



Better Lucky Than Good

Neal Devins

IN HIGH SCHOOL AND in law school, I played a lot of poker. Through thousands of hours of observation, I concluded that some of my friends were blessed with good luck and others cursed with bad luck. For the fortunate, improbable odds did not stand in their way of drawing the cards needed for a winning hand. For the unfortunate, their drawing a good hand invariably meant that someone else had drawn an even better hand.

After teaching constitutional law for seventeen years, I have come to realize that the “better lucky than good” adage is surprisingly relevant to Supreme Court lawyering. Indeed, luck, not skilled advocacy, has played a defining role in several landmark Supreme Court decisions. Prominent examples include *Brown v. Board*, *Roe v. Wade*, and, more recently, Rehnquist Court decisions upholding affirmative action and allowing foreign nationals and enemy combatants to challenge the war against terror. In the pages that follow, I will explain how events that unfolded after the granting of certiorari

in all these cases played a pivotal role in the Court’s decision making. These events were outside the control of the litigants and, as such, fortuitously benefited one side at the expense of the other side. In my review of school desegregation and affirmative action, I will make a second point, namely: interest groups who make use of litigation strategies that take many years to unfold will either benefit or suffer from changes in popular and elected government attitudes towards their underlying cause. In the case of school desegregation, the NAACP reaped the benefits of a multi-year litigation strategy; in the case of affirmative action, however, changing social norms cut against the Center for Individual Rights’ systematic step-by-step litigation strategy.

In advancing these propositions, I do not mean to suggest that a well-thought-out litigation strategy does not improve one’s chances of victory before the Court. Relatedly, it is certainly true that advocates sometimes undermine their cases by advancing arguments that neither the American

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people nor the Justices are ready to accept.¹ My point, instead, is that out-of-Court developments play a surprisingly large role in shaping Court decision making.

Let me begin with the *Brown* decisions. *Brown's* declaration that “the doctrine of separate but equal has no place” in public education is widely attributed to the NAACP’s “step-by-step assault on segregation in education, which began in the mid-1930’s with a series of cases against all-white professional schools.”² In these cases, the NAACP did not ask the courts to end racial segregation; instead, it argued that the state could remedy inequality by spending money on “unequal” all-black schools. By chipping away at the foundations of “separate but equal,” these cases were seen as necessary building blocks to the Court’s dismantling of segregation in public education.

No doubt, the NAACP’s litigation strategy was masterful. Its principal virtue, however, was that it took the NAACP twenty years to ask the Court to undo racial segregation in the public schools. During that time, there was a basic rethinking of the propriety of racial segregation by both the public and elected government. In the 1940s, FDR issued an executive order institutionalizing fair employment practices and Harry Truman desegregated the military. Also, the Truman administration filed a powerful brief in *Brown*, expressing “concern about the effects of U.S. race discrimination on Cold War foreign

relations.”³ Public opinion matched these Truman administration initiatives. In 1942, two-thirds of white adults supported public school segregation. When *Brown* was decided, Americans supported the Court’s ruling by a 54% to 41% margin.⁴ Commenting on the impact of these dramatic changes in race relations, Justice Felix Frankfurter remarked that had the segregation cases been brought in the mid-1940s, he would have sustained segregation’s constitutionality because “public opinion had not then crystalized against it.”⁵

The question remains: why do I say that the NAACP was lucky, not good? The fact that race relations underwent a sea change in the decades before *Brown* does not mean that the NAACP was not monitoring these developments. After all, perceived public hostility towards school desegregation figured prominently in the NAACP’s decision to pursue a step-by-step litigation strategy. Moreover, by securing high profile victories in professional school cases, the NAACP educated both the public and the Court about the evils of segregation. For reasons I will now detail, however, I think that the NAACP’s victory in *Brown* was an accident of fortuitous timing.

