

Winter 1-1-2014

## U.S. Judicial Independence: Victim in the “War on Terror”

Wayne McCormack

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### Recommended Citation

Wayne McCormack, *U.S. Judicial Independence: Victim in the “War on Terror”*, 71 Wash. & Lee L. Rev. 305 (2014), <https://scholarlycommons.law.wlu.edu/wlulr/vol71/iss1/9>

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# U.S. Judicial Independence: Victim in the “War on Terror”

Wayne McCormack\*

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\* E.W. Thode Professor of Law, University of Utah. Some of this Article stems from research by Erik Luna, Sydney and Frances Lewis Professor of Law, Washington & Lee University, for the second edition of our *Understanding the Law of Terrorism*. I hope I have not plagiarized Erik’s work, and I emphasize that the thesis and critiques herein are entirely my own. I do not want to attribute criticism of the federal Judiciary to Erik without his permission. I am enormously indebted to Jillian Nyhof, Nancy Anderson, and their colleagues at the Washington & Lee Law Review for extraordinarily thorough and capable research and editing.

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### *I. Introduction*

One of the principal victims in the United States’ so-called “war on terror” has been the independence of the U.S. Judiciary. Time and again, challenges to assertedly illegal conduct on the part of government officials have been turned aside, either because of overt deference to the government or because of special doctrines such as the state secrets privilege and standing requirements. I have even described the behavior of the United States since 9/11 as a “war on the rule of law.”<sup>1</sup>

This Article catalogs the principal cases first by the nature of the government action challenged and then by the special doctrines invoked. What I attempt to show is that the Judiciary has virtually relinquished its valuable role in the U.S. system of governance, which depends on judicial review. In the face of governmental claims of crisis and national security needs, the courts have refused to examine, or have examined with undue deference, the actions of government officials. Oddly enough, the mostly Republican Supreme Court has shown more stiff

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1. Wayne McCormack, *Responses to the Ten Questions*, 36 WM. MITCHELL L. REV. 5095, 5110 (2010).

resistance than most of the lower courts,<sup>2</sup> but still has ducked some significant issues.<sup>3</sup>

In the cases considered here, the U.S. government has taken the position that inquiry by the Judiciary into a variety of actions against alleged malfeasors would threaten the safety of the nation.<sup>4</sup> This is pressure that amounts to intimidation. When this level of pressure is mounted to create exceptions to established rules of law, it undermines due process of law.

Perhaps one or two examples of government warnings about the consequences of a judicial decision would be within the domain of legal argument. But a long pattern of threats and intimidation to depart from established law undermines judicial independence. That has been the course of the U.S. “war on terror” for over a decade now.

## *II. The Actions Challenged*

What follows is simply a list of the governmental actions that have been challenged and a brief statement of how the courts responded to government demands for deference.

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2. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 514, 529 (2004), *rev'g* 316 F.3d 450 (4th Cir. 2003) (rejecting the Fourth Circuit’s unfettered deference to the Executive in determining a detainee’s “enemy combatant” status, yet accepting the Government’s contention that full criminal procedures would unduly burden military officials).

3. See *Rumsfeld v. Padilla*, 542 U.S. 426, 446–47 (2004) (dismissing a U.S. citizen’s habeas petition challenging his “enemy combatant” status because he had filed his petition outside the district of confinement); *Ashcroft v. Iqbal*, 556 U.S. 662, 666–67 (2009) (describing Iqbal as a Muslim Pakistani who was labeled by the FBI as an individual “of high interest” in the 9/11 investigations).

4. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 622 (2006) (rejecting the Government’s contention that the danger posed by international terrorism serves as a sufficient reason to deny traditional criminal procedures in military commission proceedings); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 51 (D.D.C. 2010) (agreeing with the Government that the Executive’s decision to kill a U.S. citizen deemed a terrorist threat remains judicially unreviewable).

### A. Guantanamo

In *Boumediene v. Bush*,<sup>5</sup> the Supreme Court allowed the United States to detain alleged “terrorists” under unstated standards to be developed by the lower courts with “deference” to Executive determinations.<sup>6</sup> The intimidation exerted on the Court was reflected in Justice Scalia’s injudicious comment that the Court’s decision would “certainly cause more Americans to be killed.”<sup>7</sup>

### B. Detention and Torture

Khalid El-Masri<sup>8</sup> claimed that he was detained in Central Intelligence Agency (CIA) “black sites” and tortured.<sup>9</sup> His case was dismissed under the doctrine of “state secrets privilege” (SSP).<sup>10</sup>

Maher Arar<sup>11</sup> is a Canadian citizen who was detained at John F. Kennedy (JFK) Airport by U.S. authorities, shipped off to Syria for imprisonment and mistreatment, and finally released to Canadian authorities.<sup>12</sup> His case was dismissed under the “special factors” exception to tort actions for violations of law by

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5. 553 U.S. 723 (2008).

6. *Id.* at 796.

7. *Id.* at 828 (Scalia, J., dissenting).

8. *See* El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007) (describing El-Masri as a German citizen of Lebanese descent, who was detained by Macedonian officials before being transferred to CIA custody).

9. *Id.*

10. *Id.* at 300, 312 (agreeing with the Executive that classified information was “so central to the action that it cannot be fairly litigated without threatening . . . disclosure”).

11. *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 252–53 (E.D.N.Y. 2005) (explaining that Arar, a Syrian native domiciled in Ottawa, Canada, was detained by immigration officials while returning to Montreal from a family trip to Tunisia), *aff’d*, 585 F.3d 559 (2d Cir. 2009).

12. *Id.* at 252–55.

federal officials.<sup>13</sup> Arar was awarded \$10.5 million by Canadian authorities.<sup>14</sup>

Jose Padilla<sup>15</sup> was arrested deplaning at O'Hare Airport, imprisoned in the United States for three and a half years without a hearing and allegedly mistreated in prison.<sup>16</sup> His case was dismissed on grounds of "good faith" immunity.<sup>17</sup>

Binyam Mohamed<sup>18</sup> was subjected to so-called enhanced interrogation techniques at several CIA "black site[s]" before being repatriated to England,<sup>19</sup> which awarded him £ 1 million in damages.<sup>20</sup> The U.S. suit was dismissed under SSP.<sup>21</sup>

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13. *Id.* at 279, 287 (precluding a substantive due process claim arising from "torture, coercive interrogation, and detention in Syria" that implicates national security and foreign policy decisions that should remain with the political branches).

14. *See* Randall Palmer, *Canada to Pay Arar \$10.5 Million for Syria Ordeal*, WASH. POST (Jan. 26, 2007, 3:45 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/26/AR2007012600402.html> (last visited Feb. 3, 2014) ("Canada apologized on Friday to software engineer Maher Arar who was deported to Syria by U.S. agents after Canadian police labeled him an Islamic extremist, and paid him \$10.5 million in compensation.") (on file with the Washington and Lee Law Review).

15. *See* Padilla v. Yoo, 678 F.3d 748, 750–51 (9th Cir. 2012) (identifying Padilla as an American citizen who was declared an enemy combatant due to alleged associations with al Qaeda).

16. *Id.* at 751–52.

17. *See id.* at 762 (concluding that, due to Padilla's "enemy combatant" status, the Justice Department official allegedly responsible for his mistreatment had no reason to know that Padilla enjoyed constitutional protections).

18. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1074 (9th Cir. 2010) (en banc) (describing Mohamed as an Ethiopian citizen residing in the United Kingdom who was apprehended on immigration charges in Pakistan).

19. *Id.* at 1075.

20. *See* Patrick Wintour, *Guantanamo Bay Detainees to Be Paid Compensation by UK Government*, THE GUARDIAN (Nov. 15, 2010), <http://www.theguardian.com/world/2010/nov/16/guantanamo-bay-compensation-claim> (last visited Feb. 3, 2014) (reporting that the Government had reached a settlement with Mohamed and other Guantanamo detainees to compensate them for British involvement in their detention and treatment at Guantanamo) (on file with the Washington and Lee Law Review).

21. *See* Mohamed, 614 F.3d at 1086 (finding the Government's claim of privilege proper due to the threat that compelled or inadvertent disclosures of classified information in the course of litigation may "seriously harm legitimate national security interests").

*C. Unlawful Detentions*

Abdullah al-Kidd<sup>22</sup> was arrested as a material witness, held in various jails for two weeks, and then confined to house arrest for fifteen months. His suit was dismissed on grounds of “qualified immunity” and apparent validity of material witness warrant.<sup>23</sup>

Ali al-Marri was originally charged with perjury, then detained as an enemy combatant, for a total detention of four years before the Fourth Circuit finally held that he must be released or tried.<sup>24</sup>

Javad Iqbal<sup>25</sup> was detained on visa violations in New York following 9/11 and claimed he was subjected to mistreatment on the basis of ethnic profiling.<sup>26</sup> His suit was dismissed on grounds that he could not prove Attorney General authorization of illegal practices and because the Court was unwilling to divert the attention of officials away from national security.<sup>27</sup>

Osama Awadallah<sup>28</sup> was taken into custody in Los Angeles after his name and phone number were found on a gum wrapper in the car of one of the 9/11 hijackers.<sup>29</sup> He was charged with

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22. See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2079 (2011) (explaining that al-Kidd, a U.S. citizen, was arrested and detained when checking in for his flight to Saudi Arabia).

23. See *id.* at 2085 (finding that the Attorney General did not violate a clearly established Fourth Amendment right when he pursued the “objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant”).

24. See *Al-Marri v. Wright*, 487 F.3d 160, 195 (4th Cir. 2007) (“To sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the President calls them ‘enemy combatants,’ would have disastrous consequences for the Constitution—and the country.”).

25. *Ashcroft v. Iqbal*, 556 U.S. 662, 666–67 (2009).

26. *Id.* at 668–69.

27. See *id.* at 683 (finding that Iqbal’s complaint fails to demonstrate any discrimination on the basis of religion or national origin and only shows that “in the aftermath of a devastating terrorist attack,” law enforcement aimed to detain “suspected terrorists in the most secure conditions available”).

28. See *United States v. Awadallah*, 349 F.3d 42, 45 (2d Cir. 2003) (rejecting the district court’s conclusions that the material witness statute did not apply to grand jury witnesses and that Awadallah’s detention violated the requirements of the statute).

29. *Id.* at 45.

perjury before a grand jury and held as a material witness.<sup>30</sup> The Second Circuit reversed the district court's ruling that the government had abused the material witness statute.<sup>31</sup>

#### *D. Unlawful Surveillance*

Amnesty International<sup>32</sup> is one of numerous organizations that brought suit believing that its communications, especially with foreign clients or correspondents, had been monitored by the National Security Agency (NSA).<sup>33</sup> Its suit was dismissed because the secrecy of the NSA spying program made it impossible to prove that any particular person or group had been monitored.<sup>34</sup>

The validity of the entire Foreign Intelligence Surveillance Act (FISA)<sup>35</sup> rests on the “special needs” exception to the Fourth Amendment,<sup>36</sup> a conclusion that was rejected by one district court<sup>37</sup> although accepted by others.<sup>38</sup>

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30. *Id.* at 48.

31. *Id.* at 49, 64; *see also In re Grand Jury Material Witness Detention*, 271 F. Supp. 2d 1266, 1269 (D. Or. 2003) (“I conclude that a grand jury proceeding constitutes a ‘criminal proceeding,’ as the term is used in § 3144.”); *In re United States for a Material Witness Warrant*, 213 F. Supp. 2d 287, 300 (S.D.N.Y. 2002) (declining to follow the district court's holding in *Awadallah* by determining that the material witness statute should apply to grand jury witnesses).

32. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013) (finding that the plaintiffs lacked standing due to the “speculative chain of possibilities” offered in support of their allegations against the government).

33. *Id.* at 1145–46.

34. *Supra* note 32.

35. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C §§ 1801–1812 (2012)).

36. *See In re Sealed Case*, 310 F.3d 717, 745 (FISA Ct. Rev. 2002) (stating that the Supreme Court has recognized an exception for “warrantless” and “suspicionless searches” under the Fourth Amendment, when such searches serve the government's “special needs, beyond the normal need for law enforcement”).

37. *See Mayfield v. United States*, 504 F. Supp. 2d 1023, 1041 (D. Or. 2007) (finding that the special needs exception does not apply to FISA when law enforcement officers seek to conduct searches for ordinary criminal investigations).

38. *See United States v. Abu-Jihaad*, 630 F.3d 102, 120 (2d Cir. 2010) (“[A]ll other courts that have considered the issue . . . have rejected constitutional challenges to FISA.”); *United States v. Kashmiri*, No. 09 CR 830-



### *E. Targeted Killing*

Anwar Al-Aulaqi (or Al-Aulaqi)<sup>39</sup> was reported by press accounts as having been placed on a “kill list” by President Obama.<sup>40</sup> A suit by his father was dismissed on grounds that Anwar himself could come forward and seek access to U.S. courts.<sup>41</sup> Not only Anwar but also his son was then killed in separate drone strikes.<sup>42</sup>

### *F. Asset Forfeiture*

The Justice Department has found both Al Haramain Islamic Foundation and KindHearts for Charitable Humanitarian Development to be fronts for raising money for Hamas, and their assets have been blocked.<sup>43</sup> Despite findings of due process violations by the lower courts, the blocking of assets has been upheld on the basis that their support for terrorist activities is public knowledge.<sup>44</sup>

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4, 2010 U.S. Dist. LEXIS 119470, at \*2 (N.D. Ill. Nov. 10, 2010) (declining to follow the district court’s decision in *Mayfield* that FISA violates the Fourth Amendment).

39. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10 (D.D.C. 2010) (describing Al-Aulaqi as a U.S.–Yemeni citizen and Muslim cleric who was born and educated in the United States before moving to Yemen in 2004).

40. *Id.* at 11.

41. See *id.* at 17 (rejecting the father’s argument that Al-Aulaqi must remain in hiding due to the “threat of death” that has rendered him unable to appear before the court).

42. See *Al-Aulaqi v. Panetta: Lawsuit Challenging Targeted Killings*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/national-security/al-aulaqui-v-panetta> (last visited Feb. 3, 2014) (describing the killings as a part of a larger U.S. government program to target suspected terrorists outside of armed conflict) (on file with the Washington and Lee Law Review).

43. *Al-Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 970 (9th Cir. 2011); *Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 642–43 (N.D. Ohio 2010).

44. See *Al-Haramain Islamic Found., Inc.*, 686 F.3d at 989 (finding that, although the government violated the foundation’s due process rights by refusing to provide notice before freezing its assets, such error did not prejudice the government’s determination); *Kindhearts for Charitable Humanitarian Dev., Inc.*, 710 F. Supp. 2d at 660 (determining that the government could remedy its due process violations by disclosing judicially approved classified evidence and providing Kindhearts an opportunity to respond).

*G. Summary of Actions Challenged*

The Guantanamo cases are a good starting point because they show the Supreme Court answering government demands for extreme deference with a modicum of deference but also a claim of judicial review authority.<sup>45</sup> The version of judicial review adopted by the Court for the Guantanamo detentions ultimately resulted in a watered-down form of review that does not eliminate judicial independence entirely, but does allow a high degree of deference to Executive determinations.

After looking at the Guantanamo decisions, I want to illustrate the more extreme versions of deference for domestic detentions by reference to several cases in which individuals have been detained for years without any degree of judicial oversight.<sup>46</sup> And then there are the basic underpinnings of the Foreign Intelligence Surveillance Act, which depends first on the “special needs” exception to the Fourth Amendment,<sup>47</sup> but then in individual cases relies on virtually unreviewable statements by government agents.<sup>48</sup>

*III. The Lore of Judicial Independence*

Much of this Article will deal with the ways in which American courts have ducked (avoided, if that is a more neutral term) claims challenging the legality of official action in the wake of terrorism. Before turning to that discussion, it is worth taking a brief look at what commentators and courts have said about the issue of judicial independence, both domestically and

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45. See *infra* Part IV.B (demonstrating that in the Guantanamo cases the courts have spoken in deferential terms and sanctioned unusual procedures, while retaining a degree of judicial independence).

46. See *infra* Part IV.C (discussing two cases in which detainees labeled as “enemy combatants” remained in confinement for several years before obtaining judicial review).

47. See *infra* Part IV.E (analyzing how a majority of courts have excused warrantless government surveillance under FISA, by reasoning that threats of violence give rise to special needs in law enforcement).

48. See *ACLU v. U.S. Dep’t of Justice*, 265 F. Supp. 2d 20, 32 (D.D.C. 2003) (finding that surveillance information gathered under FISA qualified for the national security exemption to the Freedom of Information Act, precluding public access to such documents).

internationally. The latter point is part of how the U.S. courts' avoidance has damaged the American global presence both legally and politically. I hasten to add at the outset this caveat: the discussion of the *Justice Case* from Nuremberg<sup>49</sup> will show emphatically that the American judges have not been complicit in criminal activity but simply have shied away from their traditional judicial review function over Executive action. What remains is for the future to determine how and when that role might be resumed.

I have no doubt that no Justice or judge has received ex parte pressure or instruction from a member of the U.S. government. I firmly believe that an Article III judge would cry "foul" at the slightest hint of interference from the Executive. On the other hand, judges are people and they do like friendship. Some of the holdings described here have taken a very pro-government stance in situations when the judge could have been more vigorous in asserting the rights of the individual. The failure to stand up for the little guy is what concerns me about the role of the courts and their loss of judicial independence.

### *A. Righting the Ship of State*

Numerous American commentators have pointed out that courts tend to defer to the Executive during times of perceived emergencies, and most of the commentators carry at least the hope, if not the promise, that civil liberties will be restored when the crisis has passed.<sup>50</sup> Specifically, long before 9/11, Justice

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49. See *United States v. Alstötter*, 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948), available at <http://opil.ouplaw.com/view/10.1093/law:icl/485us47.case.1/law-icl-485us47?rskey=d0BpL5&result=2&prd=OPIL> (finding that a judge's active participation in the program of racial extermination developed by the Nazi Party constituted criminal activity).

50. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1042 (2004) (describing a common law cycle in which judges demonstrate flexibility in interpreting emergency powers during crises, but after the crisis abates, initiate an "agonizing reappraisal, casting doubt upon... their momentary permissiveness"); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1785 (2004) (rejecting the use of "suspicionless preventative detentions" during emergencies as a way to reassure the public due to the underlying premise that people are "objects whose liberty can be taken without regard to any threat they pose"); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be*

William Brennan had acknowledged that the “Ship of State” may right itself as the crisis eases, but asserted that the ship would tend to founder again in the next crisis.<sup>51</sup>

Looking at the picture from the perspective of courts other than the United States, Professor Shimon Shetreet subscribes explicitly to the “ship of state righting itself” view:

International Jurisprudence has shown in the beginning of this century, after the 9/11 attacks, complete acceptance of executive and legislative emergency measures against terror. However, in later years courts showed a very strict approach toward executive and legislative counterterrorism measures. The general pattern in most jurisdictions has been to broaden the scope of judicial review of executive decisions in matters of national security.<sup>52</sup>

Professor Shetreet rightly points to Canadian and U.K. court decisions striking down extrajudicial detention measures.<sup>53</sup> Chief

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*Constitutional?*, 112 YALE L.J. 1011, 1034 (2003) (“[I]n states of emergency, national courts assume a highly deferential attitude when called upon to review governmental actions and decisions.”); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1867 (2004) (asserting that when courts make constitutional compromises in times of emergency, such precedents will eventually “come back to haunt us”); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 287 (recognizing a common understanding of how government wartime policies affect civil liberties: “The government acts, the courts endorse or acquiesce, and . . . society reaches a judgment that the actions were unjustified and the courts were mistaken”). Perhaps the most direct apologia for full deference is offered by George Alexander in *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1, 25 (1984), which explains that the judiciary’s deference to the Executive and military in times of national emergency recognizes that “they must deal with extremely complex issues without the luxury of fact-finding.”

51. See William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. Y.B. HUM. RTS. 1, 6 (1988), [http://www.hofstra.edu/PDF/law\\_civil\\_hafetz\\_article1.pdf](http://www.hofstra.edu/PDF/law_civil_hafetz_article1.pdf) (“So far the United States has fortunately been able to restore a democratic and constitutional regime after each crisis . . . [but] ‘[t]his nation, as experience has proved, cannot always remain at peace . . .’” (quoting *Ex parte Milligan*, 71 U.S. 2, 125 (1866))).

52. See Shimon Shetreet, *Law and Counter Terror: The Shifting Trends of Judicial Jurisprudence on Human Rights in the Face of Terror* (Dec. 2010) (unpublished paper delivered at International Conference of Jurists in New Delhi) (on file with author).

53. See *Charkaoui v. Canada*, [2007] 1 S.C.R. 350, 356 (Can.) (finding that “the lack of review of the detention of foreign nationals” under the Immigration

Justice Barak authored opinions for the Israeli High Court in cases involving torture<sup>54</sup> and targeted killings.<sup>55</sup> On the general issue of judicial deference in the face of terror threats, Barak commented:

The security oriented character of administrative discretion restricted judicial review in the past. Judges are not members of the security establishment and they should refrain from interfering in security considerations. Over the years it has been held that security considerations are not unique insofar as judicial review is concerned. Judges are not administrators, yet the principle of separation of powers requires that they review the lawfulness of administrative decisions. In this regard, security considerations do not enjoy a different status.<sup>56</sup>

Optimism is welcome. And predictions of judicial recovery may well come to pass. But unfortunately, in the past decade, the U.S. Ship of State has been severely damaged and will require extensive repairs before it will set sail confidently again. As Justice Brennan said, the ship will founder again, but the question of the moment is whether it can even be righted in the short term.

### *B. U.S. Views on Judicial Independence*

Even before the watershed case of *Marbury v. Madison*,<sup>57</sup> the U.S. Supreme Court had staked out its position on judicial independence in Chief Justice Jay's answer to President Washington's request for an assessment of the validity of a particular treaty provision.<sup>58</sup> The implication of Jay's reliance on

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and Refugee Protection Act "until 120 days after the reasonableness of the certificate has been judicially confirmed infringes the guarantee against arbitrary detention"); *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [42], [2005] 2 W.L.R. 87 (Eng.) (rejecting the Attorney General's argument that deference owed to Parliament and the executive in the face of national threats precludes judicial review of the basis for the detention).

54. HCJ 5100/94 *Public Committee Against Torture v. General Security Service* 53 (4) PD 817 [1999] (Isr.).

55. HCJ 769/02 *Public Committee Against Torture v. Israel* 57(6) PD 285 [2005] (Isr.).

56. H.C. 680/88 *Schnitzer v. Chief Military Censor* 42(4) P.D. 617 [1989] (Isr.).

57. 5 U.S. 137 (1803). *Marbury* recognizes the authority of the Judiciary to review Executive and Legislative action. *Id.* at 177.

58. See 3 JOHN JAY, *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY*, 1782-1793, at 488 (Henry P. Johnston ed., 1893)

separation of powers was that the Court could become caught up in administrative matters and become subject to the political pressures of the Executive if it entered into giving opinions outside the course of litigation.

