

# A Pertinent Message for Today from Key Constitutional and Administrative Rulings of Yesterday

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In the aftermath of September 11, 2001 and debate over whether traditional mechanisms for adjudication can deal adequately with alleged perpetrators of terrorism, I've been pondering with apprehension Chief Justice Rehnquist's 1998 book *All the Laws But One: Civil Liberties in Wartime*.<sup>1</sup>

A scholarly review of historical practices confining civil liberties during the Civil War, World War I, and World War II is followed by the Chief Justice's analysis of and rationale for judicial acceptance of the maxim *Inter arma silent leges*: In time of war the laws are silent.<sup>2</sup> He predicts, if he does not quite recommend, that current and future Supreme Courts faced with the exigencies of war will replicate their predecessors' endorsements of executive and military practices and will bypass judicial principles that traditionally have protected individuals against procedural and substantive excess by the government.

The Chief Justice adverts explicitly to "the reluctance of courts to decide a case against the government on an issue of national security

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1. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998).

2. *See id.* at 218–25.

during a war” and suggests that such reluctance is a “necessary evil.”<sup>3</sup> While declaring it “both desirable and likely” that courts will accord greater scrutiny in the future to governmental claims of necessity for curtailing civil liberties,<sup>4</sup> he minimizes issues of “occasional presidential excesses and judicial restraint in wartime” as “very largely academic. There is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt, or that future Justices of the Supreme Court will decide questions differently from their predecessors.”<sup>5</sup> He expects that “[t]he laws will . . . not be silent in time of war, but they will speak with a somewhat different voice.”<sup>6</sup>

The “different voice” has already become audible in the Fourth Circuit’s January 8, 2003 disposition of the government’s appeal from Senior District Judge Robert Doumar’s ruling in *Hamdi v. Rumsfeld* requiring production by the government of materials regarding Hamdi’s status as an alleged enemy combatant.<sup>7</sup> Hamdi, a U.S. citizen who was captured in Afghanistan, detained initially in Afghanistan, then in Guantanamo Bay, and subsequently transferred to the Norfolk Naval Station Brig where he has remained since April 2002, challenged the lawfulness of his confinement in the Norfolk Brig. He maintained that the government’s detention of him without charges, access to a judicial tribunal, or the right to counsel violated the Fifth and Fourteenth Amendments to the U.S. Constitution. In its opinion of August 16, 2002, the district court ruled that the government’s declaration about Hamdi’s detention “falls far short” of supporting it.<sup>8</sup> The district court ordered the government to turn over such materials as the names and addresses of all interrogators who had questioned Hamdi, copies of Hamdi’s statements, and the notes taken from interviews with him.<sup>9</sup>

Reversing Judge Doumar’s ruling and order, the Fourth Circuit panel consisting of Judges Wilkinson, Wilkins, and Traxler maintained that the declaration by the government about Hamdi’s detention “is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition.”<sup>10</sup>

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3. *Id.* at 221.

4. *Id.* at 225.

5. *Id.* at 224.

6. *Id.* at 225.

7. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

8. *Id.* at 462.

9. *Id.*

10. *Id.* at 459.

Acknowledging that Hamdi's dual status as both an American citizen and an alleged enemy combatant "raises important questions about the role of the courts in times of war," Judge Wilkinson proceeded to confine the judiciary's role to deferring to executive and military decisions, stressing "the importance of limitations on judicial activities during wartime."<sup>11</sup> The political branches are best positioned to comprehend the global war in its full context, he emphasized, "and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches."<sup>12</sup> Not just a "somewhat different voice" but a dramatically different one rejected the need to probe Hamdi's rights as a citizen. Judge Wilkinson maintained, "For the judicial branch to trespass upon the exercise of the warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical."<sup>13</sup> The only semblance of recognition by the Fourth Circuit of the government's obligation to control itself was its observation that "judicial deference to executive decisions made in the name of war is not unlimited."<sup>14</sup> However, no limitation could be placed on judicial deference to the executive in this instance, Judge Wilkinson concluded, because "military judgments in the field" were at the core of the government's action detaining Hamdi.<sup>15</sup>

That the judiciary will and, implicitly, should speak with a different voice depending on the wartime or peacetime context of actions and that replication of abdications from scrutiny of the executive and military should be expected to recur whenever a state of war exists jolts us away from John Marshall's assurances in *Marbury v. Madison* that "[t]he government of the United States has been emphatically termed a government of laws, and not of men" and that "[t]he very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he suffers an injury."<sup>16</sup>

Chief Justice Rehnquist's analysis was alarming in its fatalistic acceptance of the Latin maxim without even posing or probing

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11. *Id.* at 462.

