JUDICIAL DEFERENCE TO EXECUTIVE BRANCH TREATY INTERPRETATIONS: A HISTORICAL PERSPECTIVE

*DAVID SLOSS**

INTRODUCTION

In recent years, there has been a vigorous debate among scholars about how much deference courts owe to the executive branch on treaty interpretation questions.[1] At one end of the spectrum, Professor John Yoo advocates absolute deference to the executive branch.[2] Most scholars favor a more modest form of deference that preserves an independent role for the judiciary in treaty interpretation and application.[3] Only one scholar has defended the view that courts owe zero deference to the President on treaty interpretation questions.[4]

In recent treaty interpretation cases, the Supreme Court has repeatedly stated that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."[5] At the same time, the Court

* Professor of Law, Saint Louis University School of Law. J.D., Stanford Law School, 1996; M.P.P., Harvard University, 1983; B.A., Hampshire College, 1981. The author thanks Lynn Hartke, Ashley Baker, Amanda Drennan and Lisa Murakami for valuable research assistance.

1. *See* Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. (forthcoming 2007) (surveying literature), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931997&high=%20Robert%20Chesney.

2. *See* John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1308 (2002); John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 853 (2001).

3. *See, e.g.*, David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1460-61, 1480-81 (1999) (contrasting questions that courts "may freely consider . . . unfettered by deference to an executive branch position" with questions where courts "defer conclusively to the executive branch's position"); Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 953 (2004) (asserting that "the determination of individual rights under a self-executing treaty is fundamentally a judicial, rather than executive, responsibility").

4. *See* Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25 (2005).

5. *See* El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982)). *See also* United States v. Stuart, 489 U.S. 353, 369 (1989) (quoting the same language

routinely adds that executive branch views on treaty interpretation questions are "not conclusive."[6] During the Rehnquist era, though, the Court almost always adopted the treaty interpretation favored by the executive branch. Professor Bederman reviewed Supreme Court decisions in treaty interpretation cases between 1986 and 1999. He found that, "of the twelve treaty interpretation cases considered so far by the Rehnquist Court, in all but one the holding followed the express wishes of the executive branch of the government."[7]

The Supreme Court's recent decision in *Hamdan v. Rumsfeld*[8] constitutes a significant departure from this trend. *Hamdan* presented the Court with a complex array of constitutional, statutory and treaty interpretation questions. Six Justices wrote separate opinions in the case, filling more than one hundred pages in Supreme Court Reports. The bulk of the analysis was devoted to statutory interpretation questions. Even so, Justice Stevens devoted approximately five pages of his forty-page majority opinion to issues involving the Geneva Conventions.[9] The majority's most important treaty-related holding was that members of al Qaeda are protected by Common Article 3 of the Geneva Conventions.[10] In reaching this holding, the Court explicitly rejected the President's contrary determination that Common Article 3 does not apply to al Qaeda members.[11] Glaringly absent from the Court's analysis is any reference to the established doctrine that courts owe deference to the President's interpretation of a treaty.

Although the Court's non-deferential approach to treaty interpretation in *Hamdan* constitutes a significant departure from the Rehnquist Court's highly deferential approach, it is entirely consistent with Supreme Court practice in the early years of constitutional history. In the first fifty years of U.S. constitutional history, between 1789 and 1838, the Supreme Court decided nineteen cases in which the U.S. government was a party, at least one party raised a

from *Sumitomo*); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

6. *El Al Israel Airlines*, 525 U.S. at 168 (quoting *Sumitomo*, 457 U.S. at 184); *Stuart*, 489 U.S. at 369 (using the same language); *see also Kolovrat*, 366 U.S. at 194 (stating that "courts interpret treaties for themselves").

7. Bederman, *supra* note 3, at 1465.

8. 126 S. Ct. 2749 (2006).

9. *See id.* at 2793-98.

10. *See id.* at 2795-96.

11. *See infra* notes 19-22 and accompanying text.

claim or defense on the basis of a treaty, and the Court decided the merits of that claim or defense.[12] The U.S. government won fewer than twenty percent of these cases.[13] This figure presents a striking contrast between the zero deference approach that the Court applied in the early nineteenth century, and the highly deferential approach that the Court applied in the late twentieth century.

This article has two parts. Part One analyzes the Supreme Court's approach to treaty interpretation issues in *Hamdan*. The analysis demonstrates that the Court decisively rejected the President's interpretation of Common Article 3. It is unlikely that the Court's decision in *Hamdan* heralds a return to the zero deference approach of the early nineteenth century. It is also too early to tell whether *Hamdan* signals a withdrawal from the highly deferential approach of the Rehnquist Court. However, the decision in *Hamdan* provides strong evidence that the Court will not accept the absolute deference model advocated by Professor Yoo.

Part Two documents that the Court actually applied a zero deference approach in treaty interpretation cases in the late eighteenth and early nineteenth centuries. It provides a brief overview of judicial decisions from 1789 to 1838 in cases raising treaty interpretation issues where the U.S. government was a party. The analysis demonstrates that, during this period, courts did not defer at all to the executive branch on most treaty interpretation questions. The judicial record from the early nineteenth century suggests, at a minimum, that there is nothing inherent in the constitutional text or structure that requires judicial deference to the executive branch on treaty interpretation issues.

I.
TREATY INTERPRETATION IN *HAMDAN V. RUMSFELD*

The Geneva Conventions are a set of four treaties concluded in 1949 that regulate the conduct of warfare. The Conventions set forth a detailed code of conduct that is designed to provide humanitarian protection for victims of warfare, including the sick and wounded,[14] prisoners of war[15] and civilians.[16] Most of the Conven-

12. *See infra* notes 57-60 and accompanying text.

13. *See id.*

14. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

tions' provisions apply to interstate armed conflict.[17] In contrast, Common Article 3, a provision that is identical in all four treaties, applies to "armed conflict not of an international character."[18]

In February 2002, President Bush issued a directive on the treatment of detainees captured in the war on terror.[19] In that directive, the President made three key findings. First, he determined that the main provisions of the Geneva Conventions do not apply to the U.S. conflict with al Qaeda because al Qaeda is not a "High Contracting Party."[20] Second, he determined that the main provisions of the Conventions do apply to the U.S. conflict with the Taliban.[21] Third, the President determined that Common Article 3 "does not apply to either al Qaeda or Taliban detainees" because Common Article 3 applies only to "armed conflict not of an international character," and "the relevant conflicts are international in scope."[22] The net result of these determinations is that members of al Qaeda are not protected by the Geneva Conventions, at least not according to the President's analysis.

On November 13, 2001, President Bush issued an order authorizing the creation of military commissions to conduct trials of individuals who were then past or current members of al Qaeda.[23]

15. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Convention].

16. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

17. *See, e.g.*, POW Convention, *supra* note 15, art. 2 ("[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties."). The other Conventions contain identical provisions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

18. POW Convention, *supra* note 15, art. 3. Since Common Article 3 is identical in all four treaties, for the sake of convenience this article will refer to Article 3 of the POW Convention.

19. *See* Memorandum from the President to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) [hereinafter Bush Directive on Detainees], *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134-35 (Karen J. Greenberg and Joshua L. Dratel eds., 2005).

20. *Id.* ¶ 2(a).

21. *Id.* ¶ 2(b).