As is now well known, the Supreme Court asserted in *Marbury* that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>59</sup> This statement followed a lengthy discussion of the difference between discretion and duty on the part of the Executive<sup>60</sup> and another discussion of the reasons why the legislature cannot be allowed to be the judge of the validity of its own action.<sup>61</sup> Of even more significance for present purposes, however, is the passage in which Chief Justice Marshall discussed the role of the judges themselves:

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? [I]f it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.<sup>62</sup>

So if a judge refuses to decide a case in which an act of the Executive is alleged to be illegal, does Marshall mean to say that it would be a crime for the judge to refuse to decide the case? He implies something like that a bit later in *Cohens v. Virginia*<sup>63</sup>:

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[T]he lines of separation drawn by the Constitution between the three departments of the government. . . . being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to . . . .

59. *Marbury*, 5 U.S. at 177.

60. *See id.* at 166 (concluding that the Judiciary may examine the acts of a government officer when “he is directed peremptorily to perform certain acts” and “the rights of individuals are dependent on the performance of those acts”).

61. *See id.* at 174 (stating that, if the legislature possessed the authority to override constitutional provisions, the structures established by the constitution would be “form without substance”). This discussion borrowed almost verbatim from THE FEDERALIST NO. 78 (Alexander Hamilton) without attribution.

62. *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

63. 19 U.S. 264 (1821) In *Cohens*, the Court determined that the nature of federalism does not restrict the judiciary from “construing the words of the constitution” in reviewing state court constitutional decisions. *Id.* at 416.

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.<sup>64</sup>

From Marshall's discussion of the "case or controversy" requirement,<sup>65</sup> it is true that the federal courts have drawn some confines around their own power in the form of requirements for justiciability. Thus, the courts will not hear a case brought by a party who has no standing, either because of lack of an "injury in fact,"<sup>66</sup> or because the injury is not "judicially redressable."<sup>67</sup> Nor will the courts hear a "political question,"<sup>68</sup> by which the courts primarily mean a matter that has "a textually demonstrable commitment to a coordinate branch."<sup>69</sup> Nor will the Court hear a case that is either not yet ripe<sup>70</sup> or already

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64. *Id.* at 404.

65. *See id.* at 305 (distinguishing between the cases over which courts may exercise their judicial powers from questions that may possess a judicial character, but do not arise between contesting parties).

66. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (stating that at a minimum for injury-in-fact the constitution requires the plaintiff to have suffered "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical" (citations omitted)); *Allen v. Wright*, 468 U.S. 737, 752 (1984) (phrasing the proper injury-in-fact inquiry as whether "the injury [is] too abstract, or otherwise not appropriate, to be considered judicially cognizable").

67. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1444 (2011) (rejecting the plaintiffs' taxpayer standing due to the purely speculative conclusion that any judicial action against "a government expenditure or tax benefit would result in any actual tax relief" to the plaintiffs (quotations omitted)); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976) (finding that no "case or controversy" exists where the plaintiff has failed to show that the injury suffered "is likely to be redressed by a favorable decision").

68. *Baker v. Carr*, 369 U.S. 186, 210 (1962) (explaining that the political question doctrine arises from the proper distribution of powers between the separate branches under the constitution).

69. *Id.* at 216. Although this is only one of six factors listed in Justice Brennan's opinion in *Baker*, on further analysis, this one factor pretty much subsumes all the others.

70. *See Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J.,

moot.<sup>71</sup> It is possible to be harshly critical of the standing, ripeness, and political question doctrine decisions without denying that the courts have no business injecting themselves into matters reserved to the political branches. As I have argued elsewhere, all that the justiciability myth properly stands for is the proposition that the complainant should lose if the complainant has no legally cognizable claim.<sup>72</sup>

None of that bears on the issue of judicial independence. When it comes to taking direction from the political branches, the Supreme Court has jealously guarded the freestanding role of the Article III courts. Perhaps the leading case on this point is *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>73</sup> in which the Court struck down the creation of Bankruptcy Courts in which judges would exercise judicial power akin to that of an Article III judge.<sup>74</sup>

Meanwhile, the Court has upheld the placing of judges on the U.S. Sentencing Commission,<sup>75</sup> has permitted Judicial

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concurring) (stating that the political branches cannot seek judicial resolution of disputes between them until they allow the “normal political process” to resolve the issue); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89–90 (1947) (“The power of courts . . . only arises when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough.”).

71. See *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (concluding that when the plaintiff no longer required a decision of the court to compel his desired outcome, the controversy between the parties lost the “definite and concrete” character appropriate for judicial resolution); cf. *Roe v. Wade*, 410 U.S. 113, 125 (1973) (finding that the termination of the plaintiff’s pregnancy did not render moot the challenge to Texas’s criminal abortion statute because pregnancy fell within an exception to the mootness doctrine).

72. See Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595, 596 (1986) [hereinafter McCormack, *The Justiciability Myth*] (asserting that the court’s decision to dismiss a case under a justiciability doctrine effectively “hides a decision on the merits without elaborating the reasons behind the decision”).

73. 458 U.S. 50 (1982).

74. See *id.* at 87 (“We conclude that . . . the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of ‘the essential attributes of the judicial power’ from the Art. III district court, and has vested those attributes in a non-Art. III adjunct.”).

75. See *Mistretta v. United States*, 488 U.S. 361, 404 (1989) (“[W]e conclude that the principle of separation of powers does not absolutely prohibit Article III judges from serving on commissions such as that created by the Act.”).



Conferences to remove judges from hearing cases,<sup>76</sup> and has permitted judges to appoint special prosecutors in politically sensitive cases.<sup>77</sup> In all of these cases, however, the Court carefully assured itself that the action involved no threat to the judicial independence of the courts.<sup>78</sup>

Finally, there is the matter of the “legislative courts,” such as in the territories and a few specialized “courts” that operate under the supervision of the Article III courts. The authority for these entities was found early by Chief Justice Marshall in the pragmatics of governance structures for territories not yet admitted to statehood.<sup>79</sup> As the Court explained later,

as the absence of a federal structure in the territories produced problems not foreseen by the Framers of Article III, the realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by that article. For the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be.<sup>80</sup>

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76. See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 89 (1970) (implicitly allowing the Judicial Conference’s removal of a judge to stand by deciding that “petitioner has not made a case for the extraordinary relief of mandamus or prohibition”).

77. See *Morrison v. Olson*, 487 U.S. 654, 676 (1988) (“In this case, however, we do not think it impermissible for Congress to vest the power to appoint independent counsel in a specially created federal court.”).

78. See *Mistretta*, 488 U.S. at 406 (“[T]he fact that Congress has included federal judges on the Commission does not itself threaten the integrity of the Judicial Branch.”); *Morrison*, 487 U.S. at 684 (“We think both the special court and its judges are sufficiently isolated . . . so as to avoid any taint of the independence of the Judiciary such as would render the Act invalid under Article III.”); *Chandler*, 398 U.S. at 84 (“There . . . [is an] imperative need for total and absolute independence of judges . . . . But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business.”).

79. See *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828)

These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States.

80. *Glidden Co. v. Zdanok*, 370 U.S. 530, 546 (1962).

For similar reasons, legislative courts have been created without life tenure for the judges in military courts-martial<sup>81</sup> and the Tax Court,<sup>82</sup> as well as numerous boards of appeals.<sup>83</sup> In all of these situations, the Court has been careful to point out that the creation of the “court” is either specifically mentioned in Article I (governance of the armed forces)<sup>84</sup> or the court is without general judicial authority,<sup>85</sup> meaning that it is acting only for limited purposes subject to review by an Article III court.

The bottom line for the purpose of reviewing the judicial behavior with respect to a particular subject, such as terrorism, is that the U.S. Judiciary has zealously guarded its independence from the Executive or Legislative Branches.<sup>86</sup> The judges can be impeached only for misconduct in office.<sup>87</sup> Their salaries cannot be reduced.<sup>88</sup> They are bound by judicial ethics not to discuss cases *ex parte*.<sup>89</sup> They are not even subject to security clearances before

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81. See *Weiss v. United States*, 510 U.S. 163, 179 (1994) (“Congress has . . . chosen not to give tenure to military judges.”); see also 10 U.S.C. § 826 (2013) (outlining the roles of military judges).

82. See 26 U.S.C. § 7443(e) (2012) (“The term of office of any judge of the Tax Court shall expire 15 years after he takes office.”).

83. See, e.g., 38 U.S.C. § 7101A (2012) (Board of Veterans’ Appeals); 5 U.S.C. § 1202 (2012) (Merit Systems Protection Board); 29 U.S.C. § 153 (2012) (National Labor Relations Board).

84. See, e.g., *Weiss*, 510 U.S. at 166–67 (“Pursuant to Article I of the Constitution, Congress has established three tiers of military courts.”).

85. See, e.g., *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) (“The Tax Court is a court of limited jurisdiction and lacks general equitable powers.”).

86. See *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (“These doctrines help to ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches . . .”).

87. See U.S. CONST. art. III, § 1, cl. 2 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

88. See *id.* (“The Judges, both of the supreme and inferior Courts, shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

89. See *Code of Conduct for U.S. Judges, Canon 3(A)(4)* (2011), JUDICIAL CONFERENCE OF THE UNITED STATES, <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx> (last updated June 2, 2011) [hereinafter *Judicial Code of Conduct*] (“[A] judge should not initiate, permit, or consider *ex parte* communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers.”) (on file with the Washington and Lee Law Review).

receiving classified information in the course of their duties (although their court personnel are so confined).<sup>90</sup> A 1997 ABA blue-ribbon commission investigated the tension between judicial independence and accountability.<sup>91</sup> The Commission reaffirmed the importance of keeping the Judiciary free of control by the political branches, and even went so far as to express concern that too-harsh and unwarranted criticism of judicial “activism” could blunt the vitality of the tripartite system.<sup>92</sup>

Under no circumstances would an Article III judge imagine being given directions by a member of the Executive Branch.<sup>93</sup> Yet, time and again, the courts have yielded to arguments that decision in a case would jeopardize national security interests when a neutral observer would be hard-pressed to see how that could be possible.

### C. *Judicial Independence and International Law*

The International Association of Judicial Independence and World Peace has promulgated standards demanding that “in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.”<sup>94</sup> Further, judges

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90. See *United States v. Smith*, 899 F.2d 564, 570 (6th Cir. 1990)

[D]istrict courts retain sufficient power to preclude the Executive from engaging in procedures that intrude upon . . . the judicial function . . . . We therefore hold that the Executive Branch may conduct reasonable background investigations, subject to district court review, of judicial personnel before such personnel are cleared to work on a case involving classified information.

91. See COMM’N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AM. BAR ASS’N, AN INDEP. JUDICIARY 1 (1997), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/government\\_affairs\\_office/indepenjud.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/government_affairs_office/indepenjud.authcheckdam.pdf) (“The Commission on Separation of Powers and Judicial Independence was . . . created to study judicial independence and accountability, to evaluate a number of recent events perceived by some as threatening judicial independence, and to make recommendations.” (footnote omitted)).

92. See *id.* at 46 (“[A]ccusations of ‘judicial activism’ have been wielded . . . . These developments have a potentially deleterious effect on the courts’ decision-making independence.”).

93. See, e.g., *Smith*, 899 F.2d at 569 (“Under no circumstances should the Judiciary become the handmaiden of the Executive. The independence of the Judiciary must be jealously guarded at all times against efforts by prosecutors to erode its authority.”).

94. *Mt. Scopus Approved Revised International Standards of Judicial*

“should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law.”<sup>95</sup> The Montreal Declaration of 1983 emphasizes in several ways the importance to the world community of the Rule of Law and due process.<sup>96</sup>

Before going any further, I feel it is important to emphasize that I see no way in which judges of the United States could be said to have violated international criminal standards by ceding so much of their responsibilities to the Executive. It is quite likely that crimes have been committed by the Executive Branch in the name of national security. Many observers have called for prosecution of political leaders, who usually are accused by detractors of “war crimes”<sup>97</sup> although many of the crimes such as torture and extrajudicial detentions occurred outside any recognizable context of war. Thus, they should be cognizable under either ordinary domestic law or international humanitarian law.

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*Independence* § 2.2.2, INT’L ASS’N OF JUDICIAL INDEP. & WORLD PEACE (Mar. 19, 2008), <http://www.jiwp.org/#!/mt-scopus-standards/c14de> (last visited Feb. 3, 2014) (on file with the Washington and Lee Law Review).

95. *Id.* § 8.4.

96. See *Montreal Declaration*, INT’L ASS’N OF JUDICIAL INDEP. AND WORLD PEACE (June 10, 1983), <http://www.jiwp.org/#!/montreal-deceleration-1983/cmmd> (last visited Feb. 3, 2014) (on file with the Washington and Lee Law Review)

§ 103 Judges and courts shall be free in the performance of their duties to ensure that the Rule of Law is observed, and shall not admit influence from any government or any other authority external to their statutes and the interests of international justice.

§ 1.05 Judges shall enjoy freedom of thought and, in the exercise of their duties, shall avoid being influenced by any considerations other than those of international justice.

§1.08 Judges shall promote the principle of the due process of law as being an integral part of the independence of justice.

97. See Jordan J. Paust, *Prosecuting the President and His Entourage*, 14 ILSA J. INT’L & COMP. L. 539, 539 (2008)

During his so-called “war on terror,” President Bush has authorized and ordered manifest violations of customary and treaty-based international law . . . . [T]he President’s 2002 memorandum authorized and ordered the denial of treatment required by the Geneva Conventions and, therefore, necessarily authorized and ordered violations of the Geneva Conventions—which are war crimes. (footnotes omitted).

The question to be answered here is whether the judges who refused to grant relief against the wrongful actions of government officials could be charged with criminal behavior. The most salient precedent, of course, is the *Justice Case*<sup>98</sup> from Military Tribunal #3 at Nuremberg. The United States convened a Military Tribunal for the purpose of prosecuting sixteen judges who were charged with having been complicit in the crimes against humanity committed by the Nazi regime.<sup>99</sup> Specifically, they were charged with participating in the “common design or conspiracy” of racial persecution.<sup>100</sup> According to the indictment,

5. It was a part of the said common design, conspiracy, plans, and enterprises to enact, issue, enforce, and give effect to certain purported statutes, decrees, and orders, which were criminal both in inception and execution, and to work with the Gestapo, SS, SD, SIPO, and RSHA for criminal purposes, in the course of which the defendants, by distortion and denial of judicial and penal process, committed the murders, brutalities, cruelties, tortures, atrocities, and other inhumane acts . . . .

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98. The Library of Congress website contains in one volume all the pleadings, the transcript, and the court opinions. III TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS (1951) [hereinafter NUREMBERG TRIALS], [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-III.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf).

99. See generally INGO MULLER, *HITLER'S JUSTICE* (1991). This trial served as the model for the fictitious version in the movie *Judgment at Nuremberg*. In particular, the movie explored the ethical dilemma of a judge who stayed in office and sentenced some people to death because he believed that his resignation would result in the appointment of an even more brutal adherent of the regime. That character was based on Judge Schlegelberger. See Michael Asimow, *Judges Judging Judges—Judgment at Nuremberg*, U.S.F. (1998), <http://usf.usfca.edu/pj/articles/Nuremberg.htm> (last visited Feb. 3, 2014) (“Judgment at Nuremberg is based on the third Nuremberg trial . . . Janning is a conglomeration of several actual defendants, including Franz Schlegelberger who was formerly undersecretary in the Ministry of Justice.”) (on file with the Washington and Lee Law Review).

100. See NUREMBERG TRIALS, *supra* note 98, at 15

The United States of America . . . charges that the defendants herein participated in a common design or conspiracy to commit and did commit war crimes and crimes against humanity, as defined in Control Council Law No. 10, duly enacted by the Allied Control Council on 20 December 1945. These crimes included murders, brutalities, cruelties, tortures, atrocities, plunder of private property, and other inhumane acts, as set forth in counts one, two, and three of this indictment.

7. The said common design, conspiracy, plans, and enterprises embraced the use of the judicial process as a powerful weapon for the persecution and extermination of all opponents of the Nazi regime regardless of nationality and for the persecution and extermination of “races.”<sup>101</sup>

Evidence in the case was heard over a period of eleven months and resulted in a 10,000-page transcript with hundreds of written exhibits along with oral testimony.<sup>102</sup> In essence, ten of the judges were found to have taken an active part in the Holocaust events,<sup>103</sup> some by drafting legislation granting special powers to the regime,<sup>104</sup> some by replacing judges who were not compliant,<sup>105</sup> and some by issuing death sentences that were manifestly unwarranted by the evidence in the individual cases.<sup>106</sup> The most interesting aspect of the case involved the role of Judge Schlegelberger, a very prominent member of the Judiciary who “was put in charge of the Reich Ministry of Justice as administrative Secretary of State” but eventually resigned.<sup>107</sup> He testified that he often found the demands of the Nazi Party to be “difficult,” but there was evidence that “Hitler was at least attempting to reward Schlegelberger for good and faithful service rendered in the performance of some of which Schlegelberger committed both war crimes and crimes against humanity as charged in the indictment.”<sup>108</sup>

As an example of his support for the regime’s dispensing with the Rule of Law, the court cited a speech in which Schlegelberger stated:

In the sphere of criminal law the road to a creation of justice in harmony with the moral concepts of the new Reich has been opened up by a new wording of section 2 of the criminal code, whereby a person is also (to) be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal

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101. *Id.* at 17–18.

102. *Id.* at 4–5.

103. *Id.* at 4.

104. *Id.* at 23.

105. *Id.* at 1021.

106. *Id.* at 19.

107. *Id.* at 1082.

108. *Id.*

law and the sound instincts of the people. This new definition became necessary because of the rigidity of the norm in force hitherto.<sup>109</sup>

The Tribunal had this to say about his defense:

Schlegelberger presents an interesting defense, which is also claimed in some measure by most of the defendants. He asserts that the administration of justice was under persistent assault by Himmler and other advocates of the police state. This is true. He contends that if the functions of the administration of justice were usurped by the lawless forces under Hitler and Himmler, the last state of the nation would be worse than the first. He feared that if he were to resign, a worse man would take his place. As the event proved, there is much truth in this also. Under Thierack the police did usurp the functions of the administration of justice and murdered untold thousands of Jews and political prisoners. Upon analysis this plausible claim of the defense squares neither with the truth, logic, or the circumstances.

The evidence conclusively shows that in order to maintain the Ministry of Justice in the good graces of Hitler and to prevent its utter defeat by Himmler's police, Schlegelberger and the other defendants who joined in this claim of justification took over the dirty work which the leaders of the State demanded, and employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home. That their program of racial extermination under the guise of law failed to attain the proportions which were reached by the pogroms, deportations, and mass murders by the police is cold comfort to the survivors of the "judicial" process and constitutes a poor excuse before this Tribunal. The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes.

Schlegelberger resigned. The cruelties of the system which he had helped to develop were too much for him, but he resigned too late. The damage was done. If the judiciary could slay their thousands, why couldn't the police slay their tens of thousands? The consequences which Schlegelberger feared were realized. The police, aided by Thierack, prevailed. Schlegelberger had failed. His hesitant injustices no longer

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109. *Id.*

satisfied the urgent demands of the hour. He retired under fire. In spite of all that he had done he still bore an unmerited reputation as the last of the German jurists and so Hitler gave him his blessing and 100,000 RM as a parting gift. We are under no misapprehension. Schlegelberger is a tragic character. He loved the life of intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security. He is guilty [of war crimes and crimes against humanity] . . . .<sup>110</sup>

This is a harsh judgment suited to harsh measures. In the United States of the past decade, despite the torture, the unjustified detentions, the unauthorized surveillance, and the targeted killings, it would not be credible to argue that a U.S. judge had participated in the “prostitution of a judicial system for the accomplishment of criminal ends.”<sup>111</sup> For some reason, the Nazi regime enlisted the support of the Judiciary in its nefarious doings, a step that has not been taken in the U.S. terrorism context except for the highly questionable seeking of a FISA Court ruling that all electronic communications are “relevant” to terrorism investigations.<sup>112</sup>

Moreover, the level of the atrocities committed in the Nazi Holocaust far outstrip the level of wrongdoing by the United States, although torture is still torture, whether one person or many. The difference, again, is that the U.S. courts have not been active participants in the wrongs—they have simply failed to prevent them—and if we ever encountered a threat of atrocities at the level of the Holocaust, even the most pessimistic observer could hope that the U.S. Judiciary would stand up and say “NO.”

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110. *Id.* at 1086–87.

111. *Id.*

112. *See In re F.B.I. for an Order Requiring Prod. of Tangible Things From*, BR 13-109, 2013 WL 5307991, at \*7 (FISA Ct. Sept. 13, 2013)

The government notes also that “[a]nalysts know that the terrorists’ communications are located somewhere” in the metadata produced under this authority, but cannot know where until the data is aggregated and then accessed . . . . As the government stated in its 2006 Memorandum of Law, “[a]ll of the metadata collected is thus relevant, because the success of this investigative tool depends on bulk collection.”

(citations omitted). This is a matter of privacy law that will be taken up under the heading of “Carte Blanche for Electronic Snooping” below. *Infra* Part IV.F.



Some judges in the past decade turned blind eyes to the wrongs displayed before them.<sup>113</sup> Some paid undue deference to the Executive.<sup>114</sup> And at least one, Justice Scalia, skirted the bounds of propriety<sup>115</sup> when he said the judgment of his colleagues would “cause more Americans to be killed.”<sup>116</sup>

I think we can safely conclude that the examples of deference and the tolerance for wrongdoing by American judges in the past decade do not amount to criminal behavior under the standards of either domestic or international law. There is no hint that any judge has sentenced a person to an unwarranted death or imprisonment, nor has any judge been directly involved in the acquisition of excessive executive power.<sup>117</sup> The most that can be said is that many judges have failed to stand firmly against encroachments on their traditional role of judicial review. I don’t see that as a violation of criminal standards.

#### IV. Avoiding Accountability

As indicated above, there are a variety of doctrines that have been used to keep the courts away from reviewing governmental actions in the name of combating terrorism. I want to review the use of the following six doctrines:

1. Deference
2. State Secrets Privilege (SSP)
3. Qualified Immunity

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113. See Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CAL. L. REV. 2203, 2203 (2007) (“[J]udges have . . . presumed—seemingly sensibly—that the actions of military and executive officials were constitutional whenever they acted in the name of national security.”).

114. See, e.g., *United States v. Smith*, 899 F.2d 564, 569 (6th Cir. 1990) (“[T]he Court has deferred to the judgment of the Executive to preserve national security . . .”).

115. See *Judicial Code of Conduct*, *supra* note 89, at Canon 3(A)(3) (“A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.”).

116. *Boumediene v. Bush*, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting).

117. Judge Bybee of the Ninth Circuit signed the infamous *Yoo* memoranda before he was appointed to the bench. Was there a political trade-off in obtaining his signature? Probably not anything overt, just the usual political cronyism of Washington politics.