12. *Id.* at 464.

13. *Id.* at 463.

14. *Id.* at 464.

15. *Id.* at 465.

16. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

justifications for its divergence from the principles of governance that animated Marshall's *Marbury* opinion and other works of the Constitution's Framers. Notwithstanding their personal experiences with realities of warfare, the Framers did not calibrate their concern with limiting the power to govern according to whether war or peace was at hand. Number 51 of the Federalist Papers stated clearly and unequivocally the priorities of government: "You must first enable the government to control the governed; and in the next place, oblige it to control itself."<sup>17</sup> Self-control was not an option; it was an obligation. And the means for self-control established by the Framers without regard to whether we were at war or peace were to be the system of separation of powers and checks and balances in which the powers and ambitions of each branch would operate to engage and limit the potential and likely excesses of the others. Nat Nathanson and his coauthor Lou Jaffe summarized precisely the status of the separation of powers principle as "a fundamental and valid dogma" whose "object is the preservation of political safeguards against the capricious exercise of power."<sup>18</sup>

To countenance the silencing of the laws because of exigencies of wartime would be both destructive of a guiding principle embedded in our nation's tradition of governance and a heedless, needless repudiation of salient and effective criteria that have enabled the government to perform its authorized tasks in times of crisis as well as times of calm without abandoning its obligation to control itself.

The evolution of the administrative state in consonance with adherence to criteria that assure administrative agencies' accountability and constrain them from unauthorized and arbitrary actions demonstrates the practicality and viability of achieving necessary and proper results through carefully articulated and consistently binding principles of law. How did this salutary evolution come about? At the outset, judicial willingness to accept in principle the constitutionality of administrative agency decisionmaking but judicial refusal to succumb to executive or legislative invocations of convenience and utility, and even their cries of "crisis" or "emergency" as justifications for bypassing traditional judicial modes and methods, played a key role.

The 1932 case of *Crowell v. Benson*<sup>19</sup> presented a prototype of this combination of willingness and refusal. Challengers in *Crowell* of awards by the U.S. Employees Compensation Commission under the Longshoremen's and Harbor Workers' Compensation Act contended

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17. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

18. LOUIS L. JAFFE & NATHANIEL L. NATHANSON, ADMINISTRATIVE LAW 33 (4th ed. 1976).

19. 285 U.S. 22 (1932).

that the statute unconstitutionally bestowed judicial power upon a nonjudicial body. Rejecting the constitutional objection, the Court ruled that Congress may establish Article I “legislative” courts in exercising the powers confided to it, as distinguished from Article III “constitutional courts,” in which the judicial power conferred by the Constitution should be deposited.<sup>20</sup> Congress could constitutionally utilize “a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.”<sup>21</sup> However, recognition of the convenience and utility of administrative agencies “does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department.”<sup>22</sup>

Chief Justice Hughes proceeded to stress that “[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.”<sup>23</sup> Trial de novo was mandated for “fundamental” or “jurisdictional” facts, whose “existence is a condition precedent to the operation of the statutory scheme.”<sup>24</sup> The essential independence of the judicial power of the United States in enforcing constitutional rights “requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.”<sup>25</sup> Justice Brandeis, in dissent, maintained that de novo review in the district court of issues tried or triable before the Commission “will, I fear, gravely hamper the effective administration of the Act.”<sup>26</sup> Nonetheless, Brandeis affirmed that “under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.”<sup>27</sup>

While trial de novo has not been imposed with draconian regularity in the aftermath of the *Crowell* decision, the Court’s insistence on the

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20. *Id.* at 50.

21. *Id.* at 54.

22. *Id.* at 57.

23. *Id.* at 60.

24. *Id.* at 54.

25. *Id.* at 64.

26. *Id.* at 94 (Brandeis, J., dissenting).