In 1950, the Supreme Court decided *Sweatt v. Painter*, a challenge to the all-white University of Texas law school. By concluding that intangible factors affect education, including “reputation, . . . traditions, and pres-

1 Lou Fisher and I, for example, have written about the causal connection between the Truman administration’s claim that presidential war making power is unreviewable and the Court’s repudiation of Truman’s efforts to seize the steel mills during the Korean War. See Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENTARY 63 (2002). See also *infra* notes 33–40 (discussing Bush administration legal arguments in 2004 war on terror cases).

2 Jack Greenberg, *CRUSADERS IN THE COURTS* 5 (1994). See also Richard Kluger, *SIMPLE JUSTICE* (1975).

3 Mary Dudziak, *COLD WAR CIVIL RIGHTS* 27 (2000). See also Phillip A. Klinker with Rogers Smith, *THE UNSTEADY MARCH* 217–21 (1999).

4 Hazel Gaudet Erskine, *The Polls: Race Relations*, 26 PUBLIC OPINION QUARTERLY 137 (1962).

5 Memorandum of William O. Douglas in Melvin I. Urofsky, ed., *THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS* (1987).

tige,”⁶ *Sweatt* convinced the NAACP that the Supreme Court was ready to rule against segregated public education. Correspondingly, the NAACP decided that “no relief other than” obtaining education on a nonsegregated basis” would be “acceptable” in future education cases.⁷ At that time, however, there is good reason to think that the Supreme Court was not ready to strike down public school segregation.

When *Brown* was argued in 1952, Chief Justice Fred Vinson supported school segregation. Moreover, according to Justice William O. Douglas’s conference notes, the Justices were set to vote 5–4 to uphold segregated education.⁸ The NAACP, in other words, was overambitious in their timing. Rather than ask the Court to invalidate public school segregation in the immediate wake of *Sweatt*, they should have waited for a further coalescing of support for their position. But this bit of bad lawyering (if you can call it that) proved irrelevant to the Court’s ruling in *Brown*. The reason: good luck.

After hearing *Brown*, the Court held the case over for reargument so that it could also decide the constitutionality of segregated education in the “federal city,” Washington, D.C. The following September, Vinson died; his replacement was Governor Earl Warren – an occurrence prompting Justice Felix Frankfurter to exclaim: “[T]his is the first solid piece of evidence I’ve ever had that there really is a God.”⁹ Warren, a skilled politician, patiently led a badly divided Court to unanimity in *Brown*.¹⁰

Needless to say, NAACP litigators did not foresee that the Vinson Court might not be ready to validate their position (something foreseeable but outside their control). They also did not know that *Brown* would be held over and that the accompanying delay would result in Warren taking over as Chief Justice (something that was not just uncontrollable but also unpredictable). The reargument of *Brown* benefited the NAACP in another way. Not only did just-elected President Dwight Eisenhower appoint Warren, he also backed the NAACP position in the case. Notwithstanding his personal opposition to school desegregation, he felt pressure not to repudiate Truman administration claims about the social desirability of desegregation.

One other thing: even if the NAACP’s expertly crafted litigation strategy set the stage for *Brown*, what about *Brown II*? The NAACP suffered a stinging defeat in that decision. The Court flat out rejected its argument that defendant school systems must be ordered to take immediate action to desegregate or be told a “day certain” for the complete desegregation of their schools. Instead, the Court concluded that “varied local school problems” were best solved by lower court judges and “[s]chool authorities” and that delays associated with “problems related to administration” were to be expected.¹¹ By delegating the administration of school desegregation remedies to school boards and district court judges, “the South was audibly relieved by *Brown II*, a victory of sorts snatched from the

6 339 U.S. 629, 634 (1950).

7 Kluger, *supra* note 2 at 293.

8 William O. Douglas, *THE COURT YEARS II* 3 (1980).

9 Philip Elman, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946–60: An Oral History*, 100 *HARV. L. REV.* 817, 840 (1987).