4. “Special Factors” Exception
5. “Special Need” Exception
6. Standing

### *A. Deference*

The word “deference” appears frequently in describing the judicial attitude toward an executive or legislative decision.<sup>118</sup> As a general matter, there is nothing wrong with the idea of deference, although we need to distinguish among deference to findings of fact, deference to policy decisions, and deference on matters of law. It makes sense that a reviewing court accepts the factual findings of a political body if there is any “rational basis” for those findings.<sup>119</sup> The most familiar example here is that the Supreme Court was able to find some evidentiary support for the proposition that a farmer’s use of homegrown wheat for commercial purposes affected interstate demand for wheat, and thus upheld federal regulation of homegrown wheat.<sup>120</sup> Within

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118. See, e.g., *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (“When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.”).

119. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (“States are not required to convince the courts of the correctness of their legislative judgments. Rather, ‘those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.’” (citations omitted)); see also *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421, 425 (1952) (“The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one . . . . But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision.”); *Henderson Co. v. Thompson*, 300 U.S. 258, 264–65 (1937) (“No facts have been found, or established by the evidence, which would justify us in pronouncing the action of the Legislature arbitrary . . . . The classification made has ample support in the evidence. We are unable to find in the regulation anything arbitrary or unreasonable.”).

120. See *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (stating Congress may regulate an activity “if it exerts a substantial economic effect on interstate commerce”); cf. *United States v. Lopez*, 514 U.S. 549, 557 (1995) (stating the Court should undertake to decide whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce instead of accepting an unsupported conclusion by Congress that a particular activity substantially affects interstate commerce).

the realm of judicial review but still entitled to a significant level of deference would be Congressional findings that a particular activity has a “substantial effect” on interstate commerce.<sup>121</sup> This form of deference is merely an expression of the degree to which a court is going to look behind findings of legislative fact by the body appropriately given responsibility for making those findings.<sup>122</sup>

Similarly, acceptance of legislative policy decisions is simply recognition of the appropriate legislative role.<sup>123</sup> An extreme example at the policy level would be a court’s acceptance of the legislature’s decision on the level of taxation for a particular activity—in that situation, we would go so far as to say that the decision is “committed to the authority of a coordinate branch” and conclude that it is a “political question” unfit for judicial review at all.<sup>124</sup>

Other examples of deference occur in the realm of executive dealings in foreign affairs.<sup>125</sup> The extreme is the unfettered

121. See *Gonzales v. Raich*, 545 U.S. 1, 17, 22 (2005) (stating that the Congress has the “power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce” and the Court only had to determine whether Congress had a “rational basis” to regulate the same); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964) (stating that it “is within the sound and exclusive discretion of the Congress” to remove obstructions in commerce, however “it is subject only to one caveat” which is “that the means chosen by it must be reasonably adapted to the end permitted by the Constitution”).

122. See *Gonzales*, 545 U.S. at 22 (“In assessing the scope of Congress’ authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”).

123. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–99 (1937) (stating “the Legislature was entitled to adopt measures to reduce the evils of the ‘sweating system’ . . . [e]ven if the wisdom of the policy be regarded as debatable” as long as it is not “arbitrary and capricious”).

124. See *Baker v. Carr*, 369 U.S. 186, 217 (1962)

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; [or one of several other factors that all add up essentially to the same point that there is no “law” for a court to apply to the claim].

125. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (claiming broadly that the President is the “sole organ of the nation in its

ability of the President to recognize one entity as the legitimate government of another country.<sup>126</sup> Congress has stated in no uncertain terms that the President has sole authority to control the export of arms to other countries<sup>127</sup> and the courts have held in equally certain terms that they will not second-guess those decisions.<sup>128</sup> Most relevant to the current issue are the authority of the State Department<sup>129</sup> and Office of Foreign Asset Control to

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external relations, and its sole representative with foreign nations” (citation omitted)).

126. This power derives from the constitutional authority to “receive ambassadors,” and is rather universally recognized as solely within the domain of the President. *See* *Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting) (relying on the ground that “the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes”). The presidential power to recognize one entity as the legitimate government of another nation was discussed in detail by the lower court. *See* *Goldwater v. Carter*, 617 F.2d 697, 707–08 (D.C. Cir. 1979) (“It is undisputed that the Constitution gave the President full constitutional authority to recognize the PRC and to derecognize the ROC.” (footnote omitted)).

127. *See* 22 U.S.C. § 2778(a)(1) (2012) (“[T]he President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services.”).

128. *See* *United States v. Hsu*, 364 F.3d 192, 194 (4th Cir. 2004) (“The Arms Export Control Act . . . authorizes the President to ‘designate those items which shall be considered as defense articles,’ and ‘promulgate regulations . . .’” (citations omitted)); *United States v. Lee*, 183 F.3d 1029, 1032 (9th Cir. 1999) (“The statute under which Lee and Ray were convicted, 22 U.S.C. § 2778, authorizes the President to control the import and export of defense articles . . . .”); *United States v. Gregg*, 829 F.2d 1430, 1434 (8th Cir. 1987)

There may be ambiguities and vagueness in these policy objectives, but the task of weighing and balancing the conflicting factors is committed by Congress to Executive discretion. As explained clearly by judge Zobel in *United States v. Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983), Congress enumerated the factors which are to guide the discretion of the executive department, but “also clearly expressed its desire that the executive branch, not the courts, have the final word on which items should be restricted.”

*See also* Cody Jones, Note, *More Than an Assertion: How United States v. Pulungan Nudged the Directorate of Defense Trade Controls Toward Increased Transparency*, 64 OKLA. L. REV. 839, 846 (2012) (“Congress ‘clearly expressed its desire that the executive branch, not the courts, have the final word on which items should be restricted.’” (footnote omitted)).

129. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996 allowed the State Department to designate “foreign terrorist organization[s]” as to whom provision of any “material support” would become criminal under 18 U.S.C. § 2339B. 8 U.S.C. § 1189 (2004).

designate persons and organizations as terrorist so that any transactions with them are criminal.<sup>130</sup> The courts have repeatedly deferred to these designations based on the fact-finding ability of the agency,<sup>131</sup> although there are due process concerns that allow designated organizations to rebut the allegations against them.<sup>132</sup> The most troubling aspect of this particular deference is the use of “classified information” by agencies making the designation, to which the courts have responded that the organization must have at least an opportunity to rebut the allegations against it, but thus far the cases have found sufficient basis in the public record to support the designations.<sup>133</sup> This subject appeared in the discussion of “asset forfeiture” above.<sup>134</sup>

With the exception of the terrorism designation cases, the examples above are thoroughly understandable and justifiable judicial deference to Executive or Legislative determinations.

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130. See International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1705 (2012) (granting sweeping power to the President).

131. See *United States v. Afshari*, 392 F.3d 1031, 1034 (9th Cir. 2004) (“That court may set aside the designation for the ordinary administrative law reasons, such as that the designation is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” (footnote omitted)); *People’s Mojahedin Org. of Iran v. Dep’t of State*, 327 F.3d 1238, 1243 (D.C. Cir. 2003) (stating that “even the unclassified record taken alone is quite adequate to support the Secretary’s determination” under AEDPA); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003) (“The district court correctly reviewed the actions of the Treasury Department under the highly deferential ‘arbitrary and capricious’ standard . . . Treasury’s decision to designate HLF as an SDGT was based on ample evidence in a massive administrative record.”).

132. See *Afshari*, 392 F.3d at 1040 (“Leaving the determination to the Executive Branch, coupled with the procedural protections and judicial review afforded by the statute, is both a reasonable and a constitutional way to make a determination of whether a group is a ‘foreign terrorist organization.’”); *People’s Mojahedin Org. of Iran*, 327 F.3d at 1242 (stating there are “due process standards that the Secretary must meet in making designations” under the AEDPA); *Holy Land Found.*, 333 F.3d at 164 (“Treasury provided HLF with the requisite notice and opportunity for response necessary to satisfy due process requirements.”).

133. See *People’s Mojahedin Org. of Iran*, 327 F.3d at 1243 (“[E]ven the unclassified record taken alone is quite adequate to support the Secretary’s determination” under AEDPA); *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 199 (D.C. Cir. 2001) (“We have, as the statute mandates, reviewed the administrative record . . . We conclude that the Secretary’s designation of the National Council of Resistance as an alias for the PMOI does not lack substantial support . . .”).

134. *Supra* Part II.F.

Many of the statements of deference that have been made in the realm of combating terrorism similarly are understandable and justifiable, but the degree of deference over time has reached a disturbing level.

The difference is that the courts have refused to apply law that is applicable, have refused even to ask whether there is law to be applied, and in some instances have at least implied (if not outright stated) that law can be sublimated to the goal of security.<sup>135</sup> When deference turns to obsequiousness, the judiciary has forfeited its role of independent judicial review. This point essentially is the flip side of Justice Jackson's famous dissent in *Korematsu v. United States*<sup>136</sup>: "If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint."<sup>137</sup>

Now instead of the people ceding power to the President, we have seen the courts ceding power to the President, which may require that "We the People" reclaim those powers.

## *B. The Detention Cases*

### *1. "Enemy Combatant" and Guantanamo Detentions*

Yaser Hamdi was one of two U.S. citizens to appear before the Supreme Court in 2004.<sup>138</sup> He was picked up in Afghanistan by

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135. For an example of this, see Judge Wilkinson's comments with regard to an extrajudicial domestic detention far removed from any realistic notion of a "battlefield":

For courts to resist this political attempt to meet these rising dangers risks making the judiciary the most dangerous branch . . . . The advance and democratization of technology proceeds apace, and our legal system must show some recognition of these changing circumstances. In other words, law must reflect the actual nature of modern warfare.

*Al-Marri v. Pucciarelli*, 534 F.3d 213, 293 (4th Cir. 2008) (en banc) (per curiam) (Wilkinson, J., concurring and dissenting), *vacated sub nom.* *Al-Marri v. Spagone*, 555 U.S. 1220 (2009). This case is discussed further below. *Infra* Part IV.C.2.

136. 323 U.S. 214 (1944).

137. *Id.* at 248 (Jackson, J., dissenting).

138. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) ("This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi.").

Northern Alliance forces around the same time and area as John Walker Lindh.<sup>139</sup> While Lindh was taken directly to the Eastern District of Virginia (landing at Andrews Air Force Base),<sup>140</sup> Hamdi was first taken to Guantanamo and then transported to Naval Brigs first at Norfolk, Virginia, and then at Charleston, South Carolina.<sup>141</sup> He was initially held incommunicado, and his father filed a habeas corpus petition on his behalf.<sup>142</sup> Although his case does not deal with Guantanamo, the subsequent cases dealing with that unfortunate locale are more easily understood with an initial look at this extrajudicial detention of a citizen by the military.

Initially, the Fourth Circuit granted total deference to the Government on the basis that “because it was ‘undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict,’ no factual inquiry or evidentiary hearing allowing Hamdi to be heard or rebut the Government’s assertions was necessary or proper.”<sup>143</sup> To this, the Supreme Court responded:

First, the Government urges the adoption of the Fourth Circuit’s holding below—that because it is “undisputed” that Hamdi’s seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or factfinding necessary. This argument is easily rejected. . . . [T]he circumstances surrounding Hamdi’s seizure cannot in any way be characterized as “undisputed,” as “those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances.”<sup>144</sup>

The more serious claim for deference came out of the language of “war” that the Government adopted to cover all

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139. *Id.*; *United States v. Lindh*, 212 F. Supp. 2d 541, 547 (E.D. Va. 2002).

140. *Lindh*, 212 F. Supp. 2d at 547.

141. *Hamdi*, 542 U.S. at 510.

142. *Id.* at 511.

143. *Id.* at 514 (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003)).

144. *Id.* at 526 (quoting *Hamdi v. Rumsfeld*, 337 F.3d 335, 357 (4th Cir. 2003) (Luttig, J., dissenting)).

instances of detention for alleged collaborators with hostile groups:

The Government's second argument requires closer consideration. This is the argument that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard. . . .

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law. He argues that the Fourth Circuit inappropriately "ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely," and that due process demands that he receive a hearing in which he may challenge the [government's conclusions] and adduce his own counterevidence.<sup>145</sup>

Conceding that "[b]oth of these positions highlight legitimate concerns," the O'Connor plurality then proceeded to balance the competing interests.<sup>146</sup> In doing so, it concluded that Hamdi was not entitled to the full procedural protections of a criminal proceeding because of "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle."<sup>147</sup> The plurality went along with the Government's assertions that "burdens" on military officials could be "properly taken into account"<sup>148</sup>—those

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145. *Id.* at 527–28 (citations omitted).

146. *Id.* at 531.

147. *Id.*

148. *Id.* at 532.



burdens consisting of distraction to commanders in the field and the prospect that “discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war.”<sup>149</sup>

Giving deference to these concerns of the military, balanced against the interests of freedom for Hamdi, the plurality came up with a hybrid sort of due process holding:

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker. . . .

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.<sup>150</sup>

An observer might consider this holding a victory for due process and judicial review, but wait: there were two Justices who believed that the legislature had not authorized nonjudicial Executive detention of a citizen on U.S. soil.<sup>151</sup> And in what has to be one of the oddest pairings in Supreme Court history, Justices Scalia and Stevens dissented sharply on the basis of British history known to the Founders, as “due process” in that context meant that a citizen accused of criminal conduct was entitled to the full procedural panoplies of a criminal trial.<sup>152</sup> So there were actually four votes for immediate remanding of Hamdi to the civil authorities for trial along with the four votes of the plurality for habeas corpus review.

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149. *Id.*

150. *Id.* at 533–34 (citations omitted).

151. *See id.* at 542–54 (Ginsburg and Souter, J.J., concurring) (arguing that the Non-Detention Act did not authorize Hamdi’s detention).

152. *See id.* at 555–58 (describing the evolution of due process, and also the writ of habeas corpus as a remedy originating in Renaissance England).

So why the diluted form of due process endorsed by the plurality rather than the rigorous version of due process endorsed by the other four? The answer lies in the procedures of the Court: if left to a 4–4 vote, the Court would have to affirm the lower court by a divided vote.<sup>153</sup> That would have left the Fourth Circuit’s total deferential approach in place and left Hamdi with no remedy whatsoever. Therefore, Justice Souter joined by Justice Ginsburg reluctantly voted with the plurality to “remand on terms closest to those I would impose.”<sup>154</sup>

The companion case to *Hamdi* that deals with Guantanamo detainees is *Rasul v. Bush*.<sup>155</sup> This time, Justice Stevens was able to command a majority of the Court (minus Justice Scalia) to the view that the Guantanamo detainees were entitled to proceed in federal court under habeas corpus.<sup>156</sup> The crux of the matter was that Guantanamo is essentially U.S. territory and prisoners on our soil are entitled to some form of due process.<sup>157</sup> The most significant case to be distinguished was a World War II case, *Johnson v. Eisentrager*,<sup>158</sup> in which German soldiers were denied access to habeas corpus following their trial and imprisonment in Germany.<sup>159</sup> According to the Court in *Rasul*:

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have

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153. See H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, SUFFOLK U. L. REV. 17, 19–20 (2004) (noting that, in the event of a 4–4 tie between Justices, the affirmation default rule applies and the court confirms the lower court’s ruling in a per curiam opinion).

154. *Hamdi v. Rumsfeld*, 542 U.S. 507, 553 (2004).

155. 542 U.S. 466 (2004).

156. *Id.* at 481–84 (“Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. . . . We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.”).

157. See *id.* at 480–81 (explaining that the United States has jurisdiction over Guantanamo and arguing aliens held in federal custody, like American citizens, are entitled to invoke the habeas statute).

158. 339 U.S. 763 (1950).

159. See *Rasul*, 542 U.S. at 475 (finding that “a Federal District Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U.S. forces in China, tried and convicted of war crimes, . . . and incarcerated in the Landsberg Prison in occupied Germany”).

engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.<sup>160</sup>

Indeed, the language of *Eisentrager* was sufficiently ambiguous that the case could stand for the proposition that the German prisoners had received habeas review and been found to have received all the due process to which they were entitled.

In conclusion, Justice Stevens' majority opinion merely stated that the federal courts had jurisdiction to hear the habeas corpus petitions from Guantanamo detainees.<sup>161</sup> It set out no criteria for when detentions would be held invalid.<sup>162</sup> In a mere footnote, the Court held:

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.”<sup>163</sup>

The third executive detention case in the 2004 set was a habeas corpus petition brought on behalf of Jose Padilla, a U.S. citizen arrested at O'Hare Airport for allegedly plotting to place a “dirty bomb” somewhere in the United States.<sup>164</sup> After *Hamdi*, it would seem that Padilla's case would be a slam dunk because he was not anywhere near a “battlefield,” unless one believed the

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160. *Id.* at 476.

161. *See id.* at 485 (“What is presently at stake is only whether federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse . . . and remand . . .”).

162. *See id.* (“Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now.”).

163. *Id.* at 483 n.15 (citing 28 U.S.C. § 2241(c)(3) (2012)).

164. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

politicians who talked as if the whole world were a battlefield.<sup>165</sup> In a masterpiece of ducking, however, the Court decided that his habeas petition was brought in the wrong court because it was filed by his New York counsel in New York two days after he had been transferred to the Navy Brig in South Carolina.<sup>166</sup> There, Padilla would languish for almost four years in isolation before he was finally brought to trial on criminal charges<sup>167</sup>—more on that abuse of the system later.

The next act in the drama of Guantanamo occurred two years later in 2006, when the Court determined that the military commissions established to try war crime allegations at Guantanamo were improperly constituted under both domestic and international law.<sup>168</sup> The case that reached the Court involved a charge of “conspiracy” against one of Osama bin Laden’s former drivers, prompting a ruling that the concept of “conspiracy” was not part of the “law of war.”<sup>169</sup> The Executive plea for deviation from the procedural requirements of the Uniform Code of Military Justice (UCMJ)<sup>170</sup> was unpersuasive. “Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that document authorizes a response to the felt need.”<sup>171</sup>

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165. A wide-ranging critique of this notion shows that it did not end with the Bush Administration but has continued under President Obama. See *Indefinite Detention: The World Is Not a Battlefield*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/sites/default/files/theworldisnotabattlefield/> (last visited Feb. 3, 2014) (noting that the Obama administration “has also claimed the authority to hold terrorism suspects in indefinite military detention”) (on file with the Washington & Lee Law Review).

166. *Padilla*, 542 U.S. at 441.

167. *Judge Agrees Padilla Terror Case ‘Light on Facts,’* ASSOCIATED PRESS, June 21, 2006, [www.nbcnews.com/id/13462968/#.61JeBBaW2k](http://www.nbcnews.com/id/13462968/#.61JeBBaW2k) (last updated June 21, 2006, 2:26 PM) (on file with the Washington and Lee Law Review).

168. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (deciding that the President’s military commission lacked the power to try Hamdan and that the procedures the Government decreed would govern Hamdan’s trial by commission violate the UCMJ and American common law of war).

169. *Id.* at 567 (summarizing Hamdan’s argument that trial by military commission for conspiracy is improper as conspiracy is not a violation of the law of war).

170. 10 U.S.C. §§ 830–854 (2012).

171. *Hamdan*, 548 U.S. at 591 (citations omitted).

The Government argued that military necessity mandated the need for a military commission with unusual authority, such as the ability to allow hearsay evidence and the ability to determine inadequate independence of counsel.<sup>172</sup> The UCMJ provided Congressional authority for military commissions so long as the commission procedures were “the same as those applied to courts-martial unless such uniformity proves impracticable.”<sup>173</sup> The Government urged several aspects of deference to the Executive determination that the military commissions could dispense with procedural safeguards:

Finally, the President’s determination that “the danger to the safety of the United States and the nature of international terrorism” renders it impracticable “to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,” is, in the Government’s view, explanation enough for any deviation from court-martial procedures.<sup>174</sup>

The majority opinion by Justice Stevens responded to this argument with mere disbelief:

Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. . . . [T]he only reason offered in support of that determination is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan’s trial, any variance from the rules that govern courts-martial.

The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental

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172. *See id.* at 622 (describing the Government’s arguments that military commissions would be of no use if they were “hamstrung” by the provisions of the UCMJ that govern courts-martial and that the nature of terrorism renders impracticable the procedures and evidentiary rules used in U.S. criminal cases).

173. *Id.* at 620.

174. *Id.* at 622 (quoting Brief for Respondents at 43–47, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 460875).

protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present.<sup>175</sup>

These comments are probably the high-water mark of judicial resistance to demands for deference in relationship to terrorism. After this decision, Congress adopted the Military Commission Act of 2006 (MCA),<sup>176</sup> in which it not only defined a complete catalog of offenses against the “law of nations,” but also attempted to validate some of the procedural objections to the commissions.<sup>177</sup> The list of offenses included both “conspiracy” and “material support” of terrorism and terrorist organizations.<sup>178</sup> Hamdan was then tried and acquitted of the conspiracy charge but found guilty of material support.<sup>179</sup> He was sentenced to sixty-six months in prison but had already served sixty-one.<sup>180</sup> By the time a deal was negotiated for repatriation to his native Yemen, his sentence had only one month left to run, which he served back home and is now free.<sup>181</sup> The final twist in this bizarre scenario is that the D.C. Circuit ultimately reversed his conviction for material support on the ground that it was not a crime under either domestic or international law at the time he was active with al Qaeda.<sup>182</sup>

The third step in the Supreme Court’s handling of Guantanamo cases is *Boumediene v. Bush*,<sup>183</sup> which provides a

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175. *Id.* at 623–24 (footnotes omitted).

176. Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 948 (2012)).

177. *See id.* § 948(b)–(d) (2012) (establishing the general purpose and authority of military commissions as well as their jurisdiction and persons subject to them).

178. *Id.* § 950(t).

179. William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1.

180. Charlie Savage, *In Setback for Military Tribunal, Bin Laden Driver’s Conviction is Reversed*, N.Y. TIMES, Oct. 17, 2012, at A22.

181. Robert Worth, *Bin Laden Driver to Be Sent to Yemen*, N.Y. TIMES (Nov. 26, 2008), [www.nytimes.com/2008/11/26/washington/26gitmo.html?ref=world](http://www.nytimes.com/2008/11/26/washington/26gitmo.html?ref=world) (last visited Feb. 3, 2014) (on file with the Washington and Lee Law Review).

182. *See Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (finding that because the Military Commission Act cannot be applied ex post facto to Hamdan’s actions, and because his actions were not otherwise illegal when committed, he could not be found guilty).

183. 553 U.S. 723 (2008).

measure of judicial review over the Guantanamo detainees,<sup>184</sup> but also provides the low-water mark for judicial independence in the form of Justice Scalia's most injudicious dissent.<sup>185</sup> Justice Kennedy, not surprisingly after his concurring opinion in *Hamdan*, wrote the majority for the Court in reviewing the validity of the MCA:

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7 of the Military Commissions Act of 2006 (MCA) operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.<sup>186</sup>

Justice Kennedy provided this insight into why judicial review, as opposed to the careful and informed review by military experts, is crucial to sustained detention:

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures.<sup>187</sup>

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184. *See id.* at 771 (holding "Art. 1, §9, cl.2 of the Constitution has full effect at Guantanamo Bay[,] and therefore, prisoners there are entitled to habeas review).