27. *Id.* at 87.

judiciary's jurisdiction and authority in "cases brought to enforce constitutional rights" has been echoed from that time to this.<sup>28</sup>

The Supreme Court's invalidation of the National Industrial Recovery Act of 1933 (NIRA) in the *Schechter Poultry* case in 1935<sup>29</sup> offered a dramatic illustration of the view that requirements of constitutional regularity trump claims of crisis. The immediate context for the statute was succinctly chronicled by Robert Stern in his 1946 *Harvard Law Review* article, *The Commerce Clause and the National Economy, 1933–1946*:

The depression which began in the Fall of 1929 had, by 1933, produced an economic crisis probably unequalled in the history of the United States. At least thirteen million persons were unemployed; . . . wages received in mining, manufacturing, construction and transportation had declined from 17 to 6.8 billion dollars. Prices had fallen 37 per cent and industrial production had been cut almost in half.<sup>30</sup>

Pursuant to that sweeping statute, codes of fair competition promulgated by industry and labor could become binding law upon receiving presidential approval without meeting or being subjected to congressionally prescribed standards and procedures. Invocation of national crisis as a justification for shoddy procedure and unquestioning deference to executive judgment became a hallmark of the government's unsuccessful effort to obtain legal approval for the NIRA.

Chief Justice Hughes's opinion for the unanimous court in *A.L.A. Schechter Poultry Corp. v. United States*<sup>31</sup> rejected the notion that crises can cure statutory defects and ruled the NIRA unconstitutional. Hughes noted trenchantly:

We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.<sup>32</sup>

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28. See, e.g., *United States v. Raddatz*, 447 U.S. 667 (1980); *Spagnolia v. Mathis*, 809 F.2d 16 (D.C. Cir. 1986); *Atl. Coast R.R. v. Pub. Serv. Comm'n of S.C.*, 77 F. Supp. 675 (E.D.S.C. 1948).

29. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

30. Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 645, 653 (1946) (footnotes omitted).

31. 295 U.S. 495.

32. *Id.* at 528–29 (footnote omitted).

The Chief Justice proceeded to contrast the procedural vagaries of the NIRA with the requirements the Federal Trade Commission (FTC) Act of 1914 established to govern operations of the then new administrative agency. Specific procedures were set up by Congress for the FTC to follow. “Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority.”<sup>33</sup>

In providing for codes of fair competition, the NIRA, on the other hand, “dispenses with this administrative procedure and with any administrative procedure of an analogous character.”<sup>34</sup> As Justice Cardozo stated in his concurring opinion, by setting up comprehensive bodies of rules to promote the welfare of industry without reference to standards—ethical or commercial—that could be known or predicted in advance of their adoption, drafters of the codes were engaged in “delegation running riot.”<sup>35</sup>

President Truman’s invocation of “emergency” as justification for his order to the Secretary of Commerce temporarily to take over the steel industry during the Korean War in order to prevent an industry-wide strike that could interrupt the supply of war materials to our troops was repudiated by the Supreme Court’s 6–3 majority in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>36</sup> notwithstanding the dissenters’ insistence that the President acted properly “to faithfully execute the laws by acting in an emergency to maintain the status quo.”<sup>37</sup>

Justice Black’s opinion for the Court responded to the claim that the President’s action “was necessary to avert a national catastrophe . . . , and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers”<sup>38</sup> by pointing out that:

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.<sup>39</sup>

In concurrence, Justice Frankfurter stressed that the Founders of the

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33. *Id.* at 533.

34. *Id.*

35. *Id.* at 553 (Cardozo, J., concurring).

36. 343 U.S. 579 (1952).

37. *Id.* at 703 (Vinson, C.J., dissenting).

38. *Id.* at 582.

39. *Id.* at 589.

Nation “rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was felt necessity.”<sup>40</sup> They “had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power.”<sup>41</sup>

Echoing Frankfurter’s ode to the checks and balances of the Constitution, Justice Douglas observed that “[w]e pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many.”<sup>42</sup>

Justice Jackson took special note of and rejected the Solicitor General’s argument that “inherent” powers accruing from customs and claims of previous administrations authorize the President “to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.”<sup>43</sup> Emphasizing that “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress,”<sup>44</sup> Justice Jackson concluded his separate concurrence with an eloquent reminder of the core of free government: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”<sup>45</sup>

Our nation would have been worse off if the Supreme Court had deferred in *Crowell* to blandishments of convenience and utility or in *Schechter* and in *Youngstown* to claims of crisis and emergency as justifications for abandoning traditional instruments and modes of minimally fair procedure. The economic crisis of the 1930s was met post-*Schechter* with resilient and imaginative governmental action that adhered to norms of fundamental fairness. And the “emergency” invoked to support President Truman’s seizure of the steel industry to prevent interruption of war materials to our troops in Korea was resolved in the quick sequences of immediate presidential compliance with the Court’s ruling, a fifty-three-day strike by the steelworkers that did not produce a steel shortage, and a negotiated settlement culminating in acceptable wage and price increases.