22. *Id.* ¶ 2(c).

23. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57834-35 (Nov. 16, 2001).

The petitioner in *Hamdan v. Rumsfeld* is a Yemeni national captured in Afghanistan who has been detained by the U.S. government at the Guantánamo Bay naval base since June 2002. In July 2003, the President determined that Hamdan was eligible for trial by military commission.[24] Hamdan then filed a habeas corpus petition to challenge the legality of the proposed military commission proceeding. He argued, among other things, that trial by military commission would violate his rights under the Geneva Conventions.[25]

Hamdan's brief to the Supreme Court raised two distinct arguments based on the Geneva Conventions. First, he claimed that he is legally entitled to be treated as a prisoner of war.[26] If that assertion is correct, then trial by military commission would violate Article 102 of the Geneva Convention Relative to the Treatment of Prisoners of War ("POW Convention").[27] In the alternative, Hamdan contended, he is legally entitled to the protection of Common Article 3.[28] Common Article 3 prohibits "the passing of sentences . . . without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[29] Hamdan's brief asserted that the military commissions established by the Bush administration are not "regularly constituted courts" within the meaning of Common Article 3, and that they do not afford the judicial guarantees that are generally thought to be "indispensable."[30]

In response to Hamdan's argument that he should be treated as a prisoner of war, the government argued that the Geneva Conventions do not apply to the U.S. conflict with al Qaeda.[31] In support of this argument, the government cited the President's legal determination that the Conventions do not "apply to our conflict

24. *See* Petition for Writ of Certiorari, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), *available at* http://www.law.georgetown.edu/faculty/nkk/documents/8-7-05_Cert_Petition.nk11.pdf.

25. *See* Brief for Petitioner Salim Ahmed Hamdan at 45-50, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184), *available at* http://www.hamdanvrumsfeld.com/petbriefhamdanfinal.pdf [hereinafter Petitioner's Brief].

26. *Id.* at 45-47.

27. *See* POW Convention, *supra* note 15, art. 102 ("A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power.").

28. *See* Petitioner's Brief, *supra* note 25, at 48-50.

29. POW Convention, *supra* note 15, art. 3.

30. *See* Petitioner's Brief, *supra* note 25, at 48-50.

31. Brief for Respondents at 37-38, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), *available at* http://www.usdoj.gov/osg/briefs/2005/3mer/2mer/toc3index.html [hereinafter Government Brief].

with al Qaeda in Afghanistan or elsewhere throughout the world."[32] The government's brief then added: "The President's determination represents a classic exercise of his war powers and his authority over foreign affairs more generally . . . and is *binding on the courts*. The decision whether the Geneva Convention applies to a terrorist network like al Qaeda . . . is *solely for the Executive*."[33] In short, the government argued that the courts owe absolute deference to the President's determination. This was a fairly bold argument, because the Supreme Court has usually insisted that "courts interpret treaties for themselves."[34] Recognizing this point, the government offered a fallback position: "Even if some judicial review of the President's determination were appropriate . . . the standard of review would surely be extraordinarily deferential to the President."[35]

The government made the preceding argument in response to Hamdan's claim that he should be treated as a prisoner of war. Then, later in its brief, the government offered an abbreviated version of the same argument in response to Hamdan's claim that he is protected under Common Article 3. In that context, the government said:

> As the President determined, because the conflict between the United States and al Qaeda has taken place and is ongoing in several countries, the conflict is 'of an international character,' and Article 3 is thus inapplicable. Once again, *the President's determination is dispositive* or, at a minimum, entitled to great weight.[36]

Thus, as above, the government made a pitch for absolute deference, but then indicated that it would settle for something less than absolute deference ("great weight") as a fallback position.

There are two reasons why one might have expected the Court to be even more deferential than usual in *Hamdan*. First, in the usual treaty interpretation case, where the Court has said repeatedly that the views of the executive branch are entitled to "great weight," the Court has deferred to the views of lower level executive branch officials.[37] In contrast, the Court in *Hamdan* was asked to defer to a treaty interpretation that the President personally en-

32. *Id.* at 38.

33. *Id.* (citations omitted) (emphasis added).

34. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

35. Government Brief, *supra* note 31, at 38.

36. *Id.* at 48 (emphasis added).

37. *See, e.g.*, United States v. Stuart, 489 U.S. 353, 369-70 (1989) (deferring to views of Internal Revenue Service officials concerning the proper construction of a bilateral tax treaty between the United States and Canada).

dorsed.[38] Second, most of the Supreme Court's recent treaty interpretation decisions have not directly implicated national security concerns.[39] In contrast, the petitioner in *Hamdan* asked the Supreme Court to assess the validity of a central feature of the Bush administration's policy for combating the global terrorist threat.

Despite these factors, the Supreme Court rejected the President's interpretation of the Geneva Conventions. The Court determined that it "need not decide the merits" of Hamdan's argument that he was entitled to be treated as a prisoner of war.[40] However, the Court accepted Hamdan's alternative argument that he and other al Qaeda members detained at Guantánamo Bay are protected under Common Article 3.[41] In response to the government's assertion that Common Article 3 does not apply because the conflict with al Qaeda is "international in scope," the Court stated emphatically: "That reasoning is erroneous."[42] Noticeably absent from the Court's analysis of Common Article 3 is any reference to the oft-repeated maxim that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."[43] Instead of deference to the executive branch, the Court's analysis relied primarily on the plain meaning of the treaty text, supplemented by references to various international authorities interpreting that text.[44] After concluding that al Qaeda members are protected by Common Article 3, the Court held that the Bush administration military commissions violate the treaty requirement that detainees may be tried only by a "regularly constituted court."[45]

38. *See supra* notes 19-22 and accompanying text.

39. *See, e.g.*, El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) (deferring to government's construction of Article 24 of Warsaw Convention in a case where passenger sued airline for personal injury).

40. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795 (2006).

41. *Id.* at 2795-96. Hamdan has never admitted that he is or was a member of al Qaeda. Regardless, the Court assumed, without deciding, that he was a member.

42. *Id.* at 2795.

43. *El Al Israel Airlines*, 525 U.S. at 168 (quoting Sumitomo Shoji American, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982)).

44. *See Hamdan*, 126 S. Ct. at 2795-96.

45. *See id.* at 2796-97. The majority held that the Bush administration military commissions do not satisfy the Common Article 3 requirement for a "regularly constituted court." *Id.* Justice Kennedy joined this portion of Justice Stevens' opinion. His separate concurrence elaborated upon Justice Stevens' rationale. *See id.* at 2803-08 (Kennedy, J., concurring). A plurality of four Justices—Justices Stevens, Souter, Ginsburg and Breyer—also held that the Bush administration military commissions violate the Common Article 3 requirement that procedures must

Justice Thomas, in dissent, defended the President's interpretation of Common Article 3. He admitted that the majority's interpretation was "plausible."[46] However, he contended, where "an ambiguous treaty provision . . . is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation."[47] Moreover, he added: "Our duty to defer to the President's understanding of the provision at issue here is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief."[48] Justice Scalia joined this portion of Justice Thomas' dissent. However, Justice Alito, who joined most of Justice Thomas' dissent, declined to join this portion of Thomas' opinion.[49]

In sum, despite the fact that the President personally determined that al Qaeda members are not protected by Common Article 3, and even though core features of the Bush administration's national security policy depended upon that presidential determination, the government managed to persuade only two Supreme Court Justices to endorse the President's treaty interpretation.[50] Thus, *Hamdan* represents a decisive rejection of the view that courts owe absolute deference to the President on treaty interpretation issues. Moreover, *Hamdan* is a very significant departure from the recent pattern of deference to the executive branch on treaty interpretation questions. However, as Part Two demonstrates, the Court's non-deferential approach in *Hamdan* is entirely consistent with the pattern of Supreme Court decision-making in the early years of constitutional history.