185. *Id.* at 826 (Scalia, J., dissenting).

186. *Id.* at 732 (majority opinion) (citations omitted).

187. *Id.* at 783.

Finally, Justice Kennedy had some comments regarding the relative roles of executive and judiciary in dealing with public safety:

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation's present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.<sup>188</sup>

Justice Scalia provided for a low point of judicial temperament and independence when he engaged in a highly inflammatory and disrespectful tirade against the majority:

America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen. On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D.C., and 40 in Pennsylvania.

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war

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188. *Id.* at 728–29.



harder on us. It will almost certainly cause more Americans to be killed. . . .

In the short term . . . the decision is devastating. At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. Some have been captured or killed. But others have succeeded in carrying on their atrocities against innocent civilians. . . .

These, mind you, were detainees whom *the military* had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection.<sup>189</sup>

The lack of civility in Justice Scalia's dissent has not been much noted in either scholarly or journalistic commentary. Accusing his colleagues of "caus[ing] more Americans to be killed" is hardly the discourse of persuasion and judicial temperament. Even more amazing is the lack of logic in the argument. If the military has released dangerous people after deciding that they are not enemy combatants, showing the difficulty of predicting dangerousness, how does that argue against judicial review over the power to imprison someone? What in that argument gives rise to an inference of confidence in the ability of anyone to predict future dangerousness?

Following *Boumediene*, the D.C. Circuit was obligated to develop standards for review of the detentions at Guantanamo. Here are summaries of some of the D.C. court opinions leading up to the question of what criteria should be used for determining whether someone is to be detained.

*Hamliily v. Obama*.<sup>190</sup> The Obama Administration staked out its position on Executive detention in a brief filed in March 2009 in this case. It based the detention authority squarely on the AUMF without mentioning inherent Article II powers, and it has continued to take that position since.<sup>191</sup> It took the position that

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189. *Id.* at 827–29 (Scalia, J., dissenting).

190. 616 F. Supp. 2d 63 (D.D.C. 2009).

191. *See id.* at 67 (noting the Government itself states its proposed framework is based on the AUMF); *see also id.* at 66 n.1 (noting the Government has dropped its Article II arguments) (citing Respondents' Memorandum regarding the Government's Detention Authority at 1, *Hamliily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009) (No. 1:05cv02378)).

detention authority extended to members and substantial supporters of al Qaeda, the Taliban, and associated forces,<sup>192</sup> differing from the Bush Administration only by adding the qualifier of “substantial” support for one who cannot be considered a “member” of an “associated force.” The subsequent cases have attempted to discern what would constitute “substantial support” in the case of someone who was not directly involved with al Qaeda or the Taliban, but (apart from the Uighurs) there has not been anyone brought before the courts who had no connection with operations in Afghanistan.<sup>193</sup>

*Al-Bihani v. Obama*.<sup>194</sup> Al-Bihani served as a cook in a loose affiliation of Taliban and al Qaeda volunteers fighting against the Northern Alliance.<sup>195</sup> He was captured and handed over to the U.S. forces and ultimately sent to Guantanamo.<sup>196</sup> The big question centered around “whom the President can lawfully detain pursuant to statutes passed by Congress. . . . The Supreme Court has provided scant guidance . . . , consciously leaving the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion.”<sup>197</sup> The D.C. Circuit panel in *al-Bihani* articulated a standard of “an . . . individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”<sup>198</sup>

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192. *See id.* at 70 (describing the Government’s arguments on who could be detained) (citing Government’s Response to Petitioners’ Joint Memorandum Relating to Detention Authority at 6, *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009) (No. 1:05cv02378)).

193. *See e.g.*, *Al Adahi v. Obama*, 698 F. Supp. 2d 48, 65 (D.D.C. 2010) (holding that the Government met its burden of demonstrating a petitioner had been a member of or substantially supported al Qaeda, a determination that is made by deciding “whether the individual functions or participates within or under the command of the organization” (quotation omitted)); *Hatim v. Obama*, 677 F. Supp. 2d 1, 1 (D.D.C. 2009) (deciding that the Government may not justify indefinite detention solely by demonstrating someone provided substantial or direct support to enemy armed forces).

194. 590 F.3d 866 (D.C. Cir. 2010).

195. *Id.* at 869.

196. *Id.*

197. *Id.* at 879 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004)).

198. *Id.* at 872 (quoting *Al-Bihani v. Obama*, 594 F. Supp. 2d 35, 38 (D.D.C. 2009)).

The standard can be satisfied by either of two independent components:

While we think the facts of this case show Al-Bihani was both part of and substantially supported enemy forces, we realize the picture may be less clear in other cases where facts may indicate only support, only membership, or neither. We have no occasion here to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard. We merely recognize that both prongs are valid criteria that are independently sufficient to satisfy the standard.<sup>199</sup>

*Bensayah v. Obama*.<sup>200</sup> “Bensayah, an Algerian citizen, was arrested by the Bosnian police on immigration charges in late 2001.”<sup>201</sup> He and the five other Algerian men arrested in Bosnia were suspected of plotting to attack the U.S. Embassy in Sarajevo but eventually were released for insufficient evidence.<sup>202</sup> The six were turned over to the United States and transported to Guantanamo in early 2002.<sup>203</sup>

The district court granted habeas relief to the other five men on the ground that there was no reliable evidence that they had intended to travel to Afghanistan to fight against the United States.<sup>204</sup> The district court, however, denied Bensayah’s petition for habeas corpus, holding that the Government had adduced sufficient evidence to show it was more likely than not that he had “supported” al Qaeda.<sup>205</sup> The evidence for this conclusion consisted primarily of a classified document plus corroboration from a classified source.<sup>206</sup> On appeal, the Government disclaimed reliance on the source and abandoned the argument that he had provided “support” for al Qaeda.<sup>207</sup> Instead, it argued that he was

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199. *Id.* at 873–74.

200. 610 F.3d 718 (D.C. Cir. 2010).

201. *Id.* at 720.

202. *Id.*

203. *Id.*

204. *Id.* at 721.

205. *Id.* at 722.

206. *Id.*

207. *Id.*

“part of” al Qaeda.<sup>208</sup> The D.C. Circuit panel started with this observation:

Although it is clear al Qaeda has, or at least at one time had, a particular organizational structure, the details of its structure are generally unknown, but it is thought to be somewhat amorphous. As a result, it is impossible to provide an exhaustive list of criteria for determining whether an individual is “part of” al Qaeda. That determination must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization. That an individual operates within al Qaeda’s formal command structure is surely sufficient but is not necessary to show he is “part of” the organization; there may be other indicia that a particular individual is sufficiently involved with the organization to be deemed part of it, but the purely independent conduct of a freelancer is not enough.<sup>209</sup>

The court stated that membership in al Qaeda would be enough to justify detention, but the Government must produce evidence showing participation in some activity directly connected to an associated group.<sup>210</sup> Without the asserted corroboration for the classified document, the court of appeals found there was insufficient evidence to show that he was “part of” an organization and remanded for the district court to receive any further evidence that the Government might choose to bring forward.<sup>211</sup> Much of the opinion is redacted so it is impossible to know what he did or what the Government did to obtain evidence about him.

*Conclusion—Preliminary.* The D.C. Circuit has decided that the government is entitled to introduce hearsay testimony and that testimony is even entitled to a presumption of regularity, not exactly a presumption of truthfulness of the statement but that the statement was made.<sup>212</sup> The burden of proof to show detainability remains on the government and the hearsay evidence is introduced only for whatever probative value it may

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208. *Id.* at 720.

209. *Id.* at 725 (citations omitted).

210. *Id.*

211. *Id.* at 727.

212. *See* Al-Bihani v. Obama, 590 F.3d 866, 879 (2012) (applying the *Hamdi* rule that hearsay should be admitted as long as petitioner is allowed to rebut it).

have, while the detainee is entitled to introduce evidence to rebut the government's position.<sup>213</sup>

As of mid-2010, the scorecard was 32–16 in favor of the petitioners.<sup>214</sup> Since that time, not a single habeas petition has been granted.<sup>215</sup> Probably, the easy cases were decided early and the prisoners released so that the remaining Guantanamo detainees mostly have demonstrable ties to al Qaeda or the Taliban and thus meet the standards for detention.

The saga of U.S. involvement with Guantanamo detention is long, complicated, and likely to continue for some time. The purpose of this exercise has been merely to address the degree of deference given by the judiciary to the Executive and Legislative branches. It is a mixed story. Although the courts have talked in deferential terms and allowed unusual procedures (such as use of hearsay evidence), there has been no *carte blanche* acquiescence to all detentions at Guantanamo or to the standards and procedures adopted by Congress. That, unfortunately, is not true with many of the cases to which we will turn next.

## 2. Looking Away from Domestic Executive Detentions

### a. Aliens as a Special Class

Immediately after 9/11, resident aliens became the primary focus of counterterrorism efforts. The majority of the detainees in the PENTTBOM<sup>216</sup> investigation were aliens who were placed in the custody of immigration officials.<sup>217</sup> Signed into law on October

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213. See *id.* (discussing procedural and policy reasons for admitting hearsay in military commissions).

214. See generally CTR. FOR CONSTITUTIONAL RIGHTS, GUANTANAMO HABEAS SCORECARD (2012), <http://ccrjustice.org/files/2012-05-30%20Updated%20Habeas%20SCORECARD.pdf>.

215. *Id.*

216. “PENTTBOM” refers to the FBI’s investigation of the 9/11 attacks. U.S. DEPT OF JUSTICE OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1 (2003) [hereinafter OIG REPORT].

217. See *id.* at 3 (explaining that the report focuses on treatment of persons detained by the Immigration and Naturalization Service at “two facilities because they held the majority of September 11 detainees”).

26, 2001, the USA PATRIOT Act<sup>218</sup> contained a provision authorizing the Attorney General to “take into custody” any alien he has reasonable grounds to believe is involved in terrorist activity and to hold the alien for up to six months in renewable increments,<sup>219</sup> with no process or evidentiary hearing and subject only to judicial review by a habeas corpus petition.<sup>220</sup> Apparently, however, DOJ did not use this power because it had sufficient authority under existing law to hold aliens considered for deportation without bond.<sup>221</sup>

In 2002, DOJ announced the “National Security Entry–Exit Registration System” (NSEERS).<sup>222</sup> Among other things, NSEERS instituted a “special call-in registration” program that required alien males from designated countries (all Muslim-majority states except for North Korea) to report to immigration offices to be fingerprinted, photographed, and interviewed.<sup>223</sup>

218. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of U.S.C.).

219. See 8 U.S.C. § 1226a(a)(6) (2012)

An alien detained [for suspicion of terrorist or espionage activity] and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

220. See *id.* § 1226a(b) (“Judicial review of any action or decision relating to this section . . . is available exclusively in habeas corpus proceedings . . . Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.”).

221. See *The USA Patriot Act: Myth v. Reality*, U.S. DEP’T OF JUST., [http://www.justice.gov/archive/ll/subs/add\\_myths.htm#s412](http://www.justice.gov/archive/ll/subs/add_myths.htm#s412) (last visited Feb. 3, 2014)

As of February 2004, the Attorney General had not used section 412. Numerous aliens who could have been considered have been detained since the enactment of the USA PATRIOT Act. But it has not proven necessary to use section 412 in these particular cases because traditional administrative bond proceedings have been sufficient to detain these individuals without bond. The Department believes that this authority should be retained for use in appropriate situations.

(on file with the Washington and Lee Law Review).

222. *Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry–Exit Registration System*, U.S. DEP’T OF JUST. (Aug. 12, 2002), [http://www.justice.gov/opa/pr/2002/August/02\\_ag\\_466.htm](http://www.justice.gov/opa/pr/2002/August/02_ag_466.htm) (last visited Feb. 3, 2014) (on file with the Washington and Lee Law Review).

223. See *Rajah v. Mukasey*, 544 F.3d 427, 433 (2d Cir. 2008) (describing the NSEERS program).

Those who did not report were threatened with arrest.<sup>224</sup> According to multiple sources, the program registered nearly 83,000 aliens, more than 13,000 of whom were placed in deportation proceedings.<sup>225</sup> In a series of cases, the program was challenged by aliens whose registration led to deportation proceedings, and in each case, the arguments were rejected.<sup>226</sup> In *Rajah v. Mukasey*,<sup>227</sup> for instance, the Second Circuit found no Equal Protection violation:

The terrorist attacks on September 11, 2001 were facilitated by the lax enforcement of immigration laws. The [Special Call-In Registration] Program was designed to monitor more closely aliens from certain countries selected on the basis of national security criteria. The individuals subject to special registration under the Program were neither citizens nor even lawful permanent residents. They were asked to provide information regarding their immigration status and other matters relevant to national security. They were not held in custody for appreciable lengths of time. Those whose immigration status was not valid were subject to generally applicable legal proceedings to enforce pre-existing immigration laws. In sum, the Program was a plainly rational attempt to enhance national security.<sup>228</sup>

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224. *Id.*

225. Nurth C. Aizenman & Edward Walsh, *Immigrants Fear Deportation After Registration; Number of Mideast, Muslim Men Expelled Rises Sharply*, WASH. POST, July 28, 2003, at A1.

226. See, e.g., *Alnahham v. Holder*, 371 F. App'x 191, 196 (2d Cir. 2010) (holding plaintiff "Alnahham had no right to remain silent with respect to [the Special Call-In Registration Program's] requirement that he appear for registration, fingerprinting and presentation of immigration-related documents" (citation omitted)); *Rajah*, 544 F.3d at 434–36, 438–443 (finding the Special Call-In Registration Program was authorized by statute and not unconstitutional); *Malik v. Gonzales*, 213 F. App'x 173, 174 (4th Cir. 2007) (stating that removal proceedings pursuant to NSEERS did not violate plaintiff's constitutional rights and federal courts did not have jurisdiction to hear these kinds of claims); *Kandamar v. Gonzales*, 464 F.3d 65 (1st Cir. 2006) (same); *Ahmed v. Gonzales*, 447 F.3d 433 (5th Cir. 2006) (finding immigration judge did not violate plaintiff's constitutional rights by denying continuance of removal proceedings brought after plaintiff's registration with NSEERS); *Zafar v. U.S. Att'y Gen.*, 461 F.3d 1357 (11th Cir. 2006) (same); *Shaybob v. U.S. Att'y Gen.*, 189 F. App'x 127 (3d Cir. 2006) (same).

227. 544 F.3d 427 (2d Cir. 2008).

228. *Id.* at 438–39 (citations omitted). Although the NSEERS re-registration requirement was suspended in December 2003, DEP'T OF HOMELAND SEC., FACT SHEET: CHANGES TO NATIONAL SECURITY ENTRY/EXIT REGISTRATION SYSTEM

With mounting complaints about post-9/11 investigations, DOJ's Office of Inspector General undertook a review of the detentions and the conditions of confinement of terrorism suspects.<sup>229</sup> Released in June 2003, the report noted that agents investigating leads would arrest all individuals who were out of immigration status and treat them as being "of interest" in the 9/11 investigation, regardless of whether they were connected with the lead.<sup>230</sup> Moreover, leads resulting in arrests were often very "general in nature, such as a landlord reporting suspicious activity by an Arab tenant."<sup>231</sup>

*b. A "Plausible" Claim of Policy*

In December 2003, a supplemental report found evidence of verbal and physical abuse of 9/11 detainees at the Metropolitan Detention Center (MDC) in New York City.<sup>232</sup> Although it did not find that detainees had been brutally beaten, "some officers slammed detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished them by keeping them restrained for long periods of time."<sup>233</sup> A number of lawsuits were filed by MDC detainees, including one by Javad Iqbal, a Pakistani Muslim arrested on criminal charges and detained in restrictive conditions as a

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(NSEERS) 1 (2003), the NSEERS program itself continued until 2011. *See DHS Removes Designated Countries from NSEERS Registration (May 2011)*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/dhs-removes-designated-countries-nseers-registration-may-2011> (last visited Feb. 3, 2014) (noting that the Department was "effectively ending the NSEERS registration process through the publication of a notice in the Federal Register") (on file with the Washington and Lee Law Review).

229. OIG REPORT, *supra* note 216, at 2–3.

230. *See id.* at 16 (providing an example of how law enforcement officials in New York followed such a process).

231. *Id.*

232. *See* U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATION OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 47 (2003) ("[W]e believe that the evidence developed in our investigation shows physical and verbal abuse of some detainees by some MDC staff members.").

233. *Id.* at 46.



person of “high interest” in the 9/11 investigation.<sup>234</sup> After pleading guilty, serving a term of imprisonment, and being deported to Pakistan, Iqbal filed a *Bivens*<sup>235</sup> action against federal officials “rang[ing] from the correctional officers who had day-to-day contact with respondent during the term of his confinement, . . . all the way to petitioners—officials who were at the highest level of the federal law enforcement hierarchy.”<sup>236</sup>

In *Ashcroft v. Iqbal*,<sup>237</sup> the Supreme Court concluded that the complaint against Attorney General John Ashcroft and FBI Director Robert Mueller failed to plead sufficient facts to state a claim for relief.<sup>238</sup> The Court rejected out of hand the allegations that Ashcroft and Mueller countenanced harsh treatment of detainees based on their religion, race, and national origin, holding that “[t]hese bare assertions . . . amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”<sup>239</sup> It also found that Iqbal failed to make a plausible showing that Ashcroft and Mueller purposefully adopted a policy of invidious discrimination in classifying 9/11 detainees as being “high interest”:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though

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234. See *Ashcroft v. Iqbal*, 556 U.S. 662, 666–67 (2009) (“Iqbal is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. . . . [Iqbal] was designated a person ‘of high interest’ to the September 11 investigation . . .”).

235. *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* recognizes a cause of action for monetary damages by an individual whose constitutional rights have been violated by federal officials. *Id.* at 391–97.

236. *Iqbal*, 556 U.S. at 668 (citation omitted).

237. 556 U.S. 662 (2009).

238. *Id.* at 687.

239. *Id.* at 681 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

the purpose of the policy was to target neither Arabs nor Muslims.<sup>240</sup>

To allow this suit to go forward, the Court concluded, would divert the attention of those officials charged with responding to “a national and international security emergency unprecedented in the history of the American republic.”<sup>241</sup> After *Iqbal*, the Second Circuit partially reversed the dismissal of another suit by MDC detainees, allowing them the opportunity to meet the Supreme Court’s pleading standard with regard to claims related to the conditions of confinement.<sup>242</sup>

### *c. Material Witness Warrants*

Another basis for detaining persons is the material witness warrant. Material witness warrants are issued by a judge or magistrate under conditions similar to an arrest warrant, but their purpose is to secure a person’s testimony rather than to hold him for trial.<sup>243</sup> Before issuing a warrant, a court will require probable cause to believe that the person’s testimony is material and that it may be impracticable to secure the person’s presence by subpoena.<sup>244</sup>

In the post-9/11 atmosphere, material witness warrants were used to secure a number of people who were thought to be

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240. *Id.* at 682.

241. *Id.* at 685 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring)).

242. See *Turkmen v. Ashcroft*, 589 F.3d 542, 546–47 (2d Cir. 2009) (deciding to “vacate that portion of the district court’s order denying dismissal of the conditions of confinement claims on the ground that an outdated pleading standard was applied, and to remand the case for further proceedings consistent with the standard articulated in *Twombly* and *Iqbal*”). Five of the detainees subsequently reached a \$1.26 million settlement with the Government. *Five New York Men Detained and Abused in Post-9/11 Immigration Sweeps Settle Case for \$1.26 Million*, CTR. FOR CONSTITUTIONAL RIGHTS (Nov. 3, 2009), <http://ccrjustice.org/newsroom/press-releases/five-new-york-men-detained-and-abused-post-9/11-immigration-sweeps-settle-ca> (last visited Feb. 3, 2014) (on file with the Washington and Lee Law Review).

243. See 18 U.S.C. § 3144 (2012) (“If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person . . .”).

244. *Id.*

plotters but as to whom there was not probable cause for arrest. Their alleged plotting was said to be the basis for thinking they would have material evidence for a grand jury, but this sounded like a subterfuge to many observers, who claimed the warrants were being used in lieu of preventive custody, a practice clearly prohibited by due process.

For example, alleged “dirty bomber” Jose Padilla was arrested under a material witness warrant and held for a month before he was transferred to military custody as an enemy combatant.<sup>245</sup> In 2004, Brandon Mayfield was arrested and held for two weeks as a material witness based on incorrect evidence connecting him to the Madrid train bombings.<sup>246</sup> Subsequent to his release, Mayfield received an apology from the FBI and a \$2 million settlement from the U.S. government.<sup>247</sup>

Not surprisingly, the use of material witness warrants suspected to be subterfuge for preventive custody was challenged in several terrorism-related cases. In *United States v. Awadallah*,<sup>248</sup> Osama Awadallah was taken into custody in Los Angeles after his name and phone number were found on a gum wrapper in the car of one of the 9/11 hijackers.<sup>249</sup> Awadallah was detained on a material witness warrant and flown to New York, where he testified twice before a grand jury over the course of several days.<sup>250</sup> He admitted having met two of the hijackers and described their physical appearances.<sup>251</sup> Initially, he claimed to know the name of only one and not the other, but during his second appearance he conceded he thought he knew the name of the other hijacker.<sup>252</sup> Charged with perjury, Awadallah moved to

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245. *Padilla v. Hanft*, 423 F.3d 386, 390 (4th Cir. 2005); *see also infra* Part IV.C.1 (discussing *Padilla*).

246. *Mayfield v. United States*, 599 F.3d 964, 966–67 (9th Cir. 2010); *see also infra* notes 411–23 and accompanying text (discussing *Mayfield*).

247. *Mayfield*, 599 F.3d at 968.

248. 202 F. Supp. 2d 55 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d. Cir. 2003).

249. *Id.* at 58.

250. *Id.* at 58–59.

251. *Id.*

252. *See id.* at 59

Awadallah immediately denied writing the name “Khalid” in the booklet. However, five days later, when he again testified before the grand jury, Awadallah testified that he had written the word “Khalid” When asked if he ‘recalled any part of this man’s name,’ Awadallah

suppress his grand jury statement<sup>253</sup> and dismiss the indictment for abuse of the material witness statute.<sup>254</sup> The district judge agreed: “[S]ince 1789, no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation.”<sup>255</sup> The Second Circuit reversed, holding that obtaining grand jury testimony would be an appropriate use of the material witness statute:

The district court noted (and we agree) that it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established. However, the district court made no finding (and we see no evidence to suggest) that the government arrested Awadallah for any purpose other than to secure information material to a grand jury investigation. Moreover, that grand jury was investigating the September 11 terrorist attacks. The particular governmental interests at stake therefore were the indictment and successful prosecution of terrorists whose attack, if committed by a sovereign, would have been tantamount to war, and the discovery of the conspirators’ means, contacts, and operations in order to forestall future attacks.<sup>256</sup>

Another case eventually made it to the Supreme Court.<sup>257</sup> In 2005, Abdullah al-Kidd, an African-American Muslim, brought a suit against Attorney General John Ashcroft and others, claiming that he had been illegally arrested and confined under the federal

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testified that he thought that the “man’s name was Khalid.”