That the Court blew its whistle on Truman’s seizure while the issue was at white heat and that the President summarily obeyed the Justices

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40. *Id.* at 593 (Frankfurter, J., concurring).

41. *Id.*

42. *Id.* at 633 (Douglas, J., concurring).

43. *Id.* at 646 (Jackson, J., concurring).

44. *Id.* at 635.

45. *Id.* at 655.

and restored the industry to its private owners were manifestations of and tributes to the resoluteness of American commitment to the rule of law.

President Truman's example of compliance was, fortunately, replicated by President Nixon in the wake of the Supreme Court's ruling in *United States v. Nixon* that the presumptive privilege of the President of confidentiality of communication "must be considered in light of our historic commitment to the rule of law."<sup>46</sup>

Concluding that "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law,"<sup>47</sup> the Court sustained the order to President Nixon to produce the recordings and documents subpoenaed by the Special Prosecutor. Along the route to the Court's 8-0 ruling against the President, the Court rejected the argument that the matter was not subject to judicial resolution because it was an intrabranch dispute. John Marshall's declaration in *Marbury* that it is "emphatically the province and duty of the judicial department to say what the law is" was pointedly reaffirmed by Chief Justice Burger.<sup>48</sup>

The Court performed its duty in refuting President Nixon's generalized claim of executive privilege, and the President followed through on his duty by complying with the Court's ruling.

Although a far cry from the sensitive matters of state involved in the *Youngstown* and *Nixon* cases, the sexual harassment allegations of Paula Jones against President Clinton once again involved the issue of presidential compliance with the rule of law. In *Clinton v. Jones*, the Justices obliged a sitting President, over his fierce objection, to arrange to testify in response to a complaint about actions allegedly taken by him before his presidential term began.<sup>49</sup> The Supreme Court ruled that it was an abuse of discretion for the district court to defer the trial of Ms. Jones's case until after the President leaves office. Said Justice Stevens for the Court, "[T]he doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office."<sup>50</sup> *Marbury*, *Youngstown*, and *Nixon* were invoked to support the proposition that the Court has the authority to determine whether the

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46. 418 U.S. 683, 708 (1974).

47. *Id.* at 713.

48. *Id.* at 703 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

49. 520 U.S. 681 (1997).

50. *Id.* at 705-06.

President's claimed immunity while in office was within the law.<sup>51</sup>

Most of my colleagues and much of the press on all sides of the political spectrum criticized the Court for allegedly interfering with the President's performance of his primary governmental duties. Any obligation to respond to the Jones charges should have awaited completion of his presidential term, they maintained. I've been an unstinting admirer of Justice Stevens's opinion for the Court, which supported accommodation to presidential scheduling needs but insisted, nonetheless, that President Clinton be accountable to judicial process while serving in office.

Two other cases—one presidential, the other congressional—that sought to validate institutional shortcuts that bypassed constitutional requirements in the name of efficiency warrant consideration at this juncture. Both sought to alter constitutional provisions for exercising vetoes. In *INS v. Chadha*, Congress's use of the legislative veto, pursuant to which the legislature reserved to itself in particular statutes the power to veto rules and regulations adopted by administrative agencies, was ruled unconstitutional by a vote of 7–2.<sup>52</sup> In *Clinton v. New York*, authorization by Congress to the President to exercise the line item veto, pursuant to which the President could cancel particular provisions of discretionary budget authority, new direct spending authority, or limited tax benefits—and no longer be required to veto such measures in their entirety or not at all—was ruled unconstitutional by a vote of 6–3.<sup>53</sup> Arguments for both kinds of vetoes were couched in national need for greater institutional efficiency.

Writing for the Court in the *Chadha* case, Chief Justice Burger declared that the President's participation in the legislative process, through the presentment clause and his veto power, “was to protect the Executive Branch from Congress and to protect the whole people from improvident laws.”<sup>54</sup> The legislative veto:

doubtless has been in many respects a convenient shortcut; . . . but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. The records of the Convention and debates in the states preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.<sup>55</sup>

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51. *See id.* at 703–04.

52. *INS v. Chadha*, 462 U.S. 919 (1983).

53. *Clinton v. New York*, 524 U.S. 417 (1998).

54. *Chadha*, 462 U.S. at 951.

55. *Id.* at 958–59.