10 See Dennis J. Hutchinson, *Unanimity in Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 *GEO. L.J.* 1 (1979). For additional discussion of Eisenhower’s disapproval of *Brown*, see Dennis J. Hutchinson, *Perspectives on Brown*, 8 *GREEN BAG 2D* 43 (2004).

11 *Brown II*, 349 U.S. 294, 299–300 (1955).

total defeat of only a year ago.”¹²

The NAACP ought not to be faulted for losing *Brown II*. Just as their victory in *Brown* was largely an accident of good timing, *Brown II* highlighted the Justices’ disinclination to get too far ahead of the political branches. Earl Warren, in particular, knew that the Eisenhower administration would not pressure southern states to implement ambitious desegregation remedies. Eisenhower personally intervened in the *Brown II* litigation, amending the government’s brief to encourage the Court to take into account that the segregated lifestyles of many people had been based on more than fifty years of Supreme Court sanction. More strikingly, after inviting Warren to dinner at the White House, Eisenhower justified southern resistance to school desegregation this way: “These are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit alongside some big overgrown Negroes.”¹³

Fast forward forty years: The Center for Individual Rights (CIR), a conservative public interest law firm, sought to undo affirmative action by “duplicat[ing]” the success and techniques of “liberal groups such as the ACLU” and NAACP.¹⁴ In particular, CIR endeavored to “develop and implement a coher-

ent, long-term litigation program.”¹⁵ More to the point, just as the NAACP sought an end to segregated public schools through a step-by-step litigation strategy, CIR also sought to “find those institutions with programs that discriminate based on race, target them, get a victory, and parlay it into a larger strategy to challenge the entire consideration of race.”¹⁶ Its initial target was the University of Texas law school. Not only did Texas make use of separate admissions pools for minority and nonminority applicants (making it “vulnerable” to attack), Texas was also in the Fifth Circuit, where CIR thought that it had a better chance of succeeding than in other federal courts of appeals.¹⁷

CIR won that case, *Hopwood v. Texas*. That 1996 decision, however, proved to be a pyrrhic victory. Texas retrofitted its admissions scheme and, for a variety of reasons, the Court denied certiorari.¹⁸ Seven years later, the Court upheld the constitutionality of race preferences at the University of Michigan law school in another CIR case, *Grutter v. Bollinger*.

When CIR filed *Grutter* (and a companion case, *Gratz v. Bollinger*) in 1998, it had reason to be optimistic. In addition to *Hopwood*, CIR had just scored an important victory in litigation challenging Proposition 209, California’s

12 J. Harvie Wilkinson III, FROM BROWN TO BAKKE: THE SUPREME COURT: SCHOOL INTEGRATION: 1954–1978 at 64 (1979).

13 Earl Warren, THE MEMOIRS OF EARL WARREN 291 (1977).

14 A Brief History of CIR, available at www.cir-usa.org/history.html.

15 Id.

16 Charles J. Ogletree, Jr., From Brown to Tulsa: Defining Our Own Future, 47 HOW. L.J. 499, 533 (2004). Hardly a fan of CIR’s agenda, Ogletree depicted CIR’s strategy as “frighteningly similar” to the NAACP’s building block approach. Id.

17 David Segal, Putting Affirmative Action on Trial, WASH. POST, Feb. 20, 1998. See also Michael S. Greve, The Demise of Race-Based Admissions Policies, CHRON. OF HIGHER ED., March 19, 1999 (CIR co-founder describing *Hopwood* litigation as “an opening salvo” in a “larger strategy”).