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afford defendants "all the judicial guarantees which are recognized as indispensable by civilized peoples." *See id.* at 2797-98 (plurality opinion).

46. *Id.* at 2846 (Thomas, J., dissenting).

47. *Id.*

48. *Id.*

49. Justice Alito did not explain his refusal to join this portion of Thomas' dissent, except to say that it concerned "matters that I find unnecessary to reach." *Id.* at 2849-50 (Alito, J., dissenting).

50. Chief Justice Roberts did not participate in the *Hamdan* decision because he was a member of the three-judge panel that decided the case in the D.C. Circuit. *See* Hamdan v. Rumsfeld, 415 F.3d 33, 35 (D.C. Cir. 2005). As a judge on that Circuit, he joined an opinion that endorsed the President's interpretation of Common Article 3. *See id.* at 41-42. Thus, if the Chief Justice had been eligible to vote in *Hamdan*, he presumably would have provided a third vote for the President's interpretation.

II.
JUDICIAL DECISIONS FROM 1789 TO 1838: THE ZERO DEFERENCE MODEL

Part Two surveys judicial decisions in the first fifty years of U.S. constitutional history to provide a historical perspective on the question of judicial deference to executive branch treaty interpretations. During this period, the analysis shows, the courts generally applied a zero deference approach. The first section presents an overview of relevant Supreme Court decisions during this period. The second section demonstrates that, even in matters pertaining directly to national security, the courts did not defer to executive branch treaty interpretations. The final section shows that, in cases where courts did defer, they deferred to the collective judgment of Congress and the President, not to the President alone. Moreover, in some cases, deference actually promoted rigorous judicial enforcement of treaties.

A. A Survey of Judicial Decisions Between 1789 and 1838

During the first fifty years of U.S. constitutional history, between 1789 and 1838, the Supreme Court never said that it was deferring to executive branch views on treaty interpretation questions. In fact, Justice Johnson said quite explicitly in *The Amiable Isabella*[51] that it would be inappropriate for the Court to defer to the executive branch in this regard. The case arose during the War of 1812. A U.S. privateer captured a ship that was sailing under Spanish colors, and that claimed to be neutral.[52] The government, though, suspected that it was an enemy ship. The ship owner claimed that the ship was immune from capture under the terms of a bilateral treaty between the United States and Spain.[53] The government, appearing as an amicus in the case, argued that the treaty did not grant the ship immunity from capture.[54] In response to the government's argument, Justice Johnson, writing a separate dissent, said:

> [T]he views of the administration, are wholly out of the question in this Court. What is the just construction of the treaty is the only question here. And whether it chime in with the views of the Government or not, this individual is entitled to the benefit of that construction.[55]

51. 19 U.S. (6 Wheat.) 1 (1821).
52. *See id.* at 66-67.
53. *See id.* at 14-15, 19-20.
54. *See id.* at 36.
55. *Id.* at 92 (Johnson, J., dissenting).

In short, he advocated zero deference to the executive branch's interpretation of the treaty.

The majority ultimately agreed with the government's position in *The Amiable Isabella*, but it did not defer to the government's views on treaty interpretation. Justice Story, writing for the majority, said that the case involves "the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our Government could not violate without disgrace, and which this Court could not disregard without betraying its duty."[56] Thus, in the majority view, the Court was bound to apply the treaty in good faith, regardless of the government's views, in order to avoid national disgrace.

A brief survey of judicial decisions during this period demonstrates that the courts actually applied a zero deference approach. In the first fifty years of U.S. constitutional history, the Supreme Court decided nineteen cases in which the U.S. government was a party, at least one party raised a claim or defense on the basis of a treaty, and the Court decided the merits of that claim or defense. The U.S. government won only three of those nineteen cases.[57] Two other cases were effectively split decisions.[58] The government lost fourteen of the nineteen cases.[59] In sum, if one eliminates the

56. *Id.* at 68 (Story, J.).

57. United States v. Kingsley, 37 U.S. (12 Pet.) 476, 487 (1838) (awarding judgment to government in dispute over title to land in Florida in which plaintiff claimed title protected by treaty); United States v. Mills' Heirs, 37 U.S. (12 Pet.) 215, 216-17 (1838) (awarding judgment to government in dispute over title to land in Florida in which plaintiff claimed title protected by treaty); Smith v. United States, 35 U.S. (10 Pet.) 326, 336-37 (1836) (awarding judgment to government in dispute over title to land in Missouri in which plaintiff claimed title protected by treaty).

58. United States v. Huertas, 33 U.S. (8 Pet.) 488, 490-91 (1834) (where plaintiff invoked treaty in support of claim for title to land in Florida, Court awarded judgment to plaintiff for 11,000 acres and judgment to government for 4000 acres); United States v. Clarke, 33 U.S. (8 Pet.) 436, 468-69 (1834) (where plaintiff invoked treaty in support of claim for title to land in Florida, Court awarded judgment to plaintiff for 8000 acres and judgment to government for other land).

59. New Orleans v. United States, 35 U.S. (10 Pet.) 662, 737-38 (1836) (awarding judgment to the City of New Orleans in a dispute over title to riverfront property where city's title was protected by treaty); Mackey v. United States, 35 U.S. (10 Pet.) 340, 342 (1836) (awarding judgment to plaintiffs in dispute over title to land in Missouri in which plaintiffs' title was protected by treaty); United States v. Sibbald, 35 U.S. (10 Pet.) 313, 324 (1836) (awarding judgment to plaintiff in dispute over title to land in Florida in which plaintiff's title was protected by treaty); United States v. Seton, 35 U.S. (10 Pet.) 309, 311-12 (1836) (awarding judgment to plaintiff in dispute over title to land in Florida in which plaintiff's title was protected by treaty); United States v. Fernandez, 35 U.S. (10 Pet.) 303, 305 (1836)

two split decisions, the government won fewer than twenty percent of the cases. These numbers provide compelling evidence that courts in the early nineteenth century did not defer to executive branch views on treaty interpretation issues.[60]