That the Justices were not confining their rejection of procedural shortcuts to the legislature was made clear in the paragraph that followed their call for “deliberate and deliberative process.” They stated:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.<sup>56</sup>

The Line Item Veto Act, like the legislative veto, was held to violate the Presentment Clause of Article I, Section 7.<sup>57</sup> “Although the Constitution expressly authorized the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes,” Justice Stevens maintained:

There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. . . . Our first President understood the text of the Presentment Clause as requiring that he either “approve all the parts of a Bill, or reject it in toto.”

. . . .

If there is to be a new procedure in which the President will play a different role in determining the final text of what may “become a law,” such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.<sup>58</sup>

The key cases holding Congress and the Chief Executive accountable to the rule of law are salient models of constitutional reasoning and policy that should banish from law’s lexicon any sweeping doctrine that our basic laws are ever silent. The Justices’ odes to compliance with constitutional prescriptions and mandates have trumped claims of efficiency, crisis, and emergency that parallel claimed exigencies of wartime, and we are the better for the traditions the Court and the complying Congresses and Presidents have honored.

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56. *Id.* at 959 (citation omitted).

57. *Clinton v. New York*, 524 U.S. at 421.

58. *Id.* at 439–40, 449 (quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940)).

As embodied in the precedents examined, goals of efficiency and fairness have been concomitants for implementation as the judiciary has confronted the alleged necessities for burgeoning administrative powers. Overall, we have been successful in enabling and encouraging federal agencies fully to perform responsibilities and exercise appropriate discretion while demanding of them adherence to basic principles of fairness and what Ken Davis called “a full structuring of discretionary power—findings, reasons, precedents, checks through appeals and through internal supervision, and procedural protections.”<sup>59</sup> Let us reexamine several additional landmark cases that supported the capacity of government agencies to operate expeditiously and efficiently while holding them accountable to standards and principles of the rule of law. They provide models for emulation and enforcement, whatever the momentary challenges our nation may face.

In chronological order, the *Chenery* cases,<sup>60</sup> *Universal Camera*,<sup>61</sup> *Florida East Coast*,<sup>62</sup> *Mathews v. Eldridge*,<sup>63</sup> *State Farm*,<sup>64</sup> *Heckler v. Chaney*,<sup>65</sup> *Chevron*,<sup>66</sup> *Webster v. Doe*,<sup>67</sup> and *Zadvydas*<sup>68</sup> make it to my hit parade, though other worthy candidates abound.

The two *Chenery* decisions of the Supreme Court, in 1943 and 1947, while embodying bitter differences among the Justices at the time over the devices and scope of agency power, produced core, lasting black letter doctrines both channeling and supporting agency expertise and discretion. In *Chenery I*, Justice Frankfurter, writing for the Court’s majority, declared the principle that “[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”<sup>69</sup> Judicial review was not to countenance post hoc agency rationalization. Agency action must be measured by what the record established in the case contains. *Chenery II*, written by Justice Murphy, with Frankfurter and Jackson in vigorous dissent, did not disturb *Chenery I*’s rule about the record but did reject Justice Frankfurter’s implication there that rulemaking rather than adjudication must be utilized for enunciation of new agency policy.<sup>70</sup>

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59. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 207 (1969).

60. SEC v. *Chenery Corp.*, 332 U.S. 194 (1947); SEC v. *Chenery Corp.*, 318 U.S. 80 (1943).

61. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

62. *United States v. Fla. E. Coast Ry.*, 410 U.S. 224 (1973).

63. 424 U.S. 319 (1976).

64. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

65. 470 U.S. 821 (1985).

66. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

67. 486 U.S. 592 (1988).

68. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

69. SEC v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).

70. See SEC v. *Chenery Corp.*, 332 U.S. 194, 201–02 (1947).

*Chenery II* made clear that agencies may choose to proceed either by rulemaking or adjudication. “In performing its important functions,” Murphy stressed, “an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.”<sup>71</sup>

In *Universal Camera Corp. v. NLRB* in 1951, Justice Frankfurter expanded on what was meant by the record, pursuant to requirements of the Administrative Procedure Act and the National Labor Relations Act, in determining whether substantial evidence is present to justify agency action.<sup>72</sup> It was upon “the whole record” that the agency action was to be evaluated, and the “whole record” includes the findings and report of the hearing examiner (now titled “administrative law judge”) in the case.<sup>73</sup> Although the examiner could be reversed by the agency without proof that his findings were clearly erroneous, “evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board’s than when he has reached the same conclusion.”<sup>74</sup> Reviewing courts should give to the examiner’s report “such probative force as it intrinsically commands.”<sup>75</sup> Thus, the Supreme Court ruled, the court of appeals had erred in holding that it was barred from taking into account the report of the hearing examiner insofar as it was rejected by the agency. Justice Frankfurter’s *Universal Camera* opinion eloquently and with nuanced perception about agency roles and needs crafted a credible, serviceable guide for judicial review that accorded for the first time official status and stature to the hearing examiner’s vital role.