18 By 1996, Justices Kennedy and O’Connor regularly avoided ruling on cases raising divisive social issues. See Thomas W. Merrill, The Making of the Second Rehnquist Court: A Preliminary Analysis, 47 ST. LOUIS U. L.J. 569 (2003). Furthermore, as suggested in a concurrence to the Court’s cert denial, a decision assessing the legality of an affirmative action plan no longer in effect would open the Court up to charges of judicial overreaching. *Texas v. Hopwood*, 518 U.S. 1033 (1996) (concurring opinion of Justices Ginsburg and Souter).

anti-affirmative action ballot initiative. And while the Supreme Court refused to hear *Hopwood*, the Justices had ruled in 1995 that race preferences are subject to strict scrutiny review.¹⁹ Moreover, Michigan seemed a vulnerable target. Michigan lawmakers opposed to affirmative action had identified about 100 potential plaintiffs, including Barbara Grutter (a mother of two with high LSAT scores who owned her own health care consulting firm) and Jennifer Gratz (a “camera ready” homecoming queen from a blue-collar family with stellar grades and no apparent political leanings).²⁰ Also, Michigan made use of race-specific grids and charts when implementing its undergraduate affirmative action scheme.²¹

By the time the Supreme Court issued its ruling in *Grutter*, however, affirmative action seemed to have become entrenched. Not only did the traditional allies of preferences continue to support affirmative action, Republican lawmakers backed away from efforts to undo race preferences. Republicans in the House and Senate, for example, voted down proposals to roll back federal affirmative-action programs. Recognizing that the GOP would need to attract the growing number of working women and Hispanic voters, Republican leadership thought it better “to craft a positive message for minorities”

than risk harming itself at the polls.²² At the state level, moreover, Republican lawmakers perceived that their party was harmed by anti-preference ballot initiatives. By 2000, the populist revolt against affirmative action largely had fizzled in response to Republican party pressure.²³

From CIR’s perspective, the timing of the *Grutter* litigation was anything but optimal. With ever-diminishing elected official and interest group opposition to preferences, CIR thought it had only one important ally, the Bush White House.²⁴ That ally, however, wound up distancing itself from CIR. Indeed, for reasons I will now detail, the biggest boost for affirmative action may well have come from George W. Bush.

One day before his Justice Department filed a brief in the Michigan cases, the President announced that he “strongly support[s] diversity ... including racial diversity in higher education” but that the Michigan plans were at “their core” an unconstitutional “quota system.”²⁵ Consistent with these remarks, the Justice Department brief suggested that universities may make use of race preferences when race-neutral alternatives are ineffective. In other words, unlike the Reagan and first Bush administrations (where the government argued that any consideration of race was impermissible), the

19 *Adarand v. Peña*, 515 U.S. 200 (1995).

20 Segal, *supra* note 17; Jonathan Groner, Center Ring, *LEGAL TIMES*, Dec. 9, 2002, National at 1.

21 The Court seized upon this fact in *Gratz*, striking down the undergraduate scheme because it awarded a set number of points to all minority applicants. 123 S. Ct. 2411, 2428–30 (2003). For reasons I have detailed elsewhere, *Gratz* (when read together with *Grutter*) places few limits on universities that want to employ race preferences. See Neal Devins, Explaining *Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 376–81 (2003).

22 Juliet Eilperin, House Defeats Bill Targeting College Affirmative Action, *WASH. POST*, May 7, 1998 at A4.

23 See Alex Fryer, Affirmative Action Fight Shifts from Ballot Box to Courtroom, *SEATTLE TIMES*, Nov. 25, 2002 at A1.

24 With John Ashcroft (who opposed preferences in the U.S. Senate) serving as Attorney General and Ted Olson (who worked with CIR in the *Hopwood* litigation) serving as Solicitor General, CIR had good reason to think it could count on strong Justice Department backing.

25 Remarks on the Michigan Affirmative Action Case, 39 *WEEKLY COMP. PRES. DOC.* 71 (Jan. 15, 2003).

George W. Bush Justice Department sought to steer a middle path on preferences.