(awarding judgment to plaintiff in dispute over title to land in Florida in which plaintiff's title was protected by treaty); Soulard's Heirs v. United States, 35 U.S. (10 Pet.) 100, 105 (1836) (awarding judgment to plaintiff in dispute over title to land in Missouri in which plaintiff's title was protected by treaty); Mitchel v. United States, 34 U.S. (9 Pet.) 711, 761 (1835) (awarding judgment to plaintiff in dispute over title to 1.25 million acres of land in Florida in which plaintiff's title was protected by treaty); United States v. Clarke, 34 U.S. (9 Pet.) 168, 169 (1835) (awarding judgment to plaintiff in dispute over title to land in Florida in which plaintiff's title was protected by treaty); Delassus v. United States, 34 U.S. (9 Pet.) 117, 135 (1835) (awarding judgment to plaintiff in dispute over title to land in Missouri in which plaintiff's title was protected by treaty); United States v. Percheman, 32 U.S. (7 Pet.) 51, 82-83, 98 (1833) (affirming decree of lower court that awarded judgment to plaintiff in dispute over title to land in Florida in which plaintiff's title was protected by treaty); United States v. Arredondo, 31 U.S. (6 Pet.) 691, 749 (1832) (awarding judgment to plaintiff in dispute over title to land in Florida in which plaintiff's title was protected by treaty); The Bello Corrunes, 19 U.S. (6 Wheat.) 152, 171-72 (1821) (where government sought condemnation of ship and cargo for alleged violation of U.S. revenue laws and Spanish consul sought restoration of ship and cargo to Spanish owners, Court ruled against government and in favor of Spanish owners); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 108 (1801) (where French ship owners sought recovery of captured vessel, Court ruled against U.S. government on treaty interpretation issue); United States v. Lawrence, 3 U.S. (1 Dall.) 42, 53-54 (1795) (where U.S. Attorney General sought mandamus relief to compel district judge to issue warrant for extradition to France of alleged deserter in accordance with bilateral extradition treaty, Court rejected mandamus petition, holding that district judge acted within scope of his discretion when he ruled that French consul failed to present proof required by treaty).

60. The government had a better win-loss record in the lower courts than it did in the Supreme Court; the executive won two out of three treaty cases in the lower federal courts during this period. *See* Open Boat, 18 F. Cas. 751 (D. Me. 1823) (No. 10,548) (ruling in favor of government that seizure was lawful where customs agents seized boat and claimant argued that seizure was unlawful, invoking decision of commissioners appointed pursuant to treaty with Great Britain); The Fame, 8 F. Cas. 984 (D. Me. 1822) (No. 4,634) (where customs agent seized ship, and claimant invoked treaty in support of argument that seizure was unlawful, court rejected claimant's treaty argument and ruled in favor of government); United States v. Laverty, 26 F. Cas. 875 (D. La. 1812) (No. 15,569a) (court granted habeas relief to individuals whom government sought to detain as alien enemies during War of 1812).

The government also fared better as an amicus than it did as a party. The government won three out of three treaty cases in which the executive branch argued as an amicus before the Supreme Court. *See* The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821) (where government argued in support of U.S. captor in a dispute with Spanish claimant, and claimant invoked treaty with Spain, the Court ruled in favor of U.S. captor, holding that "the immunity . . . intended by that article [XVII] never took effect"); The Pizarro, 15 U.S. (2 Wheat.) 227 (1817)

Not all of the cases referenced in the previous paragraph turned directly on treaty interpretation issues. Sixteen of the nineteen cases involved disputes over title to land in Florida or the former Louisiana Territory that the United States had acquired by means of treaties with Spain and France. The early Supreme Court decisions in the Louisiana and Florida land cases resolved some of the key treaty interpretation issues.[61] Later cases relied on the earlier precedents. Thus, in some of the later cases, the specific questions presented to the Supreme Court did not involve treaty interpretation issues, as such.[62] Even so, all of the Louisiana and Florida cases cited above involved situations where a claimant adverse to the government asserted rights protected by a treaty, and the claimant prevailed, in part, on the basis of Supreme Court treaty interpretations adopted in one or more of the Louisiana and Florida property cases.

The United States acquired Louisiana from France by a treaty concluded in 1803;[63] it acquired Florida from Spain by a treaty concluded in 1819.[64] Under both treaties, the government acquired land that previously belonged to the King of Spain, because Louisiana was under Spanish control from 1763 to 1800.[65] Under neither treaty, though, did the United States acquire land owned by individuals who had received land grants from the Spanish government; the guiding principle was that a change of sovereigns did not divest individuals of their private property rights.[66] Although this principle is easy to state, it proved to be quite difficult in practice to deter-

(where U.S. privateer captured Spanish ship, and government argued on behalf of foreign claimants that the capture violated treaty with Spain, the Court awarded restitution of ship and cargo to foreign claimants); Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794) (where government argued on behalf of British creditor, Court held that treaty protected creditor's right to recover debt).

Even so, if one adds these six cases to the nineteen cases summarized above, and once again eliminates the two split decisions, then the government won only eight out of twenty-three cases, slightly more than one-third of the total. These numbers reinforce the conclusion that the courts, in practice, applied a zero deference approach in treaty interpretation cases.

61. *See infra* notes 68-77 and accompanying text (discussing United States v. Arredondo, 31 U.S. (6 Pet.) 691 (1832)).

62. *See, e.g.*, United States v. Seton, 35 U.S. (10 Pet.) 309, 312 (1836) (government lost dispute over title to land in Florida).

63. Treaty for the Cession of Louisiana, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200 [hereinafter Louisiana Treaty].

64. Treaty of Amity, Settlement, and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252, 254 [hereinafter Florida Treaty].

65. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 300-01 (1829).

66. *See, e.g.*, United States v. Percheman, 32 U.S. (7 Pet.) 51, 87 (1833) ("The people change their allegiance; their relation to their ancient sovereign is dis-

mine which land was privately owned before entry into force of the treaties. The difficulty stemmed, in part, from the nature of the Spanish land system. As one commentator has noted:

> [T]he Spanish land system had been amorphous and haphazard, at least from the American point of view. Few landowners held complete titles and some claims were based only on the written permission of a commandant. Even more questionably, the majority of claims were derived from the verbal permission of the commandant or from mere occupancy. The Spanish government apparently had not insisted that its settlers perfect their land titles; indeed, imperfect titles had been passed on from generation to generation.[67]

In light of this situation, Congress enacted statutes authorizing individual suits in federal court to adjudicate land claims in Louisiana and Florida.[68] *United States v. Arredondo*[69] was the first case litigated under these statutes that produced a Supreme Court decision on the merits.[70] *Arredondo* involved a tract of land containing 289,645 acres that "embraced nearly the entire northeastern coast of Florida, including Jacksonville and other cities."[71] One key issue in *Arredondo* involved the proper construction of Article 8 of the Florida Treaty. Article 8 states:

> All the grants of land made before the 24th of January 1818, by His Catholic Majesty [the King of Spain], or by his lawful authorities, in the said Territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands.[72]

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solved; but their relations to each other, and their rights of property, remain undisturbed.").

67. Harry L. Coles, Jr., *Applicability of the Public Land System to Louisiana*, 43 MISS. VALLEY HIST. REV. 39, 41 (1956).

68. *See* An act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida, ch. 70, 4 Stat. 284 (1828); An Act enabling the claimants to lands within the limits of the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims, ch. 178, 4 Stat. 52 (1824).

69. 31 U.S. (6 Pet.) 691 (1832).

70. Two Missouri cases were presented to the Court before *Arredondo*. *See* Soulard v. United States, 29 U.S. (4 Pet.) 511 (1830) (addressing two consolidated cases). Due to the complexity of the issues presented, the Court postponed decisions in those cases for several years. *See* Smith v. United States, 35 U.S. (10 Pet.) 326, 326 (1836) (ruling in favor of government); Soulard's Heirs v. United States, 35 U.S. (10 Pet.) 100 (1836) (ruling in favor of individual plaintiffs).

71. HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 126 (1937).

72. Florida Treaty, *supra* note 64, art. 8.

The government argued that, by using the word "grants," the parties to the treaty made clear that the treaty was intended to protect only perfected titles.[73] Under the government's narrow construction of the treaty, many individuals who had inchoate property rights under the prior Spanish regime would not have been protected by the treaty. The Court, however, rejected the government's interpretation. Instead, the Court held that it was authorized to confirm the title of any individual holding property rights based on any "patent, grant, concession, warrant, or order of survey, or any other act which might have been perfected into a complete title, by laws, usages, and customs of Spain . . . ."[74]

The Supreme Court later treated *Arredondo* as a precedent not only for disputes involving land subject to the Florida Treaty, but also for disputes involving land subject to the Louisiana Treaty. It bears emphasis that these property cases raised issues of tremendous importance to the government.[75] In the next three decades after *Arredondo*, the Supreme Court decided approximately 100 cases involving more than twenty million acres of land in areas that the United States acquired under the Louisiana and Florida treaties.[76] If the government's position had prevailed in *Arredondo*, the vast majority of that land would have become government property, because very few individuals obtained perfected titles from the Spanish government. In contrast, the Court's more liberal view of individual rights protected by the treaty ultimately meant that federal courts confirmed the property rights of thousands of private landowners, and awarded millions of acres of land to private claimants. Thus, a former U.S. Attorney General commented that *Arredondo* was "the most important legal precedent of the entire body of Louisiana, Florida, and later California land cases."[77]

73. *See Arredondo*, 31 U.S. at 720.

74. *Id.* at 721. The Court's view relied not only on the treaty, but also on the statute that gave federal courts jurisdiction to entertain claims by individuals who asserted property rights protected by the treaty. *See id.* at 720-21.

75. The cast of attorneys in *Arredondo* provides one indicator of the significance of these cases. Roger Taney, who was Attorney General at the time, and was soon to become Chief Justice of the Supreme Court, represented the government, along with former Attorney General William Wirt. CUMMINGS & MCFARLAND, *supra* note 71, at 127. Daniel Webster, one of the premier Supreme Court litigators of his generation, represented the private claimants, along with former Attorney General John Berrien. *See id.*

76. *See id.* at 120-26.

77. *See id.* at 127.

B. Treaty Interpretation in Time of War

Most of the treaty cases during this period involved disputes over real property. But even in cases that raised national security issues, courts did not defer to executive branch views on treaty interpretation. This section discusses two wartime cases where courts specifically rejected the government's position on treaty-related questions.

1. Schooner Peggy

United States v. The Schooner Peggy[78] was the first case in which the Supreme Court addressed treaty-based constraints on executive action in wartime. The events leading to the decision in *Schooner Peggy* began in October 1797, when a French privateer plundered and burned a merchant ship in the harbor at Charleston, South Carolina.[79] There followed a series of hostile acts against U.S. merchant ships, committed under the authority of the French government and deemed by Congress to be "a system of predatory violence."[80] Congress responded to these acts of terrorism by terminating U.S. treaties with France.[81] Congress also enacted a statute authorizing U.S. ships to capture armed French vessels.[82] In accordance with that statute, the President instructed duly commissioned U.S. ships "to take any armed French vessel or vessels sailing under authority, or pretence of authority from the French republic, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas."[83] Acting pursuant to that presidential order, the Trumbull, a U.S. warship, captured the schooner Peggy, a French merchant ship that fell within the statutory definition of an "armed French vessel." The circuit court for the District of Connecticut declared the schooner Peggy a lawful

78. 5 U.S. (1 Cranch) 103 (1801).

79. *See* Letter from John Adams to Gentlemen of the Senate and Gentlemen of the House of Representatives (Feb. 5, 1798), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 262 (James D. Richardson ed., 1896), *available at* http://www.yale.edu/lawweb/avalon/presiden/messages/ja97-05.htm.

80. *See* An Act to Declare the Treaties Heretofore Concluded with France, no Longer Obligatory on the United States, ch. 67, 1 Stat. 578 (1798).

81. *Id.* (declaring that "the treaties concluded between the United States and France have been repeatedly violated on the part of the French government; and the just claims of the United States for reparation of the injuries so committed have been refused").

82. An Act Further to Protect the Commerce of the United States, ch. 68, 1 Stat. 578 (1798).

83. *Schooner Peggy*, 5 U.S. (1 Cranch) at 103.

prize and condemned the ship "as forfeited to the use of the United States, and of the officers and men of . . . the Trumbull."[84]

The circuit court issued its order on September 23, 1800. One week later, on September 30, 1800, the United States signed a treaty with France.[85] The fourth article of the treaty, which became effective on the date of signature, stipulated as follows: "Property captured, and *not yet definitely condemned* . . . shall be mutually restored."[86] Then, on October 2, 1800, the French owners of the schooner Peggy filed a writ of error in the Supreme Court.[87] The case before the Court pitted the French owners, who sought restoration of their ship in accordance with the treaty, against the United States, which sought condemnation and forfeiture, in accordance with the circuit court ruling.

The Supreme Court first considered whether the French ship had been "definitely condemned" within the meaning of the treaty. The executive branch contended: "[T]he sentence of the circuit court is denominated a final sentence, therefore its condemnation is definitive in the sense in which that term is used in the treaty."[88] If the Supreme Court had accepted the executive branch's interpretation of the treaty, it could have resolved the case on that basis, because the treaty obligation to restore captured property did not apply to property that had already been "definitely condemned." However, the Court rejected the executive branch's interpretation of the treaty; it held that the schooner Peggy had not been "definitely condemned" because the French claimant still had a right to appeal the circuit court judgment.[89] Since the ship had not yet been condemned, the treaty required restoration of the ship to its French owners.

Having construed the treaty to require restoration, the Court was forced to confront a conflict between the treaty, which precluded condemnation and forfeiture, and the combined effect of the congressional statute and the circuit court judgment, which required condemnation and forfeiture.[90] Even assuming that the treaty barred forfeiture as a matter of international law, the Court

84. *Id.* at 106-07.

85. *Id.* at 107.

86. *Id.* (emphasis added).

87. *Id.* at 108.

88. *Id.* at 108.

89. *Id.* at 108-09.

90. The circuit court had decreed explicitly that the schooner Peggy "with her apparel, guns and appurtenances . . . be, and the same are hereby condemned as forfeited . . . ." *Id.* at 107.

had to decide, as a matter of domestic law, whether the treaty took precedence over the statute and circuit court judgment. In resolving this question, the Court made two important rulings. First, the Court held that the treaty operated retroactively to invalidate a circuit court judgment that was valid at the time it was rendered.[91] Second, it held that the later-in-time treaty trumped the prior, conflicting statute. The Court stated: "But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."[92] Here, the "rule which governed" the circuit court decision was the statute, which required condemnation and forfeiture.[93] But the treaty intervened and "positively changed" the governing rule. In other words, the later-in-time treaty trumped the prior, conflicting statute.[94] Hence, the Court's conclusion that the "law must be obeyed, or its obligation denied" meant that the treaty must be obeyed, because it took precedence over the prior, inconsistent statute.