Fairness of the administrative process did not require that its processes be mirror images of the courts’. Flexibility could go hand in hand with fairness. According hearing examiners, who could be removed from office only “for good cause,” an explicit role in assessing whether substantial evidence is present in the whole record to justify agency action was an important accompaniment in achieving fairness to requiring that the record of the case and not post hoc rationalizations justify the action taken.

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71. *Id.* at 202.

72. *See* *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

73. *Id.* at 488, 496.

74. *Id.* at 496.

75. *Id.* at 495.

At the same time, flexibility of agency procedure could be encouraged. As *Chenery II* made clear, the agency could choose whether to proceed by rulemaking or adjudication. And, as *Richardson v. Perales* in 1971 ruled, examiners could not only admit hearsay, such as written medical reports not subjected to cross-examination, as evidence, but such evidence could constitute substantial evidence to justify agency action.<sup>76</sup>

Lower courts were cautioned in *United States v. Florida East Coast Railway Co.* not to impose on agencies requirements not specified in their enabling statutes or the Administrative Procedure Act.<sup>77</sup> In addition, whereas agency adjudications were clearly subject to compliance with due process as well as statutory standards, agency adoptions of policies in typical rulemaking proceedings were governed only by statutory provisions and were not subjected to due process scrutiny.

Where due process was triggered, as in agency adjudications, the standards to be observed beyond notice and an opportunity to respond were the products of a judicial balancing process. As Justice Powell put it in *Mathews v. Eldridge* in 1976:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>78</sup>

Concerned about “the torpidity” of the review process in social security disability cases and the heavy administrative burden and the other societal costs requiring evidentiary pretermination hearings would impose, the Court in *Mathews* concluded that such evidentiary hearings were not mandated by due process in disability cases.<sup>79</sup> The agency's provisions of notice, availability to claimants of information in the record, and opportunity for claimants to respond in writing and submit additional evidence prior to termination were sufficient to meet the constitutional standard in this instance.

Without corroding flexibility, the Court in *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* in 1983 stressed as a component of fairness that, although a court must not substitute its judgment for that of the agency, “[the reviewing court] may not supply a reasoned basis for the agency's action that the agency itself has not

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76. *Richardson v. Perales*, 402 U.S. 389, 402 (1971).

77. *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 238–41 (1973).

78. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

79. *Id.* at 342, 349.

given.”<sup>80</sup> An agency rule must normally be rejected as arbitrary and capricious:

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>81</sup>

Judicial review should determine whether the agency has examined the relevant data and articulated “a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>82</sup> Lacking a record of such a rational connection, the rescission of its previously adopted passive restraint seat belt requirement was ruled arbitrary and capricious. “We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner; and we reaffirm this principle again today,” Justice White concluded.<sup>83</sup>

The need for cogent explanation and articulation of a rational connection between facts found and choice made was not abandoned or compromised when the Court in its famous *Chevron* decision in 1984 summarized and codified applicable principles of deference to agency interpretations of their enabling statutes’ provisions.<sup>84</sup> In order to decide whether the Environmental Protection Agency (EPA) had construed the statutory term “stationary source” reasonably when it treated all of the pollution-emitting devices within the same industrial grouping as though they were within a single “bubble,” the Court set forth a codificatory mantra of criteria to govern judicial review:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative

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80. *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *SEC v. Cheney Corp.*, 332 U.S. 194, 196 (1947)).

81. *Id.*

82. *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

83. *Id.* at 48–49 (citations omitted).

84. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether an agency's answer is based on a permissible construction of the statute.<sup>85</sup>

If Congress, explicitly or implicitly, has left a gap for the agency to fill, there is a delegation of authority to the agency. "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."<sup>86</sup> The *Chevron* Court scrutinized the statute and found that it did not speak directly to the "bubble concept" at issue. Then, reviewing the action of the EPA's administrator, the Court found that "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."<sup>87</sup> Consonant with these findings, Justice Stevens concluded for the Court that "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference."<sup>88</sup> The EPA's definition of the statutory term "source" is "a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth."<sup>89</sup>

I'm aware that dictum toward the end of Justice Stevens's opinion in *Chevron* instructs judges to butt out when wisdom of agency policy is the central issue, for "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."<sup>90</sup> It is still for the courts to decide whether a challenge to agency construction of a statutory provision really centers on the wisdom of legitimate agency policy choice or whether it centers on the reasonableness of choice within a gap left open by Congress. Having found the agency's statutory construction in *Chevron* to be "permissible" and "reasonable" after detailed probing, the Court in the *Chevron* case itself certainly performed its scrutinizing role. Post-*Chevron* decisions have added to the judiciary's task when claims of deference are made by agencies the obligation to decide whether *Chevron* deference and its mantra are applicable or whether the somewhat less deferential standard of *Skidmore v. Swift & Co.*<sup>91</sup> is to be utilized. *Skidmore's* terminology for deference, it will be recalled, was that administrative rulings, interpretations, and opinions:

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85. *Id.* at 842–43 (footnotes omitted).

86. *Id.* at 844.

87. *Id.* at 865 (footnotes omitted).

88. *Id.*

89. *Id.* at 866.

90. *Id.*

91. 323 U.S. 134 (1944).

while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>92</sup>

Deference under both *Skidmore* and *Chevron* was to be the end product of judicial inquiry into and assessment of text and legislative history of the applicable statute and the record, reasoning, and explication for its action by the agency.

Judicial determinations about deference to agency constructions of statutory language are components, not bypasses, of judicial review. Can all judicial review of agency practices be precluded or denied? Clearly, judicial review can be dispensed with where agency practices are governed solely by statute. Can it be denied to constitutional challenges as well? Compliance with cases like *Crowell v. Benson* would surely mandate a “no” answer. In truth, the Court’s more recent decisions have been cagey on this point. None has ruled that constitutional challenges can be foreclosed, but none either has ruled that they cannot.

We know from *Abbott Laboratories* and *Overton Park* that judicial review of administrative action is presumed in statutory cases, but that review in such instances can be denied directly by the statute or “where ‘agency action is committed to agency discretion by law.’”<sup>93</sup> The Court has also ruled that judicial review is unobtainable in statutory cases when there is “no law to apply.”<sup>94</sup> What of constitutional challenges?

Even when the Supreme Court reformulated the doctrine of presumption of judicial review in *Heckler v. Chaney* in 1985 to exclude agency inaction from the presumption,<sup>95</sup> Justice Rehnquist was careful to note, in writing for the Court, that “[n]o colorable claim is made in this case that the agency’s refusal to institute proceedings violated any constitutional rights of respondents, and we do not address the issue that would be raised in such a case.”<sup>96</sup>

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92. *Id.* at 140.

93. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting *Abbot Labs. v. Gardner*, 387 U.S. 136, 141 (1967)).

94. *Id.*

95. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

96. *Id.* at 838.

Concurring in the opinion, Justice Brennan noted that:

the Court properly does not decide today that nonenforcement decisions are unreviewable in cases where (1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct; (2) an agency engages in a pattern of nonenforcement of clear statutory language . . . ; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect; or (4) a nonenforcement decision violates constitutional rights.<sup>97</sup>

The Court revisited the issue of reviewability of claims of constitutional rights in *Webster v. Doe* in 1988, a case brought by a dismissed employee of the Central Intelligence Agency.<sup>98</sup> Explicitly, the Court went so far as to say that the dismissed employee's constitutional claims were reviewable.

[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.<sup>99</sup>

A majority of the Court, invoking *Crowell v. Benson*, reiterated in *Zadvydas v. Davis* in 2001 the "'cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"<sup>100</sup>

Ruling that habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to detentions of aliens who have been ordered removed beyond the postremoval period, the Court avoided deciding whether the statute that could be read to authorize permanent indefinite detention was constitutional or not. "In our view," wrote Justice Breyer, "the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention."<sup>101</sup> As far as its view of black letter constitutional law was concerned, the Court went no farther than to reserve, without exercising, its ultimate authority over constitutional questions. Citing *Superintendent v. Hill* (and, again, *Crowell*, this time Brandeis's recognition in his dissent that "under certain circumstances, the constitutional requirement of due process is a requirement of judicial

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97. *Id.* at 839 (Brennan, J., concurring) (citations omitted).

98. *Webster v. Doe*, 486 U.S. 592 (1988).