By telling the Court that a “conservative president does not think that he can afford to stand unambiguously for colorblindness,”²⁶ Bush made clear how politically isolated opponents of preferences had become. In so doing, Bush made it that much harder for the Justices – especially swing Justices who typically pay close attention to social and political forces – to validate CIR’s position. Moreover, even if the Court’s swing Justices were predisposed to validating affirmative action, the Bush brief may have contributed to the Court’s lopsided and sweeping approval of preferences.²⁷ Equally significant, it is extremely unlikely that another administration will seek the overturning of *Grutter* (through judicial filings or Court appointments). Just as the Truman brief in *Brown* operated as a constraint on subsequent administrations, the Bush brief in *Grutter* signals executive approval of race diversity.

From CIR’s vantage, bad luck explains the Bush administration’s rejection of their position. The Bush brief was a direct response to racially insensitive remarks made by then-Senate majority leader Trent Lott – remarks made about a month before the Bush brief was due to the Supreme Court. In December

2002, Senator Lott appeared to embrace the segregationist appeals of Strom Thurmond’s 1948 presidential campaign. The President immediately denounced the Senator. More significantly, responding to political advisors who told him that he must do better with minority voters, the President looked for ways to convince voters that his denouncement was sincere. His qualified embrace of affirmative action was the most visible way that the President distanced himself from the Lott imbroglio.²⁸

Grutter and *Gratz*, like the *Brown* opinions before them, underscore the pivotal role that luck plays in Supreme Court decisionmaking. Just as the NAACP could not foresee Earl Warren becoming Chief Justice *after* the first round of oral arguments in *Brown*, CIR could not anticipate Trent Lott’s remarks or the impact of those remarks on the Bush White House. Likewise, just as the NAACP litigation strategy allowed social and political forces to catch up to its arguments against segregation, CIR’s step-by-step litigation strategy had the unintended consequence of allowing majoritarian forces to coalesce in support of affirmative action.²⁹

What is amazing here is that *Grutter* and *Brown* are anything but anomalous. Advocates often find themselves sabotaged (as did CIR) or propelled forward

26 Negative Reaction, NAT’L. REV., Feb. 10, 2003 at 12.

27 In *Grutter*, six Justices explicitly approved of preferences, one expressed no opinion on the issue, and two explicitly rejected preferences. For a discussion of why I think the decision gives college and university officials near carte blanche power to administer preferential treatment programs, see Devins, *supra* note 21 at 376–81.

28 For news stories detailing the Lott episode and its impact on the Bush brief, see Adam Nagourney, With His Eyes on Two Political Prizes, the President Picks His Words Carefully, N.Y. TIMES, Jan. 16, 2003 at A26; June Kronholz @ Jeanne Cummings, Bush Decries Racial Preferences, WALL ST. J., Jan. 16, 2003 at A4.

29 Before the Supreme Court, these majoritarian forces were on display. No member of Congress submitted a brief supporting CIR’s position. In sharp relief, briefs were filed in support of affirmative action by 124 members of Congress. Likewise, 23 states backed the University of Michigan (with only one state, Florida, opposing race preferences). Finally, big business, unions, civil rights interests, and colleges and universities overwhelmingly backed the Michigan plans. See Devins, *supra* at 366–70. See also Carter G. Phillips, Was Affirmative Action Saved by its Friends?, in Neal Devins @ Davison M. Douglas eds., A YEAR AT THE SUPREME COURT 115–29 (2004).

(as did the NAACP) by unexpected events that take place after the Court grants certiorari. Consider, for example, *Roe v. Wade* and 2004 Supreme Court decisions limiting presidential warmaking authority. Like *Brown*, *Roe* was a case where a change in the Court's personnel resulted in reargument and, ultimately, a different rationale. When *Roe* was first argued (in December 1971), there were two vacancies on the Court – seats ultimately filled by William Rehnquist and Lewis Powell. At that time, a 5–2 majority found the Texas abortion statute unconstitutional. The case was assigned to Harry Blackmun, the most tentative of the majority Justices. A cover note to his draft opinion suggested that he was “flexible as to results;” Blackmun's draft opinion, moreover, invalidated the Texas law on narrow “void for vagueness” grounds.³⁰