For the purposes of this article, the key point is that instead of relying on principles of judicial deference, the Court construed the

91. The executive branch argued that the circuit court judgment was correct when made, and "cannot be made otherwise by any thing subsequent to its rendition." *Id.* at 109. The Supreme Court agreed that the circuit court judgment was correct at the time it was issued, and that the judgment gave the captors "vested rights" in the captured property. The Court also conceded that "a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." *Id.* at 110. Even so, the Court said: "The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted." *Id.* at 109. Moreover, the Court stated that it "must decide according to existing laws," and the treaty was the existing law at the time of the Supreme Court's decision. *Id.* at 110. Therefore, the Court concluded: "[I]f it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law [i.e., the treaty], the judgment must be set aside." *Id.*

92. *Id.* at 110.

93. The statute provided explicitly that armed French vessels captured pursuant to the statute "shall be duly proceeded against and condemned as forfeited." An Act Further to Protect the Commerce of the United States, ch. 68, 1 Stat. 578 (1798).

94. Professor Yoo asserts that there has "been only one example in which the Supreme Court has held a treaty to supersede an earlier statute." John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2243-44 n.93 (1999) (citing Cook v. United States, 288 U.S. 102 (1933)). In fact, *Schooner Peggy* demonstrates that the Court relied on treaties to supersede prior statutes long before it endorsed the rule that a statute could supersede a prior inconsistent treaty. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870), decided seventy years after *Schooner Peggy*, was the first case in which the Court held that a statute could supersede a prior treaty.

treaty in a manner that was directly contrary to the interpretation advocated by the executive branch. The Court's refusal to accept the executive branch's construction of the treaty is especially noteworthy because the case involved a U.S. military response to foreign terrorist attacks directed against targets in the United States. The Court justified its seemingly brazen defiance of executive prerogative by invoking the principle that a treaty "ought always to receive a construction conforming to its manifest import."[95] The "manifest import" of the treaty was to terminate hostilities between the United States and France, and to restore friendly relations between the two countries.[96]

The Court's insistence on construing the treaty in accordance with its "manifest import" can be viewed as a precursor of two principles of treaty interpretation that were articulated more fully in later cases. First, the canon of good faith, or reciprocity, holds that treaties should be "construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them."[97] Second, the canon of liberal interpretation states: "[W]here a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred."[98] Historically, the canons of good faith and liberal interpretation have served as counterweights to the canon that courts owe deference to the executive branch's interpretation of treaties.[99]

95. *Schooner Peggy*, 103 U.S. (1 Cranch) at 110.

96. *See* Convention Between the French Republic and the United States of America, Sept. 30, 1800, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 457 (Hunter Miller ed., 1931) (stating in preamble that France and the United States are "equally desirous to terminate the differences . . . between the two states" and stating in art. I that, "[t]here shall be a firm, inviolable, and universal peace, and a true and sincere Friendship between the French Republic and the United States of America").

97. Jordan v. Tashiro, 278 U.S. 123, 127 (1928). *See also* Tucker v. Alexandroff, 183 U.S. 424, 437 (1902) (stating that treaties "should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity" among nations); Geofroy v. Riggs, 133 U.S. 258, 271 (1890) (stating that treaties should be interpreted "so as to carry out the apparent intention of the parties to secure equality and reciprocity between them").

98. Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 163 (1940). *See also Jordan*, 278 U.S. at 127; *Geofroy*, 133 U.S. at 272; Hauenstein v. Lynham, 100 U.S. 483, 487 (1879); Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 249 (1830).

99. *See, e.g.*, David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 972 (1994) (noting a conflict "between U.S. practice and more international approaches to treaty interpretation" that stems in part from the willingness of U.S. courts "to embrace a meaning advanced by the executive branch that may not accord with . . . the canon of liberal interpretation and good faith");

2. Laverty

United States v. Laverty[100] is the treaty case from this period that is factually most similar to the modern war on terror cases. *Laverty* arose during the War of 1812. It is worth recalling that, while the war was being fought, it was very uncertain whether the United States would survive as an independent nation.[101] In light of the gravity of the threat, the U.S. government detained a large number of individuals in Louisiana on the grounds that they were "alien enemies."[102] A group of detainees petitioned for habeas corpus relief, alleging that they were not alien enemies, but U.S. citizens. The petitioners had been born in Great Britain and had moved to Louisiana before it was admitted into the Union as a state.[103] By the time *Laverty* was decided, Louisiana had become a state.[104] The question for the court was whether the admission of Louisiana into the Union automatically conferred U.S. citizenship on individuals who, before statehood, were British citizens residing in the territory of Orleans.

Resolution of this issue turned on the proper interpretation of both the treaty for the acquisition of Louisiana from France and the Louisiana statehood statute.[105] Article III of the treaty stipulated that "[t]he inhabitants of the ceded territory shall be . . . admitted *as soon as possible* . . . to the enjoyment of all the rights, advantages and immunities of citizens of the United States."[106] It was clear that the treaty, by itself, did not confer citizenship on anyone, but the court insisted that the statehood statute must be construed in harmony with the U.S. treaty obligation to grant citizenship to the inhabitants "as soon as possible." The statehood statute provided:

Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1942-44 (2005) (discussing the relationship between good faith and deference to the executive).

100. 26 F. Cas. 875 (D. La. 1812) (No. 15569A).

101. *See* Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1568 (noting that the War of 1812 was "fought on our own territory against a powerful adversary . . . in a time of grave national peril").

102. *See Laverty*, 26 F. Cas. at 875.

103. *See id.* at 875-76.

104. *See id.* at 876.

105. The statehood statute was actually two separate statutes. The first statute, passed in February 1811, authorized the inhabitants of the relevant territory to form a constitution and state government. 2 Stat. 641 (1811). The second statute, passed in April 1812, admitted Louisiana into the Union. 2 Stat. 701 (1812).

106. Louisiana Treaty, *supra* note 63, at 202 (emphasis added).

> That the inhabitants of all that part of the territory or country ceded under the name of Louisiana, by the treaty . . . between the United States and France, contained within the following [territorial boundaries] . . . are hereby authorized to form for themselves a constitution and state government.[107]

The government argued that the word "inhabitants" in the statute "applies solely to those who were inhabitants" at the time of the treaty.[108] Under this interpretation, people who lived in Louisiana before 1803 became citizens when Louisiana became a state in 1812, but foreigners who moved to Louisiana after 1803 (including, presumably, many of the detainees in *Laverty*) were not citizens. The court rejected this argument on the grounds that the statute made "no distinction between the old inhabitant and the new."[109]

The government also argued, in the alternative, that the statehood statute did not confer citizenship on anyone because "the only mode by which an alien can be naturalized is by a compliance with the uniform rule."[110] A necessary implication of this argument, the court noted, was that "the Creoles of Louisiana are not citizens yet, for not one of them has complied with" the uniform rule.[111] Article III of the Louisiana treaty, though, obligated the United States to admit the Creoles, who were the prior inhabitants of the territory, "as soon as possible . . . to the enjoyment of all the rights, advantages and immunities of citizens of the United States."[112] Thus, the court rejected the government's alternative argument on the grounds that adoption of the government's position would place the United States in violation of its treaty obligation. The court concluded that the only way to reconcile the statute and the treaty was to interpret the statehood statute to confer citizenship on all those who were inhabitants when Louisiana became a state, including the habeas petitioners in *Laverty*. "By this construction," the court said, "every part is reconciled."[113] The court in *Laverty* did not explicitly reject the government's interpretation of the Louisiana Treaty. The court did, however, interpret the treaty for itself, and the treaty provided a key element of its rationale for rejecting the government's proposed interpretation of the Louisiana statehood statute.

