. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

52. In *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Court upheld the due process right of an alleged "enemy combatant" to have an impartial decisionmaker hear his claim that he had been wrongfully imprisoned, but recognized the need for broad executive discretion over war-making. For example, the Court conceded that the Government (1) may imprison suspected enemy combatants, and (2) must afford them only the core elements of notice and a fair hearing (not other procedural and evidentiary rules that would apply to ordinary detentions), and indeed might rely upon military tribunals if they were unbiased. *Id.* at 2643-52. I suspect that the cases might have been decided differently if either America had been hit with another terrorist attack or if the President had enjoyed greater popular support and had signaled his intention to ignore any adverse Supreme Court ruling.

53. One commentator has deemed *Youngstown* "the backlash to the legally clumsy attempt, by a famously unpopular President, to invoke national security as the justification for seizing steel mills during a labor dispute in 1952, an election year in which control of the White House subsequently shifted from one party to the other." *See* J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 CONST. COMMENT. 37, 42 (2002). Similarly, George Bush became President by a razor-thin margin in the Electoral College, and as of June 2004 (the time of the Court's decision in *Hamdi*) his approval rating had slipped to about 50 percent. USA Today/CNN/Gallup Poll Results, at www.usatoday.com/news/politics/elections/national/polls/otherpolls.htm (last visited Nov. 24, 2004).

liberties that seemed disproportionate to the actual threats presented. Here I will focus on the latter problem.

III. PROPOSALS TO ENHANCE PROTECTION OF CONSTITUTIONAL RIGHTS THROUGH MORE RIGOROUS JUDICIAL REVIEW

Civil libertarians have urged the Court to exercise the same sort of judicial review over war powers as it does in purely domestic cases—i.e., independently interpreting and applying the law of the Constitution, despite the contrary view of the political branches and regardless of the political repercussions.⁵⁴ This proposed solution ignores the institutional differences, embedded in the Constitution, that have always led federal judges to review warmaking under special standards. Most obviously, the President can act with a speed, decisiveness, and access to information (often highly confidential) that cannot be matched by Congress, which must garner a majority of hundreds of legislators representing multiple interests.⁵⁵ Moreover, the judiciary by design acts far more slowly than either political branch. A court must wait for parties to initiate a suit, oversee the litigation process, and render a deliberative judgment that applies the law to the pertinent facts.⁵⁶ Hence, by the time federal judges (particularly those on the Supreme Court) decide a case, the action taken by the executive is several years old. Sometimes, this delay is long enough that the crisis has passed and the Court's detached perspective has been restored.⁵⁷ At other times, however, the war rages, the President's action is set in stone, and he will ignore any judicial orders that he conform his conduct to constitutional norms.⁵⁸ In such critical situations, issuing a judgment simply weakens the Court as an institution, as Chief Justice Taney learned the hard way.⁵⁹

Professor Wells understands the foregoing institutional differences and thus does not naively demand that the Court exercise regular judicial review to safeguard individual constitutional rights, come hell or high water. None-

54. See, e.g., Epstein et al., *supra* note 1 (citing examples).

55. See *supra* notes 13-19 and accompanying text.

56. For an analysis of judicial power in our constitutional system of separation of powers, see Pushaw, *Justiciability*, *supra* note 10, at 415-27; Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 746, 789, 805-06, 809, 827, 844-46 (2001).

57. The Supreme Court itself has occasionally recognized this phenomenon. See *supra* note 50 and accompanying text.

58. See *supra* notes 33-42, 44-46 and accompanying text (describing the intransigence of Lincoln and Roosevelt).

59. See *supra* notes 40-42 (discussing Lincoln's successful refusal to obey Taney's command to release a military prisoner). Professor Wells acknowledges that judges sometimes might choose not to exercise meaningful judicial review, especially for political reasons such as preserving their institutional capital. Wells, *supra* note 2, at 941-42.

theless, she remains troubled by cases in which the Court's examination of executive action is so cursory as to amount to an abdication of its responsibilities—and a stamp of constitutional approval for the President's actions.⁶⁰ Therefore, she proposes a compromise: requiring the President to establish a reasonable basis for the measures he has taken in response to a genuine risk to national security.⁶¹ In this way, federal judges would ensure accountability not by substituting their judgments for those of executive officials (as happens with normal judicial review), but rather by forcing them to adequately justify their decisions.⁶²