253. *Id.*

254. *Id.* at 61.

255. *Id.* at 82 (citation omitted).

256. *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003) (citation omitted); *see also In re Grand Jury Material Witness Det.*, 271 F. Supp. 2d 1266, 1268–69 (D. Or. 2003) (finding that a grand jury proceeding is a “criminal proceeding” as used in the material witness statute and thus a witness could be detained under the statute for grand jury proceedings); *In re Application of United States for a Material Witness Warrant*, 213 F. Supp. 2d 287, 289–300 (S.D.N.Y. 2002) (declining to follow the district court’s approach in *Awadallah* and ruling that grand jury proceedings are “criminal proceedings” for the purposes of the material witness statute).

257. The Supreme Court denied Awadallah’s petition for certiorari. *Awadallah v. United States*, 543 U.S. 1056, 1056 (2005).

material witness statute.<sup>258</sup> As summarized by the appellate court,

[Al-Kidd] was arrested at a Dulles International Airport ticket counter. He was handcuffed, taken to the airport's police substation, and interrogated. Over the next sixteen days, he was confined in high security cells lit twenty-four hours a day in Virginia, Oklahoma, and then Idaho, during which he was strip searched on multiple occasions. Each time he was transferred to a different facility, al-Kidd was handcuffed and shackled about his wrists, legs, and waist. He was eventually released from custody by court order, on the conditions that he live with his wife and in-laws in Nevada, limit his travel to Nevada and three other states, surrender his travel documents, regularly report to a probation officer, and consent to home visits throughout the period of supervision. By the time al-Kidd's confinement and supervision ended, fifteen months after his arrest, al-Kidd had been fired from his job as an employee of a government contractor because he was denied a security clearance due to his arrest, and had separated from his wife. He has been unable to obtain steady employment since his arrest.<sup>259</sup>

According to al-Kidd, his mistreatment was the result of a program devised by Ashcroft and other government officials, as evidenced by a number of DOJ statements publicly extolling the utility of the procedure.<sup>260</sup>

In *Ashcroft v. Al-Kidd*,<sup>261</sup> a unanimous Supreme Court held that the former Attorney General enjoyed qualified immunity given the lack of clearly established law.<sup>262</sup> Justice Scalia's majority opinion went further by holding that "an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting

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258. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 955–56 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011).

259. *Id.* at 951–52.

260. *See Al-Kidd v. Ashcroft*, 598 F.3d 1129, 1131 (9th Cir. 2010) (Smith, J., concurring in denial of rehearing en banc) (noting that various statements made by DOJ officials supported the notion that "Ashcroft and others operating at his direction, or in concert with him, had decided to undertake a novel use of . . . the material witness statute").

261. 131 S. Ct. 2074 (2011).

262. *Id.* at 2085–86.

authority had an improper motive.”<sup>263</sup> Four concurring Justices reiterated that the Court left unresolved questions it need not reach to decide the case: whether the material witness warrant was necessary to secure al-Kidd’s testimony and, more generally, whether the material witness statute comports with the Fourth Amendment’s Warrant Clause.<sup>264</sup> Concurring Justices Breyer, Ginsburg, and Sotomayor also objected to the majority’s apparent disposition of the merits of al-Kidd’s claim:

In addressing al-Kidd’s Fourth Amendment claim against Ashcroft, the Court assumes at the outset the existence of a *validly obtained* material witness warrant. That characterization is puzzling. Is a warrant “validly obtained” when the affidavit on which it is based fails to inform the issuing Magistrate Judge that “the Government has no intention of using [al-Kidd as a witness] at [another’s] trial,” and does not disclose that al-Kidd had cooperated with FBI agents each of the several times they had asked to interview him?

Casting further doubt on the assumption that the warrant was validly obtained, the Magistrate Judge was not told that al-Kidd’s parents, wife, and children were all citizens and residents of the United States. In addition, the affidavit misrepresented that al-Kidd was about to take a one-way flight to Saudi Arabia, with a first-class ticket costing approximately \$5,000; in fact, al-Kidd had a round-trip, coach-class ticket that cost \$1,700. Given these omissions and misrepresentations, there is strong cause to question the Court’s opening assumption—a valid material-witness warrant—and equally strong reason to conclude that a merits determination was neither necessary nor proper.<sup>265</sup>

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263. *Id.* at 2085.

264. *See id.* at 2085–86 (Kennedy, J., concurring, joined by Ginsburg, Breyer, and Sotomayor, JJ.) (“Given the difficulty of these issues, the Court is correct to address only the legal theory [of qualified immunity] put before it, without further exploring when material witness arrests might be consistent with statutory and constitutional requirements.”).

265. *Id.* at 2087–88 (Ginsburg, J., concurring, joined by Breyer and Sotomayor, JJ.) (footnotes and citations omitted). Justice Ginsburg’s concurrence also balked at the majority opinion’s statement that al-Kidd’s arrest was “based on individualized suspicion”:

The word “suspicion,” however, ordinarily indicates that the person suspected has engaged in wrongdoing. Material witness status does not “involv[e] suspicion, or lack of suspicion,” of the individual so

*C. Domestic “Enemy Combatants”**1. The Odyssey of Jose Padilla*

The Government aptly demonstrated its near-contempt for judicial independence during the “rendition” of Jose Padilla for trial when his lawyers filed a petition for certiorari with the Supreme Court on his habeas corpus claim after he had spent almost four years in solitary confinement without judicial review.<sup>266</sup>

Padilla was arrested arriving at O’Hare Airport after flying from Pakistan, where he allegedly trained in bombing techniques.<sup>267</sup> He was held initially as a material witness in New York, then two days before his court-appointed counsel could file

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identified.

This Court’s decisions, until today, have uniformly used the term “individualized suspicion” to mean “individualized suspicion of wrongdoing.”

The Court’s suggestion that the term “individualized suspicion” is more commonly associated with “know[ing] something about [a] crime” or “throwing . . . a surprise birthday party” than with criminal suspects, is hardly credible. The import of the term in legal argot is not genuinely debatable. When the evening news reports that a murder “suspect” is on the loose, the viewer is meant to be on the lookout for the perpetrator, not the witness. Ashcroft understood the term as lawyers commonly do: He spoke of detaining material witnesses as a means to “tak[e] suspected terrorists off the street.”

*Id.* at 2088 n.3 (citations omitted).

266. See *Hanft v. Padilla*, 546 U.S. 1084, 1084 (2006) (explaining that Padilla wished to have the Court “consider his release [from military custody] along with his petition for certiorari,” as opposed to the Government transferring him while his petition was still pending). Chief Justice Roberts granted the transfer and noted: “[t]he Court will consider the pending petition for certiorari in due course.” *Id.*

267. See *Padilla v. Hanft*, 389 F. Supp. 2d 678, 679 (D.S.C. 2005), *rev’d*, 423 F.3d 386 (4th Cir.), *cert. denied*, 547 U.S. 1062 (2006) (“On May 8, 2002, Padilla flew from Pakistan to Chicago’s O’Hare International Airport. As he stepped off the plane, Padilla was apprehended by federal agents . . . .”); Donna Leinwand & Jack Kelly, *U.S. Citizen Arrested in ‘Dirty Bomb’ Plot*, USA TODAY (June 11, 2002, 11:28 AM), <http://usatoday30.usatoday.com/news/nation/2002/06/10/terror-arrest.htm> (last visited Feb. 3, 2014) (reporting that, prior to entering the United States, Padilla had “traveled to Pakistan, where he studied how to assemble a radioactive bomb,” according to a senior U.S. law enforcement official) (on file with the Washington and Lee Law Review).

for habeas corpus in New York, he was transferred to a Naval Brig in South Carolina as an enemy combatant.<sup>268</sup> The Government's public statements asserted that he was planning to detonate a "dirty bomb" that would spread radioactive material across a major city.<sup>269</sup>

His lawyers refiled his habeas petition in South Carolina and the district court granted the petition, holding that the AUMF did not grant authority to the President to hold a citizen arrested on U.S. soil for a crime yet to be committed.<sup>270</sup> The Fourth Circuit then accepted the Government's reframed assertions:

Padilla met with al Qaeda operatives in Afghanistan, received explosives training in an al Qaeda-affiliated camp, and served as an armed guard at what he understood to be a Taliban outpost. When United States military operations began in Afghanistan, Padilla and other al Qaeda operatives moved from safehouse to safehouse to evade bombing or capture. Padilla was, on the facts with which we are presented, "armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States."

... Once in Pakistan, Padilla met with Khalid Sheikh Mohammad, a senior al Qaeda operations planner, who directed Padilla to travel to the United States for the purpose of blowing up apartment buildings, in continued prosecution of al Qaeda's war of terror against the United States. After receiving further training, as well as cash, travel documents, and communication devices, Padilla flew to the United States in order to carry out his accepted assignment.<sup>271</sup>

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268. See *Padilla*, 389 F. Supp. 2d at 681 ("On June 9, 2002, the [New York] district court vacated the material witness warrant and petitioner was transferred to military control. . . . On June 11, Padilla's counsel, claiming to act as his next friend, filed in the Southern District [of New York] a habeas corpus petition . . .").

269. See *Leinwand & Kelly*, *supra* note 267 ("The dirty bomb plot was in its initial stages and did not have a target, although [Padilla] has 'indicated some knowledge of the Washington, D.C., area,' Deputy Defense Secretary Paul Wolfowitz said Monday. Intelligence sources said Chicago also might have been a potential target.").

270. See *Padilla*, 389 F. Supp. 2d at 689–91 (rejecting the Government's position that either Padilla's detention was explicitly authorized by Congress or that the President possessed inherent power to order such a detention).

271. *Padilla v. Hanft*, 423 F.3d 386, 390 (4th Cir. 2005) (citations omitted).



On this version of the facts, the court held that his carrying of arms in Afghanistan made him an “enemy combatant” appropriate for detention under the AUMF.<sup>272</sup> The Fourth Circuit held that Padilla was an “enemy belligerent” who “associated with the military arm of the enemy, and with its aid, guidance, and direction entered this country bent on committing hostile acts on American soil.”<sup>273</sup> But these “facts” were based on a stipulation by the petitioner’s counsel for purposes of a summary judgment motion—they were never subjected to a neutral factfinder’s review<sup>274</sup>—and the claim that he entered the country to explode a “dirty bomb” was dropped in favor of a variety of modified contentions in different venues.<sup>275</sup>

The petition for certiorari was presented to the Supreme Court on October 25, 2005.<sup>276</sup> Just before its response to the petition was due at the Supreme Court, the Government filed a motion to transfer him to civilian custody in Florida to stand trial on various charges.<sup>277</sup> That motion was referred by the Fourth Circuit to the Supreme Court, which granted it on January 4, 2006.<sup>278</sup> The Court asserted that it would “consider the pending petition for certiorari in due course,”<sup>279</sup> which it did with a very unusual set of opinions in April 2006. The petition was denied

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272. *Id.* at 391.

273. *Id.* at 392 (citation omitted).

274. *See id.* at 390 n.1 (“For purposes of Padilla’s summary judgment motion, the parties have stipulated to the facts as set forth by the government. It is only on these facts that we consider whether the President has the authority to detain Padilla.” (citation omitted)). Because the Fourth Circuit granted the Government summary judgment on these facts, *id.* at 397, and the Supreme Court subsequently denied Padilla’s petition for certiorari, *Padilla v. Hanft*, 547 U.S. 1062, 1062 (2006), the Government was never required to prove its facts at trial.

275. *Infra* notes 277–83 and accompanying text.

276. Brief of Petitioner for Writ of Certiorari, *Padilla v. Hanft*, 547 U.S. 1062 (2006) (No. 05-533).

277. *See Padilla v. Hanft*, 546 U.S. 1084 (2006) (“On November 22, 2005, the Government filed a motion before the Fourth Circuit, seeking approval to transfer Padilla from military custody to the custody of the warden of a federal detention center in Florida, to face criminal charges contained in an indictment filed November 17, 2005.” (citation omitted)).

278. *Id.*

279. *Id.*

over three dissents with a concurring opinion by three Justices.<sup>280</sup> Justice Kennedy, for the three concurring Justices, wrote:

In light of the previous changes in his custody status and the fact that nearly four years have passed since he first was detained, Padilla, it must be acknowledged, has a continuing concern that his status might be altered again. That concern, however, can be addressed if the necessity arises. . . .

That Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against addressing those claims when the course of legal proceedings has made them, at least for now, hypothetical. This is especially true given that Padilla's current custody is part of the relief he sought, and that its lawfulness is uncontested.<sup>281</sup>

Ironically, it could just as easily be argued that the "separation of powers, including consideration of the role and function of the courts," weighed heavily against allowing the government to play fast and loose with the system by transferring him once again to a different jurisdiction for a different purpose, thus avoiding judicial review of his four-year-long detention. Justice Ginsburg was quite restrained in her dissent from the denial of certiorari, addressing merely the issue of whether the petition was moot.<sup>282</sup>

All this came after Padilla's application for habeas relief was kicked from New York to South Carolina, granted by the district court, and denied by the Fourth Circuit, by which time he had been held in solitary confinement with no judicial review for nearly four years. How can this be considered to be in compliance with our own due process clause, let alone with any number of international human rights provisions? It also illustrates the near contempt with which the Administration tended to treat the

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280. Justices Ginsburg, Breyer, and Souter voted to grant certiorari, but only Justice Ginsburg wrote separately. *Padilla v. Hanft*, 547 U.S. 1062, 1062–64 (2006). Justice Kennedy concurred in the denial of certiorari, writing on behalf of himself, Chief Justice Roberts, and Justice Stevens. *Id.*

281. *Id.* at 1063–64 (Kennedy, J., concurring in the denial of certiorari, joined by Roberts, C.J., and Stevens, J.).

282. *See id.* at 1064 (Ginsburg, J., dissenting from the denial of certiorari) (noting that the Government's "voluntary cessation [of reliance on purported Executive authority] does not make [the] case less capable of repetition or less evasive of review" (citation omitted)).

Judiciary—deciding not to give the Supreme Court a chance at an obvious violation of law.

Following these shenanigans, Padilla eventually was tried and convicted on charges for conspiring to commit murder outside the United States and conspiring to provide material support to terrorism.<sup>283</sup> He was sentenced to seventeen years in prison<sup>284</sup> and then brought a civil action for damages against John Yoo,<sup>285</sup> among others in California, while his mother brought a similar action in Virginia.<sup>286</sup> Both actions sought damages for wrongful confinement as well as mistreatment while in custody.<sup>287</sup> These will be considered in the section below on “Damage Actions Against Government Officials,”<sup>288</sup> but suffice to say at this point the courts have ducked those actions as well.

## 2. *The Iliad of Ali al-Marri*

Just as the Greek *Iliad* tells a very elaborate tale but purports to cover only a few weeks in a protracted war, the case of Ali al-Marri speaks volumes in the context of a single person’s treatment at the hands of our government. Judge Motz’s opening paragraph of her concurring opinion in the Fourth Circuit en banc proceeding is worth quoting in full:

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283. Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, WASH. POST (Aug. 17, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/16/AR2007081601009.html> (last visited Feb. 3, 2014) (on file with the Washington and Lee Law Review). The charges were actually a touch more complicated than that, and raise some substantial issues of the propriety of conspiracy law, but that is a subject for another day. See *United States v. Hassoun*, No. 04-60001-CR-COOKE/Brown, 2007 U.S. Dist. LEXIS 85720, at \*10–13 (S.D. Fla. Nov. 20, 2007) (rejecting the various arguments of Padilla and other defendants that the trial judge erred in instructing the jury on the substantive law).

284. Peter Whoriskey & Dan Eggen, *Judge Sentences Padilla to 17 Years, Cites His Detention*, WASH. POST (Jan. 23, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/22/AR2008012200565.html> (last visited Feb. 3, 2014) (on file with the Washington and Lee Law Review).

285. *Padilla v. Yoo*, 678 F.3d 748, 754 (9th Cir. 2012).

286. *Lebron v. Rumsfeld*, 670 F.3d 540, 546–47 (4th Cir. 2012).

287. *Padilla*, 678 F.3d 751–52; *Lebron*, 670 F.3d at 546.

288. *Infra* notes 364–73 and accompanying text.

For over two centuries of growth and struggle, peace and war, the Constitution has secured our freedom through the guarantee that, in the United States, no one will be deprived of liberty without due process of law. Yet more than five years ago, military authorities seized Ali Saleh Kahlah al-Marri, an alien lawfully residing here. He has been held by the military ever since—without criminal charge or process. He has been so held, despite the fact that he was initially taken from his home in Peoria, Illinois, by civilian authorities and imprisoned awaiting trial for purported domestic crimes. He has been so held, although the Government has never alleged that he is a member of any nation's military, has fought alongside any nation's armed forces, or has borne arms against the United States anywhere in the world. And he has been so held, without acknowledgment of the protection afforded by the Constitution, solely because the Executive believes that his indefinite military detention—or even the indefinite military detention of a similarly situated American citizen—is proper.<sup>289</sup>

Ali al-Marri, a citizen of Qatar, entered the United States on September 10, 2001, to pursue a Master's Degree.<sup>290</sup> He was arrested in December at his home in Peoria, Illinois, on suspicion of handling money for al Qaeda.<sup>291</sup> He was questioned about credit card fraud and eventually charged with both forgery and perjury.<sup>292</sup> Almost two years after his initial arrest, on a Friday, the court scheduled a hearing on pretrial motions.<sup>293</sup> The following Monday, he was certified by Presidential decree as an enemy combatant and transferred to the Naval Brig in South Carolina.<sup>294</sup> To quote Judge Motz again:

Since that time (that is, for five years) the military has held al-Marri as an enemy combatant, without charge and without any indication when this confinement will end. For the first sixteen months of his military confinement, the Government did not permit al-Marri any communication with the outside world, including his attorneys, his wife, and his children. He

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289. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 217 (4th Cir. 2008) (en banc) (per curiam) (Motz, J., concurring, joined by Michael, King, and Gregory, JJ.), *vacated sub nom.* *Al-Marri v. Spagone*, 555 U.S. 1220 (2009).

290. *Al-Marri v. Wright*, 487 F.3d 160, 164 (4th Cir. 2007).

291. *Id.* at 165–66.

292. *Id.* at 164.

293. *Id.*

294. *Id.* at 164–65.

alleges that he was denied basic necessities, interrogated through measures creating extreme sensory deprivation, and threatened with violence. A pending civil action challenges the “inhuman, degrading,” and “abusive” conditions of his confinement.<sup>295</sup>

The original panel of the Fourth Circuit, led by Judge Motz over one dissent, held that he must be released or tried.<sup>296</sup> Judge Motz pointed out that the Government

does *not* assert that al-Marri: (1) is a citizen, or affiliate of the armed forces, of any nation at war with the United States; (2) was seized on or near a battlefield on which the armed forces of the United States or its allies were engaged in combat; (3) was ever in Afghanistan during the armed conflict between the United States and the Taliban there; or (4) directly participated in any hostilities against United States or allied armed forces.<sup>297</sup>

Judge Motz was at pains to point out that the Government’s allegations would justify trying al-Marri for very serious offenses, but there was nothing to justify extrajudicial Executive detention of someone who never directly participated in hostilities against the United States.<sup>298</sup>

When the Fourth Circuit reheard this case en banc, the result was a highly fractured set of opinions.<sup>299</sup> Judge Wilkinson believed the AUMF authorized al-Marri’s detention as an enemy combatant on the basis of his alleged affiliation with the Taliban or al Qaeda.<sup>300</sup> The “low-water mark” for judicial independence in

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295. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 220 (4th Cir. 2008) (en banc) (per curiam) (Motz, J., concurring, joined by Michael, King, and Gregory, JJ.), *vacated sub nom.* *Al-Marri v. Spagone*, 555 U.S. 1220 (2009).

296. *See Al-Marri v. Wright*, 487 F.3d 160, 164 (4th Cir. 2007) (stating the Government could return al-Marri to civilian prosecutors and try him, but may not subject him to military detention indefinitely).

297. *Id.* at 166 (emphasis added).

298. *See id.* at 164 (explaining that no Government allegation established al-Marri as an enemy combatant even though al-Marri would face grave criminal penalties if convicted in civilian criminal court).

299. *See Al-Marri v. Pucciarelli*, 534 F.3d 213, 216 (4th Cir. 2008) (en banc) (per curiam), *vacated sub nom.* *Al-Marri v. Spagone*, 555 U.S. 1220 (2009) (listing seven separate opinions in addition to the per curiam opinion).

300. *See id.* at 294 (Wilkinson, J., concurring in part and dissenting in part) (declaring that the plurality ignores the plain language of the AUMF).

this drama may be represented by these comments by Judge Wilkinson:

The present case reminds that we live in an age where thousands of human beings can be slaughtered by a single action and where large swaths of urban landscape can be leveled in an instant. If the past was a time of danger for this country, it remains no more than prologue for the threats the future holds. For courts to resist this political attempt to meet these rising dangers risks making the judiciary the most dangerous branch.

I say this not as an exhortation to panic or fear, but rather as a call for prudence. The advance and democratization of technology proceeds apace, and our legal system must show some recognition of these changing circumstances. In other words, law must reflect the actual nature of modern warfare. By placing so much emphasis on quaint and outmoded notions of enemy states and demarcated foreign battlefields, the plurality (the opinion authored by Judge Motz) and concurrence (the opinion authored by Judge Traxler) misperceive the nature of our present danger, and, in doing so, miss the opportunity presented by al-Marri's case to develop a framework for dealing with new dangers in our future.<sup>301</sup>

I suppose it is good the judge said this was not an exhortation to panic or fear because otherwise I would have taken it for exactly that. It is a call to abandon judicial processes for unreviewable discretion of the Executive to imprison anybody at any time anywhere simply because other people could be killed. What is new in this? What are the “new dangers”? Slaughter of innocents has always been with us, and unfortunately will continue to be so. The pleas for Executive carte blanche power are exactly what the writ of habeas corpus was developed to avoid,<sup>302</sup> and what many statements in various declarations of human

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301. *Id.* at 293.

302. The infamous British Star Chamber was abandoned in 1641. See The National Archives, *Court of Star Chamber: 1485–1642*, <http://www.nationalarchives.gov.uk/records/research-guides/star-chamber.htm> (last visited Feb. 3, 2014) (on file with the Washington and Lee Law Review). It was a mixture of “judges” and “privy councillors” that heard cases in secret and dealt mostly with political crimes. *Id.* Although it started as a seemingly necessary way to deal with accusations against powerful persons, it became a major source of oppression by the monarchy.

rights are all about. The way of unreviewed Executive discretion is the way of tyranny.