107. Act of Feb. 20, 1811, sec. 1, 2 Stat. 641.
108. *Laverty*, 26 F. Cas. at 876.
109. *Id.*
110. *Id.* at 876-77.
111. *Id.* at 877.
112. Louisiana Treaty, *supra* note 63, at 202.
113. *Laverty*, 26 F. Cas. at 877.

As a consequence of the court's decision in *Laverty*, the U.S. marshal discharged "a considerable number of persons, born in the dominions of the king of the United Kingdom of Great Britain and Ireland, who had resided in Louisiana, under the territorial government" on the grounds that they were no longer "liable to the restrictions imposed on alien enemies."[114] In short, the court granted habeas relief to individuals whom the government had detained as alien enemies in the midst of a war that posed a grave national security threat to the United States. In contrast, no U.S. court has ordered the release of an enemy combatant detained in the current war on terror, because courts have invoked principles of judicial deference to the executive branch.[115]

C. Cases Where the Courts Did Defer

During this period, there were two types of situations in which the courts deferred to the political branches on treaty-related issues. This article will refer to these as treaty abrogation issues and territorial boundary issues. In the treaty abrogation cases, courts deferred to the policy judgment of the political branches that it was not in our national interest to abrogate a treaty. They did not defer to the executive branch's interpretation of a treaty. This form of deference to the political branches actually promoted judicial enforcement of the treaty. In the territorial boundary cases, deference limited judicial enforcement, but the courts never deferred to the executive branch alone; they deferred to the combined will of Congress and the President.

1. Treaty Abrogation Issues

The case of *Jones v. Walker* illustrates the treaty abrogation issue.[116] In *Jones*, a British creditor sued a U.S. debtor to recover

114. *Id.*

115. One district judge even refused to order the release of Guantánamo detainees whom the government admits are not enemy combatants. *See* Qassim v. Bush, 407 F.Supp. 2d 198 (D.D.C. 2005). The court held that the "indefinite imprisonment [of the petitioners] at Guantánamo Bay is unlawful." *Id.* at 201. However, the judge believed that he was powerless to provide a remedy. *See id.* at 201-03.

116. 13 F. Cas. 1059 (district and date not given) (No. 7507) (Jay, Circuit Justice). Since John Jay decided the case while sitting as a circuit justice, the decision must have been rendered between 1789 and 1795, because those were the dates when John Jay served as Chief Justice. At that time, a Circuit Court consisted of a district judge and two Supreme Court Justices, "any two of whom shall constitute a quorum." Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74-75 (1789). The published opinion does not say who sat on the panel with Chief Justice Jay.

payment on a debt incurred before the Revolutionary War. The defendant argued that he had satisfied the debt during the war by paying his debt into a state loan office in accordance with the law of Virginia.[117] The plaintiff then replied by invoking article 4 of the Definitive Treaty of Peace between Britain and the United States—the treaty that ended the Revolutionary War.[118] Article 4 obligated the United States to ensure that British creditors could recover their pre-war debts.[119] In response, the defendant argued that the treaty was no longer binding on the United States, because Great Britain had violated the treaty.[120] The case was argued before Chief Justice John Jay, who was sitting as a circuit justice in the case.

Jay noted that the Judiciary Act granted federal courts the "power to determine cases where is drawn into question the validity of treaties."[121] In construing the statute, he drew a distinction between what he called the "necessary validity" and the "voluntary validity" of a treaty. He defined "necessary validity" as "that which results from the treaty's having been made by persons authorized by, and for purposes consistent with the constitution."[122] He gave several examples of questions involving necessary validity, including: "Does [the treaty] contain articles repugnant to the constitution? Are those articles void? Do they vitiate the whole treaty?"[123] He defined "voluntary validity" as "that validity which a treaty, become voidable by reason of violations, afterwards continues to retain by the silent volition and acquiescence of the nation."[124] In this category, he included the following questions: "Has the treaty been so violated as justly to become voidable by the injured nation? Is it advisable immediately to declare it void? . . . Would it be more prudent first to remonstrate and demand reparation, or to direct reprisals?"[125] In Jay's view, questions involving a treaty's necessary validity "are referable to the judiciary," but questions involving voluntary validity must be addressed to "those departments which are charged with the political interests of the state."[126]

117. *Jones*, 13 F. Cas. at 1060.

118. Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80, 80.

119. *Id.*, art. 4 (stipulating "that Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted").

120. *Jones*, 13 F. Cas. at 1059, 1061.

121. *Id.* at 1062.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

As noted above, the defendant in *Jones* argued that the Definitive Treaty of Peace was no longer binding on the United States due to British treaty violations. This argument raised three distinct questions. Had Great Britain violated the treaty? Was the treaty voidable as a consequence of those alleged violations? Should the United States abrogate the treaty? The third question, said Jay, was a political question, not a judicial question, because it pertained to voluntary validity. Moreover, Jay added: "Where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should . . . continue to be obeyed and observed, no right can be incident to the judiciary to declare it void."[127] In short, Jay deferred to the political branches' policy decision that the treaty should continue to be obeyed; he did not defer to their legal interpretation of the treaty. Since, in this case, the political branches had chosen not to terminate the treaty with Britain, the courts were obligated to enforce the treaty on behalf of British creditors. Accordingly, the court ordered the U.S. debtor to repay the debt owed to the British creditor, as required by article 4 of the treaty.[128]

It is instructive to apply this logic to the current war on terror cases. The Bush administration argues that members of al Qaeda do not deserve the protections of the Geneva Conventions, in part because al Qaeda has violated the laws of war. Under Jay's logic, though, al Qaeda's violations of the laws of war might make the Geneva Conventions voidable, but further action by the political branches is necessary to void the treaties. Moreover, until the political branches have abrogated the Geneva Conventions, the courts are obligated to enforce the treaties on behalf of foreign nationals. Thus, this form of deference to the political branches actually promotes judicial enforcement of treaties.

127. *Id.* at 1063.

128. *See id.* at 1069. The Supreme Court as a whole never endorsed Jay's logic in *Jones*. Justice Iredell, writing a separate opinion in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), addressed precisely the same argument that Chief Justice Jay addressed in *Jones*. Iredell's analysis of the issue was identical, in all relevant respects, to Jay's. *See Ware*, 3 U.S. (3 Dall.) at 258-61 (Iredell, J.). All five Justices wrote separate opinions in *Ware*. None of the other Justices explicitly addressed the argument that British treaty violations rendered the Definitive Treaty of Peace judicially unenforceable. Even so, they all apparently agreed *sub silentio* with Justices Jay and Iredell because they all agreed that the treaty was judicially enforceable.