99. *Id.* at 603 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

100. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

101. *Id.*

process”<sup>102</sup>), Justice Breyer said: “This Court has suggested . . . that the Constitution may well preclude granting ‘an administrative body the unreviewable authority to make determinations implicating fundamental rights.’”<sup>103</sup> The Court did dismiss the government’s claim that Congress has “plenary power” to create immigration law and that the judiciary must defer to executive and legislative decisions in that realm with a succinct rebuttal, citing *Chadha*, “[b]ut that power is subject to important constitutional limitations.”<sup>104</sup>

Puzzlingly, after reiterating that an alien’s liberty interest raises a serious question as to whether the Constitution permits indefinite detention, Justice Breyer declared: “Despite this constitutional problem, ‘if Congress has made its intent’ in the statute ‘clear, ‘we must give effect to that intent.’”<sup>105</sup>

The Court made a special point of noting further that the issues in *Zadvydas* do not:

require us to consider the political branches’ authority to control entry into the United States. . . . Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.<sup>106</sup>

The *Zadvydas* ruling was handed down two and a half months before 9/11. What hope can there be that in a post-9/11 world, the Court will reaffirm commitment, not only to traditional norms of statutory interpretation to avoid conflicts with constitutional law, but to the primacy of the constitutional limitations when the conflict cannot be avoided?

This issue may well be in the same orbit as that labeled “academic” by Chief Justice Rehnquist in *All the Laws But One*, as he expressed the certainty that Presidents faced with wartime crises would deal with them as they had in the past, without distraction by or attention to civil liberties concerns, and that the Court would respond in similar fashion, upholding the President’s actions and shelving resolution of constitutional conflicts until crisis abates and normalcy returns.<sup>107</sup>

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102. *Crowell*, 285 U.S. at 87.

103. *Zadvydas*, 533 U.S. at 692 (quoting *Superintendent v. Hill*, 472 U.S. 445, 450 (1985)).

104. *Id.* at 695 (citing *INS v. Chadha*, 462 U.S. 919, 941–42 (1983)).

105. *Id.* at 696 (quoting *Miller v. French*, 530 U.S. 327, 336 (2000)).

106. *Id.* at 695–96.

107. *See* REHNQUIST, *supra* note 1, at 224.

I can't refute that the approach set forth by the Chief Justice may prevail. I believe, however, that such an approach would fly in the face of key decisions by the Court that honored and burnished our commitment to constitutional governance and the accountability of power.

The Constitution is not a showpiece, facade, or Orwellian work of "doublethink" that was written to shield reprehensible practices from confrontation and repudiation or "spin" them into less deadly, more acceptable euphemisms (as has been done with the term "collateral damage"). The Constitution sets forth principles and recipe to "enable the government to control the governed" and "oblige it to control itself."<sup>108</sup> It has served to correct and surmount abuses of power, whether by legislature or President or both. It does not countenance maintaining two versions of constitutional bookkeeping (Enron-style bookkeeping)—one for evaluating actions taken in peacetime, the other for bowing to or bypassing evaluating actions taken in war.

Steven Brill's recent book *After: How America Confronted the September 12 Era* is comforting in its finding that "[a]lthough American freedoms and the legal system that protects its people have been tested and even changed, Americans are still fundamentally free. . . . How Americans live has been indelibly affected. But the country's core values and way of life remain the same."<sup>109</sup> Reassuring, too, was a talk last week by Justice Breyer at the American Society of International Law, in which he maintained that courts, including his own, are fully aware of mistakes made in American history, including the holding in camps during World War II of Americans of Japanese ancestry.<sup>110</sup>

I close with words from the Supreme Court's past that, in conjunction with the cases considered earlier that implemented principled and viable standards for fusing needed polices with fundamental fairness, would do more credit to the Chief Justice for replication and application today than the Constitution-denigrating maxim *inter arma silent leges* that he invokes. These words, from *Ex parte Milligan*, are noted by the Chief Justice in his book, but are treated by him more like hyperbolic dicta than as authentic declarations of binding constitutional interpretation:

The Constitution of the United States 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, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of

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108. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

109. STEVEN BRILL, *AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA* 623–24 (2003).

110. Stephen G. Breyer, *The Supreme Court and the New International Law*, Address Before the Annual Meeting of the American Society of International Law (Apr. 4, 2003).

its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence . . . .<sup>111</sup>

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111. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866) (footnotes omitted); Rehnquist, *supra* note 1, at 129.