Other Justices in the *Roe* majority would have preferred a more forceful opinion but did not want to run the risk of reargument (fearing that Blackmun would switch sides and that Powell and Rehnquist would join this group to form a five-member majority rejecting abortion rights). This effort failed, for Chief Justice Warren Burger strongly backed reargument – an event that prompted William O. Douglas to write a memo to the Justices complaining of Burger's “manipulat[ion].” For Douglas: “The plea that the cases be reargued is merely strategy by a minority somehow to suppress the majority view with the hope that exigencies of time will change the result.”³¹ Contrary to Burger's

apparent intent, changes in the internal dynamics of the Court transformed Blackmun's mealy mouthed *Roe* draft into an absolutist pro-choice decision. In particular, Powell's prodding of Blackmun resulted in the Court's embrace of the highly controversial and now-defunct trimester standard.

No doubt, Burger and Douglas's battle over reargument in *Roe* did not anticipate Powell's role in the decision. For their part, pro-choice advocates in *Roe* could not foresee the Court's reargument let alone the proclivities of Justices who had not been confirmed when the case was first argued. Indeed, when the Court granted certiorari in *Roe*, Hugo Black and John Harlan seemed certain to participate in the case. For all these reasons, *Roe*'s reasoning and landmark status are certainly tied to events outside the advocates' control.³²

Events subsequent to the granting of certiorari and outside the advocates' control also figured prominently in this past term's war on terror decisions. Shortly after April 2004 oral arguments, the world learned about the prisoner abuse scandal in Iraq. The photographs from Abu Ghraib prison highlighted the potential for abuse when the executive branch has unchecked authority over detainees. More to the point, the prison scandal cast doubt on the very arguments made by Deputy Solicitor General Paul Clement. Clement told the Justices that it's “the judgment of [military officials] involved in this process that the last thing you want to do is torture somebody or try to do something

30 David J. Garrow, *LIBERTY AND SEXUALITY* 547–48 (1994) (quoting Blackmun memo). Blackmun's draft opinion in the related Georgia case, *Doe v. Bolton*, more forcefully overturned Georgia's abortion statute. *Id.* at 549–51. That draft opinion, however, did not go as far as other Justices in the majority would have liked and did not come close to embracing the trimester standard that the Court ultimately adopted in *Roe*. *Id.* at 551.

31 *Id.* at 555 (quoting Douglas memo).

32 It should also be noted that the *Roe* litigation was anything but well thought out. Rather than a carefully drawn out plan from a national interest group, *Roe* was a grass roots, seat of the pants effort. See Neal Devins, *The Countermajoritarian Paradox*, 93 *MICH. L. REV.* 1433, 1444–45 (1995).

along those lines.”³³ Yet torture was clearly a fixture at Abu Ghraib. Further harming the administration’s case, Justice Department memoranda that provided a legal justification for the torturing of al Qaeda terrorists were disclosed by *The Washington Post*, *New York Times*, and other media outlets in May and June 2004.³⁴ And if that was not enough, administration officials acknowledged in the midst of this imbroglio that interrogation experts from the American detention camp at Guantanamo Bay trained military intelligence teams at Abu Ghraib (and that training included techniques utilized at Guantanamo).³⁵

Against this backdrop, it is little wonder that the Court concluded both that “a state of war is not a blank check for the president” and that “essential constitutional promises may not be eroded.”³⁶ Two months earlier, when the Court heard oral arguments in these cases, there was little reason to expect such a

rebuke of administration claims that “where the government is on a war footing, you have to trust the executive.”³⁷ Traditionally, the Supreme Court has shown a reluctance to second-guess the decisions of elected officials in time of war.³⁸ Before the Abu Ghraib scandal, that tradition might have prompted judicial deference to executive and military judgments.³⁹ And even if the Court would have ruled against the administration, the prison scandal and related developments may have prompted the Court’s rebuke of administration efforts “to condense power.”⁴⁰