2. Territorial Boundary Issues

The second type of situation in which courts have deferred to the political branches on treaty-related questions involved territorial boundaries. The case of *Garcia v. Lee*[129] illustrates this issue. *Garcia* involved a dispute over title to land in what is now southeastern Louisiana. The land was located in an area that this article will call "Floriana." Floriana was bounded on the west by the Mississippi River, on the east by the Perdido River, and on the north by the 31st parallel. The United States claimed that it had acquired Floriana from France as part of the Louisiana Treaty in 1803. Spain, on the other hand, insisted that Floriana was part of Florida, which the United States ultimately acquired from Spain in 1819. Hence, between 1803 and 1819, there was an ongoing political dispute between the United States and Spain concerning sovereignty over the land in Floriana.[130]

During that period, the Spanish governor in Florida issued land grants to numerous individuals for land in the disputed territory. The plaintiff in *Garcia* claimed title on the basis of an 1806 Spanish land grant.[131] The defendant argued that the grant was void because the land at issue was part of the United States at the time of the grant, and the Spanish governor in Florida had no authority to grant land in the United States.[132] Thus, the validity of plaintiff's title depended upon whether the land at issue was part of the United States in 1806. That question, in turn, depended upon the correct interpretation of two treaties. In a treaty concluded in 1803, France ceded Louisiana to the United States "as fully and in the same manner" as France acquired Louisiana from Spain.[133] France had acquired Louisiana from Spain pursuant to the Treaty of St. Ildefonso, concluded in 1800. Under article 3 of that treaty, Spain ceded Louisiana to France "with the same extent that it now has in the hands of Spain and that it had when France possessed

129. 37 U.S. (12 Pet.) 511 (1838).

130. For a more detailed explanation of the dispute between the United States and Spain, see David Sloss, *When Do Treaties Create Individually Enforceable Rights?: The Supreme Court Ducks the Issue in* Hamdan *and* Sanchez-Llamas, 45 COLUM. J. TRANS. L. 20 (2006).

131. *Garcia*, 37 U.S. (12 Pet.) at 515.

132. *See id.* at 514 (defendant's argument claiming that the United States solved its dispute with Spain when it "took actual possession of the territory within the disputed limits . . . and annexed a part of it to the state of Louisiana"). The Court noted that "grants made by the Spanish authorities" to land falling within the disputed territory "gave no title to the grantees." *Id.* at 516.

133. Louisiana Treaty, *supra* note 63, at 202.

it."[134] For present purposes, it is not necessary to explore the nuances of the treaty interpretation issues involved. Suffice it to say that there were legitimate arguments in support of the Spanish position that Spain retained Floriana as part of Florida when it ceded Louisiana to France in 1800. There were also legitimate arguments in support of the U.S. position that the United States acquired Floriana from France in 1803.

In any case, these treaty interpretation questions were not novel when they were presented to the Supreme Court in *Garcia*. Between 1803 and 1819, Congress had enacted a series of statutes asserting U.S. sovereignty over Floriana.[135] Congress had established its *de facto* interpretation of the treaty by admitting the State of Louisiana into the Union in 1812 and including within the boundaries of Louisiana land that Spain still claimed as part of Florida at that time. Congress had also enacted a series of other statutes asserting U.S. sovereignty over the disputed territory.[136] In light of the history of congressional legislation on the subject, the Court stated:

> The question of boundary between the United States and Spain, [is] a question for the political departments of the government . . . the legislative and executive branches having decided the question, the courts of the United States [are] bound to regard the boundary determined on by them as the true one.[137]

Two points bear emphasis here. First, the Court was deferring to the combined will of Congress and the executive branch on this issue; it was not deferring solely to the executive branch. Second, the Court was dealing with a question of national boundaries. Nothing in the Court's opinion suggests that the Court would defer to Congress on issues of treaty interpretation that did not involve national boundaries.

In sum, during the period from 1789 to 1838, there were only two kinds of situations in which the courts deferred to the political branches on treaty-related questions: territorial boundary issues and treaty abrogation issues. On all other treaty interpretation

134. Treaty of San Ildefonso, Oct. 1, 1800, Fr.-Spain, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 509 (Hunter Miller ed., 1931).

135. *See Garcia*, 37 U.S. (12 Pet.) at 515-16 (summarizing relevant legislation).

136. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 303-09 (1829) (providing a detailed review of relevant legislation).

137. *Garcia*, 37 U.S. (12 Pet.) at 516. The quoted language is essentially a reaffirmation of the Court's prior holding in *Foster*. *See Foster*, 27 U.S. at 309.

questions, the courts applied a zero deference approach. They even applied a zero deference approach to treaty interpretation questions that arose during wartime and that implicated the national security interests of the United States.

CONCLUSIONS

In *Hamdan v. Rumsfeld*, the government argued that the President's interpretation of the Geneva Conventions is "dispositive" and therefore "binding on the courts."[138] Similarly, Professor Yoo has defended the view that courts owe absolute deference to the President's interpretation of a treaty.[139] This article has shown that, during the first fifty years of U.S. constitutional history, courts actually applied a zero deference approach to most treaty interpretation questions. They even applied a zero deference approach in cases implicating core national security concerns. The Supreme Court has emphasized that the force of constitutional precedents "tends to increase in proportion to their proximity to the Convention in 1787."[140] Thus, the force of the early precedents summarized in Part Two weighs heavily against the claim that the President's interpretation is binding on the courts. At a minimum, the record from the early years of U.S. constitutional history suggests that the Constitution does not require judicial deference to executive branch treaty interpretations. Thus, the question of how much deference courts should accord to executive branch views on treaty interpretation issues is properly viewed as a matter of judicial policy, not a matter of constitutional law.

In *Hamdan,* the Supreme Court adopted an interpretation of Common Article 3 that is directly contrary to the President's interpretation.[141] The majority did not even mention the oft-repeated maxim that courts owe deference to the executive branch on treaty interpretation questions. The Court's refusal to accept the President's treaty interpretation in a case that directly implicates core national security concerns constitutes a significant departure from the Rehnquist Court's highly deferential approach to treaty inter-

138. *See supra* notes 32-37 and accompanying text.

139. *See* John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 853 (2001); John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1308 (2002).

140. Powell v. McCormack, 395 U.S. 486, 547 (1969).

141. *See supra* notes 41-45 and accompanying text.

pretation.[142] Moreover, the Court's decision in *Hamdan* constitutes a decisive rejection of the view that courts owe absolute deference to the President on treaty interpretation issues.

The Court's non-deferential approach in *Hamdan* is entirely consistent with Supreme Court practice in the early years of U.S. constitutional history. However, the world has changed dramatically in the past two hundred years. In the early nineteenth century, the United States was a weak state that feared the superior military forces of the European powers. Today, the United States is the most powerful nation in the world. As the power of the United States has grown internationally, there has been a steady accumulation of foreign relations power in the federal executive branch.[143] Along with the rise of executive dominance in foreign affairs, the judicial branch has become more deferential to executive judgments on a variety of foreign affairs matters, including treaty interpretation issues. In light of these trends, it is safe to predict that *Hamdan* does not foreshadow a return to the zero deference approach of the early nineteenth century.

There is a broad spectrum of possible approaches between the poles of absolute deference and zero deference. Although *Hamdan* signals a rejection of the absolute deference model, and recent history suggests that the Court will not endorse a zero deference model, it remains to be seen whether *Hamdan* will initiate a judicial move toward a less deferential approach.

142. *See* Bederman, *supra* note 3, at 1465-66 (documenting the Rehnquist Court's highly deferential approach).

143. *See, e.g.*, EDWIN S. CORWIN, TOTAL WAR AND THE CONSTITUTION (1947); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 279 (1973); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 3 (1999).