This proposal intelligently blends a concern for individual rights with pragmatism. Civil libertarians often overlook the basic point that constitutional rights are not absolute, but rather may be infringed if the government has a compelling reason for doing so and employs the least restrictive means to achieve that interest.⁶³ Obviously, national security is a compelling governmental interest.⁶⁴ Professor Wells's crucial insight is that courts should not allow the President simply to *assert* that "national security" necessitated his actions; rather, he must concretely *demonstrate* that his policies were a reasonable and narrowly tailored response to a particular risk that had been assessed accurately.⁶⁵

Although this approach is plausible in theory, I am not sure it would work well in practice. Presumably, the President almost always will be able to set forth plausible justifications for his actions, often based on a wide array of factors—including highly sensitive intelligence that he does not wish to disclose.⁶⁶ Moreover, if the President's response seems unduly harsh, he will likely cite the wisdom of erring on the side of caution. If the Court disagrees, it will have to find that those proffered reasons are pretextual and that the President overreacted emotionally instead of rationally evaluating and responding to the true risks involved. But are judges competent to make such determinations? And even if they are, would they be willing to impugn the President's integrity and judgment? If so, what effect might such a judicial decision have on America's foreign relations? These questions are worth

60. See Wells, *supra* note 2.

61. *Id.* at 944-45.

62. *Id.*

63. The Court first articulated this "strict scrutiny" test in *Korematsu v. United States*, 323 U.S. 214, 216-20, 223-24 (1944), but held that the Government had carried its burden.

64. See, e.g., *Haig v. Agee*, 453 U.S. 280, 307 (1981).

65. Wells, *supra* note 2, at 944-45.

66. The Court has long shown sensitivity to such concerns. See, e.g., *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30-33 (1827) (declining to require the President to reveal in court proceedings the factual basis for his determination that an invasion was sufficiently imminent to warrant calling forth the militia, particularly because this decision might have been based on secret information).

pondering before concluding that “hard look” review would be an improvement over the Court’s established approach.

Moreover, such searching scrutiny will be useless in situations where the President has made a wartime decision that he will not change, even if judicially ordered to do so. For instance, assume that the Court in *Korematsu* had applied “hard look” review and found that President Roosevelt had wildly exaggerated the sabotage and espionage risks posed by Japanese-Americans and had imprisoned them based on unfounded fears and prejudice (as appears to have been the case). If the Court accordingly had struck down FDR’s order to relocate them, he would likely have disobeyed it.

Professor Wells could reply that this result would have been better than what happened, which was that the Court engaged in “pretend” review and stained its reputation by upholding the constitutionality of the President’s odious and unwarranted racial discrimination. I would agree. But I submit that the solution in such unique situations (i.e., where a politically strong President has made a final decision and will defy any contrary court judgment) is not judicial review in any form—ordinary, deferential, or hard look. Rather, the Court should simply declare the matter to be a political question and dismiss the case. Although such Bickelian manipulation of the political question doctrine might be legally unprincipled and morally craven,⁶⁷ at least it would avoid giving the President political cover by blessing his unconstitutional conduct and instead would force him to shoulder full responsibility.

CONCLUSION

Subject to the “political question” exception just mentioned, I agree with the Court’s general approach of deferentially reviewing the executive’s military actions. In this uniquely delicate context, room must be allowed for judges to make a sophisticated legal and political calculus based on the facts and nuances of each case. Admittedly, such ad hoc balancing is unpalatable to those who crave certainty or who are ardent civil libertarians. Nonetheless, for federal judges, sometimes discretion is the better part of valor.

67. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (arguing that the Court should manipulate the justiciability doctrines to ensure that it always renders principled decisions on substantive constitutional law). I hasten to add that I would not apply Professor Bickel’s approach in any other situation. See Pushaw, *Justiciability*, *supra* note 10, at 465-67 (criticizing Bickel’s thesis).