In critical respects, the administration made its bad luck in the war on terror cases. That is not to say that the prison scandal did not come as a surprise to administration officials. Justice Department attorneys defending the administration before the Supreme Court, in particular, were almost certainly unaware of Abu Ghraib (and, quite possibly, the torture memos). Otherwise, they would

33 Respondent’s statement during oral argument at 50, *Hamdi v. Rumsfeld*, No. 03–6696, available at supreme.lp.findlaw.com/supreme_court/docket/2003/april.html.

34 Dana Priest @ R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004 at A1; Neil A. Lewis, *Justice Memo Explained How to Skip Prisoner Rights*, N.Y. TIMES, May 21, 2004 at A5.

35 See Douglas Jehl @ Andrea Elliot, *Cuba Base Sent Its Interrogators to Iraqi Prison*, WASH. POST, May 28, 2004 at A5; Dana Priest @ Bradley Graham, *Guantanamo List Details Approved Interrogation Methods*, WASH. POST, June 10, 2004 at A13.

36 *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004).

37 Petitioner’s statement during oral argument at 23, *Rumsfeld v. Padilla*, No. 03–1027, available at supreme.lp.findlaw.com/supreme_court/docket/2003/april.html.

38 Along with Lou Fisher, I have detailed the Court’s growing reluctance to interfere with unilateral presidential war making. See Devins @ Fisher, *supra* note 1.

39 Absolutist arguments by the Bush administration in the war on terror cases might well have been tied to increasing judicial deference towards presidential war making. Following the prison scandal, however, the administration understood that social forces weighed against its arguments. In an effort to counter these forces, the administration sought to call attention to the risks of a Court ruling limiting presidential power. On June 1, Deputy Attorney General James Comey spoke of administration efforts to play to the “court of public opinion” by releasing documents suggesting that enemy combatant Jose Padilla planned to detonate a radiological dirt bomb and to blow up apartment buildings. Scott Turow, *Trial by News Conference? No Justice in That*, WASH. POST, June 13, 2004 at B1 (quoting Comey). For his part, President Bush sought to limit the damage of the Justice Department terror memo. On June 17, the White House released a 2002 presidential memorandum in which Bush “decline[d] to exercise” the powers that the Justice memo said he had, preferring instead to abide by “the provisions of [the] Geneva [Conventions]” “Humane Treatment of al Qaeda and Taliban Detainees,” memorandum of February 7, 2002 from President Bush to the Vice President et al.

40 *Hamdi*, 124 S. Ct. at 2650 (emphasis in original).

never have said what they did during oral argument. For this very reason, the war on terror cases are cut from the same cloth as the other cases discussed in this essay. Events outside of the litigants' control – many of which happened after oral argument – shaped the social context and almost certainly the content of the Court's decisions.

More than eighty years ago, Justice Cardozo reminded us that the "great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."⁴¹ Skilled litigants can ride the crests of these tides and, in this way, help shape Court decisionmaking. Nevertheless, as both *Grutter* and *Brown* show, majoritarian pressures ebb and flow – so that it is very

hard to predict precisely when a multi-year litigation strategy should commence and precisely when litigants should go for the jugular by seeking Supreme Court review of the issue that matters most to them. Beyond majoritarian pressures, luck sometimes plays a prominent – perhaps decisive – role in Court decisionmaking. Indeed, after the Court grants certiorari (and sometimes after oral argument), the reasoning and outcome of Court decisions often seem to be a by-product of events that no litigant can predict nor control. *Grutter*, *Brown*, *Roe*, and the war on terror cases are all examples of this phenomenon. In all of these cases, the winning litigant can attest to the fact that being lucky is often better than being good. *GB*

41 Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).