The middle ground for the en banc court was struck by Judge Traxler, who agreed that the AUMF provided authority for detention of a domestic “enemy combatant” but read *Hamdi* as requiring al-Marri be given an opportunity to rebut the claims against him.<sup>303</sup> This resulted in a divided court’s issuing an order for remand for hearing at the district court on the counterevidence.<sup>304</sup>

The Supreme Court granted certiorari.<sup>305</sup> Again showing contempt for the judicial process, the Government then applied to the Court to transfer the prisoner to civilian authorities for trial on the original charges, to which the Supreme Court acquiesced.<sup>306</sup> Al-Marri pleaded guilty to providing material support under § 2339B<sup>307</sup> and was sentenced to 100 months in prison; the sentence initially would have been 180 months under the statute, but the judge granted credit of 71 months for time spent in custody and another 9 months “to reflect the very severe conditions of part of his confinement at the Naval Brig.”<sup>308</sup>

#### *D. Damage Actions—Immunity, State Secrets, “Special Factors”*

The three most commonly deployed doctrines to prevent recovery by those who have been wrongfully mistreated (allegedly in some cases, certainly in others) have been the state secrets privilege (SSP), qualified immunity, and the special factors exception to federal damage actions.<sup>309</sup> These three doctrines are

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303. See *Al-Marri*, 534 F.3d at 253–54 (Traxler, J., concurring in the judgment) (agreeing with the opinion that the AUMF grants the President detention powers over enemy combatants, but finding al-Marri did not receive fair opportunity to rebut his “enemy combatant” status).

304. *Id.* at 216–17 (per curiam).

305. *Al-Marri v. Pucciarelli*, 555 U.S. 1066 (2008).

306. *Al-Marri v. Spagone*, 555 U.S. 1220 (2009).

307. 18 U.S.C. § 2399B (2012).

308. *Al-Marri v. Davis*, 714 F.3d 1183, 1186 (10th Cir. 2013).

309. See, e.g., George D. Brown, “Counter-Counter Terrorism Via Lawsuit”—*The Bivens Impasse*, 82 S. CAL. L. REV. 841, 877 (2009) (discussing these three doctrines).

somewhat intertwined and will be treated in a single section devoted to damage actions.

Damage actions against federal officials begin under the *Bivens* doctrine,<sup>310</sup> under which federal courts will imply private rights of action from some constitutional provisions, such as Due Process for physical abuse, or the Fourth Amendment for invasions of privacy.<sup>311</sup>

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established” at the time of the challenged conduct.<sup>312</sup>

I mentioned above the case of Abdullah al-Kidd, who was detained on a material witness warrant and then brought suit against former Attorney General Ashcroft, alleging a post-9/11 policy of using the material-witness statute to detain individuals with suspected ties to terrorist organizations.<sup>313</sup> His complaint alleged that agents detained suspects as material witnesses in other cases as a pretext because they had insufficient evidence to charge them with a crime.<sup>314</sup> Al-Kidd, a native U.S. citizen, was arrested in 2003 as he checked in for a flight to Saudi Arabia and then held under a material-witness warrant issued by a federal magistrate in an unrelated case.<sup>315</sup> He was in custody for sixteen days and on supervised release until the other trial concluded over a year later.<sup>316</sup>

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310. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

311. *See, e.g., Butz v. Economou*, 438 U.S. 478, 523–24 (1978) (applying *Bivens* to commodity futures company’s claims, including personal privacy violations); *Mahone v. Waddle*, 564 F.2d 1018, 1054–55 (3d Cir. 1977) (making a *Bivens* argument regarding alleged police abuse against two African-American citizens).

312. *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

313. *See id.* at 2079 (discussing the complaint’s assertion that the Attorney General had no intention of calling these detainees as witnesses); *see also supra* notes 259–65 and accompanying text (describing the al-Kidd case).

314. *See Ashcroft v. Al-Kidd*, 131 S. Ct. at 2079 (stating that the Attorney General directed the federal officials to detain suspected terrorist supporters despite lacking enough evidence for a conviction).

315. *Id.*

316. *Id.*



The Ninth Circuit held that Ashcroft “should have known” that a pretextual use of a warrant was a violation of the Fourth Amendment.<sup>317</sup> For the Supreme Court, Justice Scalia responded in his subtle fashion:

We have repeatedly told the lower courts—and the Ninth Circuit in particular . . . not to define clearly established rights at a high level of generality. . . . The Fourth Amendment was a response to the English Crown’s use of general warrants, which often allowed royal officials to search and seize whatever and whomever they pleased while investigating crimes or affronts to the Crown. . . . According to the Court of Appeals, Ashcroft should have seen that a pretextual warrant similarly ‘gut[s] the substantive protections of the Fourth Amendmen[t] and allows the State to arrest upon the executive’s mere suspicion.’ Ashcroft must be forgiven for missing the parallel, which escapes us as well.<sup>318</sup>

In a similar case, Javad Iqbal unsuccessfully sued Attorney General Ashcroft and FBI Director Mueller for policies that resulted in his being mistreated while in custody awaiting trial.<sup>319</sup> He alleged that he was placed in a special administrative unit and “subjected . . . to harsh conditions of confinement on account of his race, religion, or national origin.”<sup>320</sup> The Supreme Court’s opinion by Justice Kennedy noted that Iqbal’s allegations of mistreatment certainly stated violations of constitutional rights by unknown guards.<sup>321</sup> But nothing in his pleadings tended

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317. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 969 (9th Cir. 2009)

“There is a valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier. . . .” That is precisely the distinction at work here, and the reason we hold that Ashcroft’s policy as alleged was unconstitutional.

(quoting *Illinois v. Lidster*, 540 U.S. 419, 428 (2004) (Stevens, J., concurring in part, dissenting in part)).

318. *Al-Kidd v. Ashcroft*, 131 S. Ct. 2074, 2084 (2011) (quoting *Al-Kidd*, 580 F.3d at 972).

319. *See Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009) (discussing plaintiff’s claims of mistreatment in a maximum security prison). He eventually pleaded guilty to charges of identity fraud, served his sentence, and was deported to his native Pakistan. *Id.*

320. *Id.* at 666.

321. *See id.* (“Respondent’s account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors.”).

to validate his speculation that Ashcroft or Mueller had authorized or prompted that treatment.<sup>322</sup> Thus, applying the Court's recently adopted pleading standards requiring plaintiffs to state a "plausible" theory of the facts,<sup>323</sup> Iqbal failed to survive a motion to dismiss on the basis of qualified immunity.<sup>324</sup>

The state secrets doctrine has two aspects. One aspect shields specific pieces of evidence when the privilege is claimed.<sup>325</sup> The more extreme application occurs when the mere existence of the litigation would be a threat to national security, resulting in a total exception to the *Bivens* doctrine and dismissal of the plaintiff's case.<sup>326</sup> The state secrets privilege protects a wide array of governmental action in matters that touch upon national security, and everything rides on the government's ability to persuade a judge of that without even producing any material for in camera inspection:

It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.<sup>327</sup>

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322. See *id.* at 682 (stating the complaint does not allege that Ashcroft or Mueller adopted a policy of racial classifications).

323. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (requiring a claim to be "plausible" rather than "conceivable").

324. See *Iqbal*, 556 U.S. at 687 ("We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners.").

325. See *United States v. Reynolds*, 345 U.S. 1, 6–8 (1953) (describing circumstances in which a court should exclude a certain piece of evidence based on the state secrets doctrine).

326. See *Totten v. United States*, 92 U.S. 105, 107 (1876) (stating that courts must dismiss suits that would require disclosures involving the secret services of the government); *Wilson v. Libby*, 498 F. Supp. 2d 74, 94 (D.D.C. 2007) (finding "serious questions of justifiability" when secret national security information is implicated).

327. See *Reynolds*, 345 U.S. at 9–10 (explaining that a court should not automatically require disclosure of the secret information in question to the judge).

Khaled El-Masri brought a damage action against George Tenet, three corporate defendants, ten unnamed employees of the Central Intelligence Agency (CIA), and ten unnamed employees of the defendant corporations.<sup>328</sup> He alleged that he was originally detained by Macedonian authorities, handed over to CIA operatives who then transported him to Afghanistan, and finally released somewhere in Albania.<sup>329</sup> Along the way, he claimed to have been “beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility.”<sup>330</sup>

The Fourth Circuit held that the claim inexorably involved privileged state secrets and that the lawsuit could not proceed at all.<sup>331</sup> For the plaintiff even to make a prima facie showing of his treatment, he would have to introduce evidence about CIA operations.<sup>332</sup>

Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations. . . . With respect to the defendant corporations and their unnamed employees, El-Masri would have to demonstrate the existence and details of CIA espionage contracts, an endeavor practically indistinguishable from that categorically barred by *Totten* and *Tenet v. Doe*.<sup>333</sup>

Then if the plaintiff carried the prima facie burden, the defendants would not be able to present a cogent defense without disclosure of sources and methods.<sup>334</sup>

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328. See *El-Masri v. United States*, 479 F.3d 296, 300–01 (4th Cir. 2007) (outlining the complaint).

329. *Id.* at 300–01.

330. *Id.* at 300.

331. See *id.* at 313 (recognizing the gravity of denying the plaintiff a judicial forum for his complaint).

332. See *id.* at 309 (determining the plaintiff would have needed to produce secret evidence linking the defendants with the alleged harm).

333. *Id.*; see also *Totten v. United States*, 92 U.S. 105, 107 (1875) (establishing an absolute bar to enforcement of confidential agreements to conduct espionage, on the ground that “public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential”); *Tenet v. Doe*, 544 U.S. 1, 10–11 (2005) (reaffirming *Totten* in unanimous decision).

334. *El-Masri v. United States*, 479 F.3d 296, 309 (4th Cir. 2007).

The district court in *El-Masri* concluded its opinion dismissing the complaint with these comments:

[N]othing in this ruling should be taken as a sign of judicial approval or disapproval of rendition programs; it is not intended to do either. In times of war, our country, chiefly through the Executive Branch, must often take exceptional steps to thwart the enemy. Of course, reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of those exceptional steps. But what this decision holds is that these steps are not proper grist for the judicial mill where, as here, state secrets are at the center of the suit and the privilege is validly invoked.

Finally, it is worth noting that, putting aside all the legal issues, if El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.<sup>335</sup>

In a case that generated significant controversy in the United Kingdom, Binyam Mohamed was joined by four other detainees who alleged they were tortured in various secret locations.<sup>336</sup> They sued the operator of the aircraft (a Gulfstream V) that was used by the CIA in "black site" and extraordinary rendition operations.<sup>337</sup> The Ninth Circuit echoed the sentiments of the district judge in *El-Masri* with this comment:

This case requires us to address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security. Although as judges we strive to honor all of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them. On those rare occasions, we are bound to follow the Supreme Court's admonition that "even the most compelling necessity

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335. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 540–41 (E.D. Va. 2006).

336. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073–74 (9th Cir. 2010) (outlining plaintiffs' factual allegations).

337. *See id.* at 1075 (describing plaintiff's allegations that the defendant provided flight planning and logistical support services).

cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.” After much deliberation, we reluctantly conclude this is such a case, and the plaintiffs’ action must be dismissed.<sup>338</sup>

Mohamed was repatriated to the United Kingdom and created a major controversy with credible allegations of MI5 involvement in his interrogation and torture.<sup>339</sup> The U.K. Court of Appeal held that the British version of SSP would not shield investigative reports that the court thought made it clear Mohamed had been subjected to illegal treatment and raised questions about the involvement of British officers.<sup>340</sup> Mohamed eventually settled his claims against the British Government for £1,000,000.<sup>341</sup>

A Canadian citizen, Maher Arar, also brought suit in the United States unsuccessfully<sup>342</sup> and subsequently received a significant settlement from his home government. Arar was detained while in transit through JFK Airport on the basis of information from Canadian authorities.<sup>343</sup> His detention for twelve days in New York, rendition to Syria, and ten months of abuse in a Syrian prison were documented by a Canadian special commission.<sup>344</sup> His claims in Canada were settled by a \$10.5 million payment and apology from the Canadian government.<sup>345</sup>

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338. *Id.* at 1073 (citation omitted) (quoting *United States v. Reynolds*, 345 U.S. 1, 11 (1953)).

339. *See* *Al Rawi v. Security Service*, [2010] EWCA (civ) 482 [5] (stating plaintiff’s claims that MI5 contributed toward their “detention, rendition and ill treatment”).

340. *See id.* at [11] (allowing trial to proceed with a closed material procedure).

341. *See* Christian Gysin, *Going Out Shopping, the Terror Suspect Who Pocketed a Million in Compensation Over Torture Claims*, DAILY MAIL (Oct. 31, 2011), <http://www.dailymail.co.uk/news/article-2055474/Binyam-Mohamed-Terror-suspect-pocketed-1m-compensation-torture-claims.html> (last visited Feb. 3, 2014) (discussing payout to former terror suspect who was allegedly tortured with the complicity of British security services) (on file with the Washington and Lee Law Review).

342. *See generally* *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

343. COMM’N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR 27 (2006), [http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher\\_arar/07-09-13/www.ararcommission.ca/eng/AR\\_English.pdf](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf).

344. *Id.* at 27–33.

345. *See* Ian Austen, *Canada Reaches Settlement With Torture Victim*, N.Y.

In Arar's suit against various U.S. officials, the Second Circuit held that he could not state a claim under the Torture Victims Protection Act<sup>346</sup> because that statute deals only with actions taken under color of foreign law and there was no allegation that the U.S. officers were acting pursuant to Syrian law.<sup>347</sup> With regard to his detention for twelve days in New York, he might have been able to state a due process claim but his complaint did not "specify any culpable action taken by any single defendant."<sup>348</sup> Judge Calabresi, joined by several colleagues, dissented with this comment:

I respectfully dissent. . . . [B]ecause I believe that when the history of this distinguished court is written, today's majority decision will be viewed with dismay, I add a few words of my own, ". . . more in sorrow than in anger."<sup>349</sup>

In what it described as a "lamentable case," complete with details of the despicable treatment to which some detainees were subjected in Abu Ghraib and Afghanistan, the D.C. District Court reached a similar conclusion.<sup>350</sup> In addition to the "crucial national-security and foreign policy considerations" discussed by the Second Circuit, the D.C. court engaged in a more extended discussion of *Eisentrager* and its progeny because the plaintiffs in these cases had never attempted to enter the United States and indeed were detained in areas of active hostilities.<sup>351</sup>

The plaintiffs, as well as *amici* [retired military officers], contest the notion that a *Bivens* remedy would impose judicial oversight over military decision-making and chill military

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TIMES, Jan. 27, 2009, [http://www.nytimes.com/2007/01/26/world/americas/26cnd-canada.html?\\_r=0](http://www.nytimes.com/2007/01/26/world/americas/26cnd-canada.html?_r=0) (last visited Feb. 3, 2014) (describing the settlement and three separate government apologies) (on file with the Washington and Lee Law Review).

346. Torture Victims Protection Act of 1992, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2012)).

347. See *Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009) (stating Arar did not allege defendants possessed power under Syrian law).

348. *Id.* at 569.

349. *Id.* at 630 (Calabresi, J., dissenting) (quoting WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 2).

350. *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 88 (D.D.C. 2007).

351. See *id.* at 95–96 (discussing *Eisentrager* as "the most instructive" case on point).

effectiveness on the battlefield, arguing instead that “providing an effective remedy for the violation of Plaintiffs’ constitutional rights would be wholly consonant with longstanding military laws and regulations and would not entangle the Court in any inappropriate inquiry.” . . .

The Court cautions against the myopic approach advocated by the plaintiffs and *amici*, which essentially frames the issue as whether torture is universally prohibited and thereby warrants a judicially-created remedy under the circumstances. There is no getting around the fact that authorizing monetary damages remedies against military officials engaged in an active war would invite enemies to use our own federal courts to obstruct the Armed Forces’ ability to act decisively and without hesitation in defense of our liberty and national interests, a prospect the Supreme Court found intolerable in *Eisenrager*.<sup>352</sup>

Shafiq Rasul (the titular petitioner in the 2004 Supreme Court case out of Guantanamo<sup>353</sup>) was repatriated to the United Kingdom in 2004.<sup>354</sup> He and three others brought suit against a variety of federal officials, including Secretary of Defense Rumsfeld, for tortious mistreatment and religious discrimination.<sup>355</sup> Rasul and two others alleged that they were in Afghanistan to provide humanitarian relief when they were captured by the Northern Alliance and handed over to western forces.<sup>356</sup> Another co-plaintiff, al-Harith, alleged that he was actually kidnapped out of Pakistan by the Taliban, from whom he escaped before he was mistakenly detained by western forces.<sup>357</sup> The D.C. Circuit held that

a. Their claims under the Alien Tort Statute<sup>358</sup> should have been brought under the Federal Tort Claims Act,<sup>359</sup> which has

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352. *Id.* at 104–05 (citations omitted).

353. *See generally* Rasul v. Bush, 542 U.S. 466 (2004).

354. *See generally* Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008), *aff’d*, 563 F.3d 527 (D.C. Cir. 2009).

355. *Id.* at 649–50.

356. *See id.* at 649–50 (describing the plaintiffs’ capture by a Uzbek warlord and transfer into U.S. custody).

357. *See id.* at 650 (repeating al-Harith’s claims that U.S. and British forces detained him after his escape from the Taliban).

358. 28 U.S.C. § 1350 (2012).

359. *Id.* §§ 1346(b), 2674.

a specialized procedure that must be followed when federal officers are sued for acts done in the scope of employment;<sup>360</sup>

b. Their constitutional claims were unavailing because nonresident aliens outside the United States have no constitutional rights and because the claims would be barred by the good faith immunity of the defendants;<sup>361</sup>

c. Their religious freedom claims were not cognizable under the Religious Freedom Restoration Act (RFRA)<sup>362</sup> because the statute has no application to aliens located outside sovereign United States territory at the time their alleged RFRA claim arose.<sup>363</sup>

One more individual claimant for compensation is Jose Padilla.<sup>364</sup> As described above, Padilla was arrested at O'Hare Airport and confined in isolation in a military brig for almost four years until he was finally tried and convicted in a civilian federal court trial.<sup>365</sup> His civil suit then charged John Yoo with various constitutional violations in rendering bogus legal opinions that permitted Padilla to be subjected to extrajudicial imprisonment.<sup>366</sup>

Yoo argued that “special factors” counseled against implication of a *Bivens* claim.<sup>367</sup> The court assessed the national security implications of Yoo’s arguments by noting that Padilla was not alleged to have taken up arms against the United States or otherwise shown to have been “engaged in armed conflict” with the United States, so the notion of making him a prisoner under

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360. See *Rasul v. Myers*, 512 F.3d 644, 661 (D.C. Cir. 2008), *aff'd*, 563 F.3d 527 (D.C. Cir. 2009) (noting that this procedure includes exhaustion of administrative remedies).

361. See *id.* at 663 (stating that “Guantanamo detainees lack constitutional rights because they are aliens without property of presence in the United States”).

362. 42 U.S.C. § 2000bb–2000bb-4 (1994)

363. See *Rasul*, 512 F.3d at 671–72 (determining the plaintiffs did not constitute “persons” under the RFRA).

364. See *generally* *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012).

365. See *id.* at 1013–14 (describing the harsh conditions Padilla faced in the Naval Brig); see also *supra* notes 267–71 and accompanying text (discussing *Padilla*).

366. See *id.* at 1015–17 (describing the various memoranda the defendant, a law professor, wrote about detention and interrogation).

367. *Id.* at 1022.



the law of war was not a reason for denying him relief.<sup>368</sup> Indeed, unlike the allegations made by Iqbal against Attorney General Ashcroft, “the Court finds Padilla has alleged sufficient facts to satisfy the requirement that Yoo set in motion a series of events that resulted in the deprivation of Padilla's constitutional rights.”<sup>369</sup> And with regard to Yoo’s claim for qualified immunity:

The Court finds that Padilla alleges a violation of his constitutional rights which were clearly established at the time of the conduct. Further, based on the fact that the allegations involve conduct that would be unconstitutional if directed at any detainee, a reasonable federal officer could have believed the conduct was lawful. Therefore, Yoo is not entitled to qualified immunity.<sup>370</sup>

On appeal, the Ninth Circuit reversed, holding that Yoo’s derelictions were not so clearly established at the time as to have stripped him of qualified immunity.<sup>371</sup> The Ninth Circuit stated the applicable standard to be whether “at the time he acted the law was . . . ‘sufficiently clear that every reasonable official would have understood that what he [wa]s doing violat[e]d’ the plaintiffs’ rights.”<sup>372</sup> Meanwhile, the Fourth Circuit held that Padilla, as represented by his mother in a separate action, could not bring a *Bivens* claim against anyone for his allegedly wrongful detention and mistreatment.<sup>373</sup> The court reasoned, similarly to its opinion in *El-Masri*, that any exploration into the circumstances of his treatment would embroil the courts in second-guessing the actions of the executive and legislature at a time of national crisis.<sup>374</sup> Those “special circumstances” thus occasioned hesitation in implying a *Bivens* remedy.<sup>375</sup>

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368. *Id.* at 1027.

369. *Id.* at 1034.

370. *Id.* at 1038 (citation omitted).

371. *Padilla v. Yoo*, 678 F.3d 748, 768 (9th Cir. 2012).

372. *Id.* at 750 (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011)).

373. *See* *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012) (holding defendants were entitled to a qualified immunity).

374. *See id.* at 558 (discussing court practice of “preferring that Congress explicitly authorize suits that implicate the command decisions of those charged with our national defense”).

375. *See id.* at 556 (concluding that a variety of “sources of hesitation in Padilla’s *Bivens* claim” require that the action not be maintained).

Finally, there is one institutional plaintiff with a near-victory in a compensation case but no compensation: the Al-Haramain Foundation.<sup>376</sup> In protracted litigation regarding the warrantless and FISA-less surveillance program carried out by the NSA, the plaintiff foundation first had to show standing to sue.<sup>377</sup> The foundation was able to persuade the Ninth Circuit that it had probably been the target of unauthorized wiretaps because otherwise there would have been no evidence on which the Government could have based its petitions to have the organization declared a Foreign Terrorist Organization (FTO).<sup>378</sup> After passing that hurdle, the plaintiff was then met with the SSP, to which the trial court answered that FISA preempted SSP by providing a civil remedy for unauthorized wiretaps.<sup>379</sup> Allowing the Government repeated opportunities to come forward with evidence that surveillance of the foundation had in fact been authorized by the FISA Court, the district court finally entered summary judgment for the plaintiff and assessed damages and attorney fees.<sup>380</sup> On appeal, the Ninth Circuit reversed the grant of summary judgment on the ground of sovereign immunity.<sup>381</sup>

*E. “Special Needs” Exception—Foreign Intelligence  
Surveillance Act*

In December 2005, an article in the *New York Times* revealed the existence of the Terrorist Surveillance Program (TSP), under which “President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United

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376. See generally *Al-Haramain Islamic Found. v. Obama (In re NSA Telecomm. Records Litig.)*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010).

377. See *id.* at 1194 (finding prior Ninth Circuit mandate did not preclude plaintiffs from attempting to establish standing).

378. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007) (“The organization posits that the very existence of the TSP, and Al-Haramain’s status as a ‘Specially Designated Global Terrorist,’ suggest that the government is in fact intercepting Al-Haramain’s communications.”).

379. See *Al-Haramain Islamic Found. v. Obama*, 700 F. Supp. 2d at 1197 (stating that the “FISA displaces the SSP in cases within its purview”).

380. See *id.* at 1204 (requesting from plaintiffs a proposed form of judgment for damages, costs, and attorney’s fees).

381. *Al-Haramain Islamic Foundation, Inc. v. Obama*, 690 F.3d 1089, 1099–1100 (9th Cir. 2012), *amended*, 705 F.3d 845 (2012).

States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying.”<sup>382</sup> Apparently, the TSP was one of a collection of clandestine intelligence activities referred to as the “President’s Surveillance Program,” with the other parts of the program remaining classified.<sup>383</sup> As events have unfolded, we have been exposed to reports of NSA projects called Carnivore and PRISM. In May 2013, Edward Snowden became famous by going public with reports of massive collection of phone and e-mail records of American citizens.<sup>384</sup> As if anyone was really surprised by these disclosures, some politicians called him a traitor and the government filed espionage charges against him.<sup>385</sup>

But even without regard to the unauthorized surveillance, the very premise of the Foreign Intelligence Surveillance Act (FISA) is highly debatable and has been subjected to minimal judicial scrutiny. FISA<sup>386</sup> was enacted in 1978 “to provide legislative authorization and regulation for all electronic surveillance conducted within the United States for foreign intelligence purposes.”<sup>387</sup> The whole premise for a secret special court is something called the “special needs” doctrine. That doctrine creates an exception to the Fourth Amendment, which would otherwise require a judicial warrant before any electronic surveillance (wiretap, e-mail intercepts, and the like) affecting

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382. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), [http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0)[http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0).

383. See OFFICES OF INSPECTORS GEN. FOR THE DEP’T OF DEF., DEP’T OF JUSTICE, CENT. INTELLIGENCE AGENCY, NAT’L SEC. AGENCY & OFFICE OF DIR. OF NAT’L INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM (2009) (discussing what constituted the President’s Surveillance Program). This report was mandated by the Foreign Intelligence Surveillance Amendments Act of 2008, Pub. L. No. 110-261, § 301, 122 Stat. 2467 (codified as amended in scattered sections of 50 U.S.C. (2012)).

384. See Peter Finn & Sari Horwitz, *U.S. Charges Snowden With Espionage*, WASH. POST, June 21, 2013, [http://articles.washingtonpost.com/2013-06-21/world/40116763\\_1\\_hong-kong-nsa-justice-department](http://articles.washingtonpost.com/2013-06-21/world/40116763_1_hong-kong-nsa-justice-department) (describing Snowden’s activities resulting in espionage charges).

385. See *id.* (discussing the charges against Snowden).

386. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C §§ 1801–1812 (2012)).

387. S. REP. NO. 95-701, at 9 (1978).

U.S. persons.<sup>388</sup> The Fourth Amendment protects the privacy of “the people,” which could easily exclude foreign governments and similar entities but might include foreign citizens lawfully within the United States. Therefore, the “special needs” of intelligence work would seem to apply, if at all, only to scrutinizing suspected agents of foreign powers, which is how the statute at first was constructed.

The most significant difference between a FISA court order and an ordinary warrant is that a warrant requires a showing of probable cause to believe that the target of the surveillance has committed or is about to commit a crime, while the FISA order originally could be based on probable cause to believe that the target was an “agent of a foreign power,” which included foreign political organizations.<sup>389</sup> After 9/11, FISA was amended to allow surveillance of any person believed to be outside the United States (whose conversations, of course, could include U.S. citizens at home).<sup>390</sup>

The premise of FISA was that a court-order scheme for foreign intelligence electronic surveillance could be devised consistent with the Fourth Amendment’s requirement of reasonableness.<sup>391</sup> FISA created a special court of designated federal judges—the Foreign Intelligence Surveillance Court (FISC)—that can issue orders authorizing electronic surveillance

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388. See, e.g., *City of Indianapolis v. Edmond*, 521 U.S. 32, 54 (2000) (“The ‘special needs’ doctrine . . . is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing.”).

389. See 50 U.S.C. § 1801(b) (2012) (defining “agent of a foreign power” with distinctions between U.S. citizens and “any persons”).

390. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (implementing “enhanced surveillance procedures” in order to “deter and punish terrorist acts”) (codified as amended in scattered sections of U.S.C.).

391. See S. REP. NO. 95-701, at 14–15

The departures here from conventional Fourth Amendment doctrine have, therefore, been given close scrutiny to ensure that the procedures established in [FISA] are reasonable in relation to legitimate foreign counterintelligence requirements and the protected rights of individuals. Their reasonableness depends, in part, upon an assessment of the difficulties of investigating activities planned, directed, and supported from abroad by foreign intelligence services and foreign-based terrorist groups. Other factors include the international responsibilities of the United States, . . . and the need to maintain the secrecy of lawful counterintelligence sources and methods.

to gather foreign intelligence.<sup>392</sup> A subsequent amendment extended that authority to issuing court orders to conduct physical searches for foreign intelligence purposes.<sup>393</sup>

Several courts struggled with whether “foreign intelligence” had to be the “primary purpose” of the surveillance.<sup>394</sup> The First Circuit stated “the investigation of criminal activity cannot be the primary purpose of the surveillance.”<sup>395</sup> The Ninth Circuit refused to distinguish between “purpose or primary purpose . . . . We refuse to draw too fine a distinction between criminal and intelligence investigations.”<sup>396</sup>

These discussions about the “purpose” requirement prompted the FISA Court of Review, prior to 9/11, to approve the DOJ’s practice of erecting a “wall” between criminal investigations and intelligence investigations.<sup>397</sup> The idea was that the looser procedures of FISA should not be used for ordinary criminal proceedings.<sup>398</sup> The attacks of 9/11 prompted much hand-wringing over perceived failures of the “intelligence community.” But there is no way of knowing how many hundreds or thousands of other leads similar to those of 9/11 could be followed to dead ends. Just because there was one needle in the haystack does not mean that one should have been found or that there were others to find. Nevertheless, the USA PATRIOT Act—the “Uniting and Strengthening America by Providing Appropriate Tools Required

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392. See 50 U.S.C. § 1803 (1978) (allowing the appointment of judges to the new court).

393. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, §§ 301–309, 108 Stat. 3423 (1995) (codified at 50 U.S.C. §§ 1821–1824 (1994)).

394. See, e.g., *United States v. Johnson*, 952 F.2d 565, 571–73 (1st Cir. 1991) (analyzing FISA in the case of an American citizen researching and developing explosives for the Provisional Irish Republican Army); *United States v. Sarkissian*, 841 F.2d 959, 964–65 (9th Cir. 1988) (analyzing FISA in the case of Armenian terrorists).

395. *Johnson*, 952 F.2d at 572.

396. *Sarkissian*, 841 F.2d at 965.

397. See William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1148–49 (2003) (discussing the origins of the “wall”).

398. See *id.* (noting that using FISA for espionage was acceptable, as “the danger of espionage or international terrorism is grave, and that the privacy intrusions are limited to the collection of information for foreign intelligence purposes”).

to Intercept and Obstruct Terrorism Act”<sup>399</sup>—was enacted six weeks after 9/11. It has served in some minds as a lightning rod for debate, but could also be seen as a smokescreen for many government policies that have nothing to do with the legislation itself (for example, military detentions, harsh interrogation, and extraordinary rendition).

For our purposes here, the principal impact of PATRIOT was to modify FISA to require that gathering foreign intelligence information is “*a significant purpose*” (rather than “*the purpose*”) of surveillance.<sup>400</sup>

Following the amendment of FISA to require that foreign intelligence be only *a significant purpose*, rather than the primary purpose, of the surveillance,<sup>401</sup> the Attorney General issued a memorandum in March 2002 allowing full exchange of information between law enforcement and intelligence units, and permitting criminal prosecutors to consult with and advise intelligence officials regarding FISA surveillance and searches.<sup>402</sup> These changes were permissible because the PATRIOT Act “allows FISA to be used *primarily* for a law enforcement purpose, as long as a significant foreign intelligence purpose remains.”<sup>403</sup> So interpreted, the Act essentially tears down the wall between foreign intelligence and criminal investigation.

In a unanimous opinion, the FISA Court balked at the idea that criminal investigation could be the primary purpose of surveillance under FISA and rejected the new procedures.<sup>404</sup> In

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399. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.).

400. *See id.* § 218 (stating that certain sections of the Foreign Intelligence Surveillance Act are amended by striking “the purpose” and inserting “a significant purpose”) (codified at 50 U.S.C. §§ 1804 (a)(6)(B), 1823(a)(6)(B) (2012)).

401. *See* 50 U.S.C. §§ 1804 (a)(6)(B), 1823 (a)(6)(B) (2012) (describing how a significant purpose is required for surveillance).

402. John Ashcroft, U.S. Att’y Gen., *Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI*, FAS.ORG (Mar. 6, 2002), <http://www.fas.org/irp/agency/doj/fisa/ag030602.html> (last visited Feb. 3, 2014) (“The Act also expressly authorizes intelligence officers who are using FISA to ‘consult’ with federal law enforcement officers . . .”) (on file with the Washington and Lee Law Review).

403. *Id.*

404. *See In re All Matters Submitted to Foreign Intelligence Surveillance*

the opinion of the FISC, separation of intelligence gathering from law enforcement is necessary under the Fourth Amendment.<sup>405</sup>

In the first-ever appeal from the FISC, the Court of Review (FISCR) in its *In re Sealed Case*<sup>406</sup> decision reversed the lower court's retention of the wall of separation.<sup>407</sup> FISCR described the wall as a "false dichotomy" between intelligence gathering and criminal investigation.<sup>408</sup> In its view, foreign intelligence information includes evidence of espionage, sabotage, terrorism, and other crimes; likewise, a U.S. person who is an agent of a foreign power is necessarily involved in criminal conduct.<sup>409</sup> "Indeed, it is virtually impossible to read the 1978 FISA to exclude from its purpose the prosecution of foreign intelligence crimes."<sup>410</sup>

Several years later, a district court judge in Oregon disagreed with the FISCR and declared the amended FISA scheme to be an unconstitutional violation of the Fourth Amendment.<sup>411</sup> The facts of the case were quite compelling: Following the Madrid subway bombing of March 11, 2004, Spanish authorities submitted to the FBI a fingerprint from a plastic bag found in the subway.<sup>412</sup> The fingerprint was identified as belonging to Brandon Mayfield, an Oregon lawyer, former U.S. Army officer, and practicing Muslim.<sup>413</sup> As a result of the

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Court, 218 F. Supp. 2d 611, 622–23 (FISA Ct. 2002) (discussing how the FISA Court rejected new procedures), *abrogated by In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

405. *Id.* at 622–23.

406. 310 F.3d 717 (FISA Ct. Rev. 2002).

407. *Id.* at 746.

408. *Id.* at 725 (citing *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980)).

409. *See id.* (upholding the government's argument that foreign intelligence information includes "evidence of crimes such as espionage, sabotage, or terrorism").

410. *Id.* at 723.

411. *See Mayfield v. United States*, 504 F. Supp. 2d. 1023, 1042 (D. Or. 2007) ("After the Patriot Act, however, FISA surveillance, including the surveillance at bar, may have as its 'programmatic purpose' the generation of evidence for law enforcement purposes—which is forbidden without criminal probable cause and a warrant."), *overruled by Mayfield v. United States*, 599 F.3d 964 (9th Cir. 2010).

412. *Id.* at 1027.

413. *Id.*

fingerprint identification, the FBI applied for and received a FISA order to wiretap Mayfield's phones, to place listening devices in his home, and to conduct sneak-and-peak searches of his home and office.<sup>414</sup> Mayfield was then arrested and detained for more than two weeks.<sup>415</sup> Finally, he was released after Spanish authorities notified the FBI that they had matched the fingerprint to an Algerian in their custody.<sup>416</sup> In 2006, Mayfield received an official apology and a \$2 million settlement,<sup>417</sup> which still allowed him to pursue his constitutional challenge to FISA.<sup>418</sup>

In ruling on this claim, the district court described how “a seemingly minor change in wording”—from *the purpose* to a *significant purpose*—has a profound effect on government powers under FISA:

Now, for the first time in our Nation's history, the government can conduct surveillance to gather evidence for use in a criminal case without a traditional warrant, as long as it presents a non-reviewable assertion that it also has a significant interest in the targeted person for foreign intelligence purposes. Since the adoption of the Bill of Rights

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414. *Id.* at 1028.

415. *Id.* at 1029.

416. *See id.* (“[O]n May 20, 2004, news reports revealed, that Spain had matched the Madrid fingerprint with an Algerian, Ouhane Daoud. Mayfield was released from prison the following day.”). The incident stands as a watershed for fingerprint evidence, which was once considered infallible, but is now recognized as fraught with potential for error. *See, e.g.*, COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 1–3 (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>; Jennifer Mnookin, *The Achilles' Heel of Fingerprints*, WASH. POST, May 19, 2004, at A27 (stating that “the science of fingerprinting is surprisingly underdeveloped” and that “[w]e lack good evidence about how often examiners make mistakes, nor is there a consensus about how to determine what counts as a match”).

417. *See* Dan Eggen, *U.S. Settles Suit Filed by Ore. Lawyer; \$2 Million Will Be Paid for Wrongful Arrest After Madrid Attack*, WASH. POST, Nov. 30, 2006, at A3 (discussing how Mayfield and his family received \$2 million dollars).

418. On appeal, the Ninth Circuit held that Mayfield lacked standing to bring a Fourth Amendment challenge to FISA. *See* *Mayfield v. United States*, 599 F. 3d 964, 966 (9th Cir. 2010) (holding Mayfield lacked standing to pursue his Fourth Amendment claim because his injuries were already substantially redressed by the settlement agreement); *infra* notes 423–24 and accompanying text (stating that a declaratory judgment would not impact Mayfield or his family).



in 1791, the government has been prohibited from gathering evidence for use in a prosecution against an American citizen in a courtroom unless the government could prove the existence of probable cause that a crime has been committed. The hard won legislative compromise previously embodied in FISA reduced the probable cause requirement only for national security intelligence gathering. The Patriot Act effectively eliminates that compromise by allowing the Executive Branch to bypass the Fourth Amendment in gathering evidence for a criminal prosecution.<sup>419</sup>

The district court found the FISCR's application of the special needs doctrine to be "without merit."<sup>420</sup> After the PATRIOT Act amendments, a FISA order need not meet a special need beyond ordinary law enforcement.<sup>421</sup> Instead, an order could serve the same objective as a search warrant, having "as its 'programmatic purpose' the generation of evidence for law enforcement purposes—which is forbidden without criminal probable cause and a warrant."<sup>422</sup>

The Ninth Circuit reversed on the ground that Mayfield lacked standing because he had settled the damages claim "and a declaratory judgment would not likely impact him or his family."<sup>423</sup> And although at least one judge said he "shares the very significant concerns that the 'significant purpose' standard violates the Fourth Amendment,"<sup>424</sup> the *Mayfield* opinion has been termed an "outlier."<sup>425</sup> Thus, with the exception of a lone judge in Oregon, courts have universally accepted the argument

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419. *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1036–37 (D. Or. 2007), *overruled by* *Mayfield v. United States*, 599 F.3d 964 (9th Cir. 2010).

420. *See id.* at 1041 ("The FISCR also attempts, without merit, to distinguish the Supreme Court's 'special needs' cases.").

421. *See id.* (discussing how the PATRIOT Act allows FISA to not require the special needs carved out by the Supreme Court to violate the Fourth Amendment).

422. *Id.* at 1042.

423. *Mayfield v. United States*, 599 F.3d 964, 966 (9th Cir. 2010).

424. *United States v. Warsame*, 547 F. Supp. 2d 982, 996 (D. Minn. 2008). The *Warsame* court did not decide the issue, however, as it found that the primary purpose of the FISA surveillance at issue was to gather foreign intelligence. *Id.* at 994.

425. *See United States v. Kashmiri*, No. 09 CR 830-4, 2010 U.S. Dist. LEXIS 119470, at \*8 (N.D. Ill. Nov. 10, 2010) ("The Court is not persuaded by the one outlier district court case [*Mayfield*] which held that FISA, as it currently exists, violates the Fourth Amendment.").

that FISA is not subject to the standards applicable to judicial search warrants.<sup>426</sup> The common rubric is that foreign intelligence is different and gives rise to “special needs” of government surveillance. It is difficult, however, to see what is “special” about surveilling alleged plotters of violence. Perhaps special needs could apply in the case of foreign governments or political entities, which are not part of “the people” protected by the Fourth Amendment anyway. The only persons who come within the concerns of FISA are really foreign citizens in the United States whom the government has probable cause to believe are acting as agents of a foreign power. Thus, the whole premise of FISA as a special needs exception to the Fourth Amendment could be flawed even before the change to “a significant purpose,” and is surely flawed, as the Oregon court believed, when the relaxed standards have the “primary purpose” of law enforcement.

The “special needs” cases to which the courts have referred in creating this exception have all been instances in which the target of the search had undertaken some voluntary departure from the private realm—such as traveling by air, driving on a public street, or operating a restaurant—in which the public safety demanded an inspection without regard to probable cause.<sup>427</sup> It is possible that taking to the airwaves through telephone or internet is a similar departure from normal life such that we have relinquished any claim to privacy. But this conclusion should at least deal carefully with all the Supreme Court precedents regarding expectations of privacy, the issue covered in the next section.<sup>428</sup>

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426. The *Mayfield* opinion has been termed an “outlier.” *United States v. Kashmiri*, 2010 U.S. Dist. LEXIS 119470, at \*8 (N.D. Ill. Nov. 10, 2010). Every other federal court has upheld FISA as amended by the PATRIOT Act, often relying on the reasoning of *In re Sealed Case*. See, e.g., *United States v. Abu-Jihaad*, 630 F.3d 102, 120 (2d Cir. 2010) (collecting cases).

427. See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (discussing the search of a probationer’s home); *New York v. Burger*, 482 U.S. 691, 699–703 (1987) (analyzing the search of premises of certain highly regulated businesses); *O’Connor v. Ortega*, 480 U.S. 709, 721–25 (1987) (evaluating the work-related searches of employees’ desks and offices); *New Jersey v. T. L. O.*, 469 U.S. 325, 337–342 (1985) (describing the search of student’s property by school officials); *Bell v. Wolfish*, 441 U.S. 520, 558–60 (1979) (analyzing the intricacies of body cavity searches of prison inmates).

428. The Court held in *Katz v. United States*, 389 U.S. 347, 358 (1967), that

Just dealing with the basic justification of FISA, with the lone exception of a district judge in Oregon, we have the apparent specter of the Judiciary yielding to executive claims of special needs arising from the threat of violence, resulting in a failure of judicial review and loss of judicial independence. But, in 2013 came the “revelation” that the FISA Court had authorized unlimited recording of data communications by U.S. citizens within the United States—a revelation of little surprise to those who were following the issue.

### *F. Carte Blanche for Electronic Snooping*

The battle over NSA surveillance probably has less to do with actual invasions of privacy and more to do with the sense that government decided it can do whatever it wants to do with total impunity. The existence of secret NSA programs is not at all surprising to those who have paid close attention to this issue for the last decade. The fact is that our government was never open or transparent about what it was doing, and we knew it was not.

For example, Attorney General Alberto Gonzales in a number of public statements during 2005 and 2006 was always careful to say “the program the President has disclosed” is legal, leaving open the inference that there was much more that had not been disclosed:

A word of caution here. This remains a highly classified program. . . . So my remarks today speak only to those activities confirmed publicly by the President, and not to other purported activities described in press reports. These press accounts are in almost every case, in one way or another, misinformed, confusing, or wrong. And unfortunately, they have caused concern over the potential breadth of what the President has actually authorized.<sup>429</sup>

Nowhere in the many public statements of the era—all of which are contained on the DOJ website—is there any mention of

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we have an expectation of privacy in telephonic communications. The NSA surveillance program is built on later precedent regarding the bare data of phone numbers and e-mail addresses.

429. E-mail from U.S. Dep’t of Justice, Office of Pub. Affairs, to U.S. Dep’t of Justice, Office of Pub. Affairs 2 (Jan. 24, 2006, 10:30 AM EST), <http://www.justice.gov/ag/readingroom/surveillance15.pdf>.

the undisclosed activities of the NSA. Naturally we would get “press accounts . . . [that were] misinformed, confusing, or wrong.”<sup>430</sup> But we probably got some information that was accurate.

What do we know now in 2014? We know that NSA and its affiliated agencies are capable of reading all our e-mail and listening to our phone conversations.<sup>431</sup> Do they do so? They would have us believe they are too busy to bother with us little people. But it is also clear that if the “metadata mining” reveals a pattern of curiosity, then it is a simple matter to reach into the grab bag and pull out everything any particular individual has said for a long period of time.<sup>432</sup> Indeed, some instances of unauthorized snooping into content have been acknowledged and one FISA judge has described the NSA as having repeatedly misrepresented its activities to the court.<sup>433</sup>

The FISA Court has approved “programmatically” surveillance by interpreting the word “relevant”<sup>434</sup> to mean basically all electronic communications, which can be monitored for suspicious patterns.<sup>435</sup> “And under the ‘reasonable suspicion’ standard, there

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430. *Id.*

431. See James Risen & Laura Poitras, *N.S.A. Gathers Data on Social Connections of U.S. Citizens*, N.Y. TIMES (Sept. 28, 2013), [http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html?pagewanted=all&_r=0) (last visited Feb. 3, 2014) (discussing how the NSA is able to collect both email and phone data) (on file with the Washington and Lee Law Review).

432. See *id.* (“A series of agency PowerPoint presentations and memos describe how the N.S.A. has been able to develop software and other tools—one document cited a new generation of programs that ‘revolutionize’ data collection and analysis—to unlock as many secrets about individuals as possible.”).

433. *In re* Production of Tangible Things from [Redacted], BR 08-13, at 5–6 (FISA Ct. March 2, 2009), [http://www.dni.gov/files/documents/section/pub\\_March%20202009%20Order%20from%20FISC.pdf](http://www.dni.gov/files/documents/section/pub_March%20202009%20Order%20from%20FISC.pdf) (describing the government’s “non-compliance with the Court’s orders”).

434. 50 U.S.C. § 1842(c)(2) (2012) (information likely to be obtained . . . is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities).

435. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], BR 13-109, at 18–23 (FISA Ct. Aug. 29, 2013), <http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf>; see also Wayne McCormack, *Privacy, the NSA, and Impunity*, UTAH LAW TODAY (July 15, 2013), <http://today.law.utah.edu/projects/blog-privacy-the-nsa-and-impunity/> (last visited Feb. 3, 2014) [hereinafter McCormack, *Privacy*] (on file with the Washington and Lee Law

is no judicial review when someone decides to look into the content of those communications.”<sup>436</sup>

Frankly, I’m not so sure that privacy of information is really that important, except to the extent that I need to be able to protect my bank accounts from being raided. What makes the NSA dustup more disturbing is the feeling within government that government can act with impunity in the name of “national security.”<sup>437</sup>

If they can read my e-mails today, can they haul me off to a military brig without judicial approval tomorrow? Oh, wait, they did that already—kept several people locked up for years with total impunity—even tortured with impunity.<sup>438</sup>

Recently, two judges have taken a hard look at the NSA activity and disagreed on the merits.<sup>439</sup> At least, these two judges did not yield to the temptation to abdicate judicial independence in the face of the dreaded word “terrorism.”<sup>440</sup>

### G. Standing

The U.S. federal courts have a rather mystical, ethereal approach to their “special place” in separation of powers. Part of the mystique is a doctrine called “standing,” which I have described elsewhere as part of the “Mythology of Justiciability.”<sup>441</sup> The heart of the doctrine is that a person who is not able to show an injury by another person has no claim of right against that

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Review).

436. McCormack, *Privacy*, *supra*, note 435.

437. See *NSA/CSS Strategy*, NAT’L SEC. AGENCY (Jan. 15, 2009), [http://www.nsa.gov/about/strategic\\_plan/](http://www.nsa.gov/about/strategic_plan/) (last updated Mar. 31 2011) (describing the goals and strategies employed by the NSA to protect national security) (on file with the Washington and Lee Law Review).

438. See *supra* notes 5–24 and accompanying text (discussing various cases in which people were imprisoned and tortured with total impunity).

439. *Klayman v. Obama*, Civil Action No. 13–0881(RJL), 2013 WL 6598728, at (D.D.C. Dec. 16, 2013) (determining the bulk collection of metadata to be invalid); *ACLU v. Clapper*, No. 13 Civ. 3994(WHP), 2013 WL 6819708, at \*24 (S.D.N.Y. Dec. 27, 2013) (upholding practice).

440. Cf. Andrew E. Taslitz, *Terrorism and the Citizenry’s Safety*, CRIM. JUST. 4, 5–6 (2002) (discussing how terrorism has, in certain circumstances, led to judicial abdication).

441. See generally McCormack, *The Justiciability Myth*, *supra* note 72.

other person. The mystery is why we need to waste barrels of ink and jurisprudential energy on a point basic to all of law—if you haven't harmed me, I don't have a claim against you.<sup>442</sup>

Be that as it may, there are two instances in which federal courts have turned blind eyes to what would seem to be palpable injuries, either likely or threatened. These are the cases dealing with the illegal surveillance by the NSA under the heading of the Terrorist Surveillance Program (TSP),<sup>443</sup> and the targeted killing of a U.S. citizen, Anwar al-Aulaqi.<sup>444</sup>

### 1. *Have I Been Bugged?*

A number of lawsuits challenged the NSA program. One suit was brought by the ACLU on behalf of a group of individuals and groups who regularly conducted international telephone and Internet communications for legitimate professional reasons (for example, journalism or the practice of law).<sup>445</sup> A district court in Michigan granted the plaintiffs' request for an injunction, finding that the TSP violated FISA, the First and Fourth Amendments, and the separation of powers doctrine.<sup>446</sup> On appeal, the Sixth Circuit found that the plaintiffs lacked standing to bring the action.<sup>447</sup> They could not show that any particular conversation was intercepted, nor could the plaintiffs claim that any personal interest was harmed by refraining from conversations that might

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442. *See id.* (discussing the doctrine of standing and its various nuances).

443. *Cf.* Ellen Nakashima, *AT&T Plaintiffs Cite McConnell Remarks*, WASH. POST, Sept. 1, 2007, (last visited Jan. 1, 2014) ("The Bush administration has asked Congress to grant the phone companies immunity from lawsuits arising from the [TSP].") (on file with the Washington and Lee Law Review).

444. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 1–14 (D.D.C. 2010) (describing the litigation and the actual killing of Anwar al-Aulaqi).

445. *ACLU v. NSA*, 438 F. Supp. 2d 754, 757 (E.D. Mich. 2006) (discussing how persons who allegedly conducted regular international telephone and internet communications brought action challenging NSA's secret program).

446. *See id.* at 782 ("The Permanent Injunction of the TSP requested by Plaintiffs is granted inasmuch as each of the factors required to be met to sustain such an injunction have undisputedly been met.").

447. *ACLU v. NSA*, 493 F.3d 644, 652 (6th Cir. 2007) ("[I]t follows that if the plaintiffs lack standing to litigate their declaratory judgment claim, they must also lack standing to pursue an injunction.").

be monitored.<sup>448</sup> Judge Gilman dissented on the ground that the attorney-plaintiffs had a clear duty to refrain from communicating with clients when those communications were likely to be intercepted, and were thus able to show a cognizable harm from the threat of interception.<sup>449</sup> Speaking to the merits, Judge Gilman argued that the TSP was illegal because “the clear wording of FISA and Title III that these statutes provide the ‘exclusive means’ for the government to engage in electronic surveillance within the United States for foreign intelligence.”<sup>450</sup>

At the same time, the Al-Haramain Foundation and two of its lawyers filed a similar action against the government in Oregon district court.<sup>451</sup> Al-Haramain is a Muslim charity designated a “Specially Designated Global Terrorist” by the Treasury Department’s Office of Foreign Assets Control, which freezes the organization’s assets and makes it illegal for others to do business with it.<sup>452</sup> At one point, the Government inadvertently disclosed a “top secret” document that proved Al-Haramain had been subjected to warrantless surveillance and prompted a further claim for unlawful surveillance.<sup>453</sup> The Government sought to dismiss the case by invoking the state secrets privilege, which the district court rejected on the basis that the existence of the TSP was not a secret, and that “no harm

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448. *See id.* at 656–57

By refraining from communications (i.e., the potentially harmful conduct), the plaintiffs have negated any possibility that the NSA will ever actually intercept their communications and thereby avoided the anticipated harm—this is typical of declaratory judgment and perfectly permissible. . . . But, by proposing only injuries that *result* from this refusal to engage in communications (e.g., the inability to conduct their professions without added burden and expense), they attempt to supplant an insufficient, speculative injury with an injury that appears sufficiently imminent and concrete, but is only incidental to the alleged wrong . . . .

449. *See id.* at 695 (Gilman, J., dissenting) (arguing that the attorney-plaintiffs were able to show harm and distinguishing the facts of this case from precedent on which the majority opinion relies).

450. *Id.* at 720; *see also supra* note 448 (detailing the majority’s argument).

451. *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006).

452. *Id.* at 1218.

453. *See id.* at 1219 (describing the inadvertent disclosure and the sensitive information the document contained).

to the national security would occur if plaintiffs [were] able to prove the general point that they were subject to surveillance as revealed in the Sealed Document,” so long as no other information in the document was revealed.<sup>454</sup>

The Ninth Circuit granted the Government’s request for interlocutory review of the state secrets issue,<sup>455</sup> holding that the public disclosures about the TSP had already made the basic dimensions of the program known and thus the state secrets privilege did not foreclose the lawsuit entirely.<sup>456</sup> Nevertheless, the top-secret document was protected by the privilege, and the plaintiffs would not be allowed to introduce their memory of the document into evidence.<sup>457</sup> Although the court believed that the plaintiffs could not establish standing without the document, the Ninth Circuit remanded the case to the district court to determine whether FISA might preempt the state secrets privilege.<sup>458</sup> On remand, the district court first held that FISA would, in fact, preempt the privilege, but a remedy would be available only on behalf of someone who was an “aggrieved person” under the statute.<sup>459</sup>

The plaintiffs were able to rely on public announcements by government officials and publicly available press reports to make a prima facie case, based on nonclassified information, that they were aggrieved persons because of wiretaps and e-mail intercepts

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454. *Id.* at 1224.

455. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007).

456. *See id.* at 1193 (noting the disclosure of the TSP and agreeing with the district court that the lawsuit cannot therefore be barred on a state secret basis).

457. *See id.* at 1204–05 (providing that each individuals’ memory of the sealed document’s contents and speculation about the document’s contents were “completely barred from further disclosure in this litigation”).

458. *See id.* at 1206 (“Rather than consider the issue for the first time on appeal, we remand to the district court to consider whether FISA preempts the state secrets privilege and for any proceedings collateral to that determination.”).

459. *Al-Haramain Islamic Found. v. Bush (In re NSA Telecomm. Records Litig.)*, 564 F. Supp. 2d 1109, 1134 (N.D. Cal. 2008). The district court held that 50 U.S.C. § 1810 contained an implicit waiver of sovereign immunity. *Id.* at 1125; *see also* 50 U.S.C. § 1810 (2012) (providing that an “aggrieved person” who suffers from illegal electronic surveillance may recover damages, including punitive damages and attorney’s fees).



without a court order.<sup>460</sup> After extended recalcitrance by the Government, the district court ordered:

Plaintiffs have made out a prima facie case and defendants have foregone multiple opportunities to show that a warrant existed, including specifically rejecting the method created by Congress for this very purpose. Defendants' possession of the exclusive knowledge whether or not a FISA warrant was obtained, moreover, creates such grave equitable concerns that defendants must be deemed estopped from arguing that a warrant might have existed or, conversely, must be deemed to have admitted that no warrant existed. The court now determines [that f]or purposes of this litigation, there was no such warrant for the electronic surveillance of any of plaintiffs.<sup>461</sup>

With no genuine issue of material fact, the district court granted summary judgment for the plaintiffs, and it later awarded them about \$41,000 in damages and over \$2.5 million in fees and expenses.<sup>462</sup> The entire amount went to the attorney-plaintiffs, as the “[d]istribution of any funds to plaintiff Al-Haramain is impossible because Al-Haramain’s assets are blocked as a result of its designation as a SDGT organization.”<sup>463</sup> Indeed, the district court acknowledged that “the government had reason to believe that Al-Haramain supported acts of terrorism.”<sup>464</sup> In the final episode of this long-running litigation, the Ninth Circuit ruled that the Government enjoyed sovereign immunity from a damage action by the organization.<sup>465</sup>

Another large number of lawsuits alleged that telecommunications companies violated their customers’ rights by

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460. See *Al-Haramain Islamic Found. v. Bush (In re NSA Telecomm. Records Litig.)*, 595 F. Supp. 2d 1077, 1083–86 (N.D. Cal. 2009) (describing the precedent plaintiffs relied on in forming a prima facie case and noting that plaintiffs met the requirements for making out a prima facie case).

461. *Al-Haramain Islamic Found. v. Obama (In re NSA Telecomm. Records Litig.)*, 700 F. Supp. 2d 1182, 1197 (N.D. Cal. 2010).

462. *Al-Haramain Islamic Found. v. Obama (In re NSA Telecomm. Records Litig.)*, No. 06-1791 VRW, at \*29, \*46 (N.D. Cal. Dec. 21, 2010), <https://www.eff.org/sites/default/files/filenode/att/alharamainorder122110.pdf>.

463. *Id.* at \*14.

464. *Id.* at \*25.

465. See *Al-Haramain Islamic Found., Inc. v. Obama*, 690 F.3d 1089, 1099 (9th Cir. 2012) (finding that Congress did not waive sovereign immunity and thus the Government still retained it).

cooperating and assisting the NSA in surveillance of their phones.<sup>466</sup> The actions were consolidated as part of the multi-district litigation panel in northern California.<sup>467</sup> While these cases were pending in district court, Congress enacted a statutory provision rendering an electronic communications service provider immune from suit if the Attorney General certified that the provider helped the government in intelligence gathering, including assistance in executing the TSP.<sup>468</sup> Based on this provision, the district court dismissed the pending suits against the telecommunications companies.<sup>469</sup> On appeal, the Ninth Circuit affirmed, rejecting a series of constitutional arguments, including several related to the separation of powers doctrine and due process considerations.<sup>470</sup>

But in another opinion on the same day, the Ninth Circuit allowed a class action suit to proceed against the Government for what the plaintiffs described as “a communications dragnet of ordinary American citizens.”<sup>471</sup> According to the court, the

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466. Among the litigants was Pulitzer Prize-winning author Studs Terkel. See generally *Terkel v. AT&T Corp.*, 411 F. Supp. 2d 899 (N.D. Ill. 2006); STUDS TERKEL, *THE GOOD WAR: AN ORAL HISTORY OF WORLD WAR TWO* (1984) (containing interviews with people involved in World War Two and winning the 1985 Pulitzer Prize for General Nonfiction).

467. See *NSA Multi-District Litigation*, ELEC. FRONTIER FOUND., <https://www.eff.org/cases/nsa-multi-district-litigation> (last visited Feb. 3, 2014) (describing the consolidation and transfer of about forty NSA cases to the United States District Court for the Northern District of California) (on file with the Washington and Lee Law Review).

468. See 50 U.S.C. § 1885a–c (2012) (providing that this immunity requires the Attorney General to certify the assistance falls into one of five categories).

469. *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949, 976 (N.D. Cal. 2009); *McMurray v. Verizon Commc’ns, Inc. (In re NSA Telecomm. Records Litig.)*, No. 09-0131, 2009 U.S. Dist. LEXIS 64621, at \*12 (N.D. Cal. July 27, 2009).

470. See *Hepting v. AT&T Corp. (In re NSA Telecomm. Records Litig.)*, 671 F.3d 881, 894–904 (9th Cir. 2011) (discussing bicameralism and presentment, the nondelegation doctrine, congressional interference with adjudication, and notice and process on the way to rejecting the constitutional arguments); see also *McMurray v. Verizon Commc’ns, Inc. (In re NSA Telecomm. Records Litig.)*, 669 F.3d 928, 933 (9th Cir. 2011) (dismissing the case for lack of jurisdiction and not reaching the merits of the Fifth Amendment takings claim).

471. *Jewel v. NSA*, 673 F.3d 902, 905 (9th Cir. 2011). The plaintiffs claimed [u]sing [a] shadow network of surveillance devices, Defendants have acquired and continue to acquire the content of a significant portion of phone calls, emails, instant messages, text messages, web

plaintiffs had standing by alleging a concrete and particularized injury from the collaboration between the government and AT&T at a specific facility in San Francisco.<sup>472</sup> And although the claims “strike . . . at the heart of a major public controversy involving national security and surveillance,” the Ninth Circuit refused to characterize the legal issues as political questions, or to impose a heightened standing requirement for government surveillance involving national security interests.<sup>473</sup> Where this case will go now after the Snowden revelations remains to be seen, but at least the Ninth Circuit has shown itself to be the exception in standing up against some of the government abuses.

The FISA Amendments Act of 2008 (FAA)<sup>474</sup> continued the authorization of intercepts involving parties outside the United States but stipulated that the government may not conduct electronic surveillance or intercept wire, oral, or electronic communications except pursuant to express statutory authorization (for example, FISA).<sup>475</sup> This statement of exclusive authority should have defused the Executive argument for unfettered discretion, but of course we now have public admissions of massive government gathering of electronic communications data.<sup>476</sup>

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communications and other communications, both international and domestic, of practically every American who uses the phone system or the Internet, including Plaintiffs and class members, in an unprecedented suspicionless general search through the nation's communications network.

*Id.* at 906.

472. *See id.* at 908 (concluding that the injury was “concrete and particularized” and that Jewel thus satisfied the “injury in fact” requirement and had standing).

473. *Id.* at 912. The Supreme Court denied certiorari in *Hepting v. AT&T Corp.*, No. 09-422, 2012 U.S. LEXIS 8053 (Oct. 9, 2012).

474. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

475. *See* 50 U.S.C. § 1812 (2012) (providing that such communications may only be conducted pursuant to the statute’s prescribed procedures or separate statutory authorization).

476. *See, e.g.,* Ellen Nakashima, *NSA Gathered Thousands of Americans’ E-mails Before Court Ordered it to Revise its Tactics*, WASH. POST (Aug. 21, 2013), [http://www.washingtonpost.com/world/national-security/nsa-gathered-thousands-of-americans-e-mails-before-court-struck-down-program/2013/08/21/146ba4b6-0a90-11e3-b87c-476db8ac34cd\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-gathered-thousands-of-americans-e-mails-before-court-struck-down-program/2013/08/21/146ba4b6-0a90-11e3-b87c-476db8ac34cd_story.html) (last visited Feb. 3, 2014) (describing how the NSA collected tens of thousands of Americans’ e-mails annually) (on file with the Washington and Lee Law

The ACLU filed suit against the FAA on behalf of a group of attorneys, journalists, and legal, media, and human rights organizations, arguing that the provision “allows the executive branch sweeping and virtually unregulated authority to monitor the international communications . . . of law-abiding U.S. citizens and residents.”<sup>477</sup> The district court granted summary judgment in favor of the government on the basis that the plaintiffs lacked standing to bring the suit.<sup>478</sup> On appeal, a panel of the Second Circuit reversed and remanded, asserting that the plaintiffs had standing based on a reasonable fear that their sensitive international electronic communications were being monitored, requiring them to engage in costly and burdensome measures to protect the confidentiality of communications necessary for their work.<sup>479</sup> In September 2011, the Second Circuit denied rehearing en banc by an equally divided vote.<sup>480</sup>

In February 2013, the Supreme Court reversed on standing grounds, agreeing with the Government that the plaintiffs failed to show a realistic threat of imminent injury.<sup>481</sup> Their speculations required assuming that the government would target their communications, that authorization under the statute would be judicially approved, and that government would succeed in acquiring their communications.<sup>482</sup> Moreover, the plaintiffs’ choices to make expenditures to prevent interception of confidential communications based on hypothetical future harm

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Review).

477. Complaint for Declaratory and Injunctive Relief at 2, *Amnesty Int’l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009) (No. 08 CIV 6259).

478. See *Amnesty Int’l USA v. McConnell*, 646 F. Supp. 2d 633, 658 (S.D.N.Y. 2009) (rejecting plaintiffs’ second standing argument and thus denying plaintiffs’ motion for summary judgment).

479. See *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011) (“Because standing may be based on a reasonable fear of future injury . . . and the plaintiffs have established that they have a reasonable fear of injury . . . , we agree that they have standing. We therefore reverse the district court’s judgment.”)

480. See *Amnesty Int’l USA v. Clapper*, 667 F.3d 163, 164 (2d Cir. 2011) (finding the Second Circuit panel did not err and thus affirming its decision).

481. See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013) (concluding the plaintiffs lacked standing because they acted pursuant to “hypothetical future harm” and not imminent harm).

482. See *id.* at 1148–50 (providing that the plaintiffs’ speculation depended on five conditions, none of which could be proven).

was their own choice and not the direct result of identifiable government action.<sup>483</sup>

Of course, now we know the assumptions of the Supreme Court about judicial authorization of intercepts were unfounded because the NSA has been monitoring anything and everything that it chooses to monitor.<sup>484</sup> This set of assumptions was particularly poignant in some of the dissents from the earlier Second Circuit denial of rehearing.<sup>485</sup> One dissent pointed to the FISCR's opinion in *In re Directives* as offering "a glimpse into the actual world of foreign intelligence targeting," which "appears quite different from the one hypothesized by plaintiffs."<sup>486</sup>

[The FISCR] reviewed the actual procedures adopted by the executive to satisfy PAA requirements and found that they in fact afforded "protections above and beyond those specified" in the statute and adequately allayed any particularity or probable cause concerns. . . . Such scrupulous oversight rebuts any general assumptions, unsupported by specific facts, that the executive will instinctively abuse its targeting discretion under the FAA. . . .<sup>487</sup>

Now that it is publicly known that the NSA has been routinely gathering information on U.S. residents, the assertion that the statutes "rebut . . . any general assumption, unsupported by specific facts, that the executive will instinctively abuse its targeting discretion" rings extremely hollow.<sup>488</sup> This is not to say that the judges holding that view were knowingly complicit in government misdeeds, but they certainly chose consciously to turn a blind eye when their colleagues were insisting on scrutiny of actual government practices.

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483. *See id.* at 1153 (finding that plaintiffs' self-constructed fear was another reason they lacked standing).

484. *See supra* notes 382–385, 431–433, and accompanying text (discussing the NSA's ability and willingness to monitor civilians and the public disclosure of such behavior).

485. *See supra* note 480 and accompanying text (explaining that the Second Circuit denied rehearing en banc in *Clapper*).

486. *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 186 (2d Cir. 2011) (Raggi, J., dissenting).

487. *Id.*

488. *Id.*

*2. Judicial Review of Killing U.S. Citizens*

The final case that I wish to highlight here is the “targeted killing” of Anwar Al-Aulaqi, a U.S. citizen who expatriated to Yemen and became a major jihadist figure on the Internet.<sup>489</sup> When it was leaked in the press that Anwar al-Aulaqi had been placed on the U.S. government’s kill lists, his father Nasser al-Aulaqi filed suit to assert his son’s rights to due process.<sup>490</sup> His lawsuit also asserted that the U.S. targeted-killing policy violated the Fourth and Fifth Amendments, as well as treaty and customary international law.<sup>491</sup> While asking for an injunction to stop the government from killing his son, he sought a declaration that the policy was illegal and disclosure of the criteria used to determine whether to target a U.S. citizen.<sup>492</sup>

The D.C. District Court started with the observations that this “unique and extraordinary case” presented “[s]tark, and perplexing, questions” such as: “How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to the defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?”<sup>493</sup> Yet, the court dismissed the case, holding that Nasser al-Aulaqi lacked standing to bring the constitutional claims on behalf of his son.<sup>494</sup> The court also blindly asserted that there was nothing to prevent Anwar al-Aulaqi from peacefully presenting himself at the U.S. Embassy in Yemen and announcing his wish to vindicate his constitutional rights in court, which, as a matter of domestic

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489. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

490. See *id.* at 20 (noting that though Al-Aulaqi’s father is the plaintiff in the action, his hope to act for his son’s best interest is insufficient to satisfy next-friend standing).

491. See *id.* at 12 (listing the plaintiff’s constitutional and statutory claims).

492. See *id.* (outlining plaintiff’s four requests including a “preliminary injunction prohibiting defendants from intentionally killing Anwar Al-Aulaqi” and “an injunction ordering defendants to disclose the criteria that the United States uses to determine whether a U.S. citizen will be targeted for killing” (citing Complaint for Declaratory and Injunctive Relief at 9–11, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469))).

493. *Id.* at 8.

494. See *id.* at 30 (noting that the “plaintiff lacks third party standing . . . because his interests do not align with those of his son”).

and international law, the U.S. government would have to respect without resorting to violence.<sup>495</sup> Moreover, it was not clear that the father was serving his son's "best interests," understood as acting in accordance with Anwar al-Aulaqi's intentions or wishes.<sup>496</sup> There was no evidence that Nasser al-Aulaqi wanted to vindicate his rights in a U.S. court; to the contrary, his public statements showed disdain for the American legal system, as well as a belief that Muslims were not bound by Western law and it was therefore legitimate to violate U.S. law.<sup>497</sup>

Moreover, Nasser al-Aulaqi's claims might have been barred by sovereign immunity, because a suit against the President, Secretary of Defense, and CIA Director was "tantamount to a suit against the United States."<sup>498</sup> In the portion of its opinion most strikingly presenting problems of judicial independence, the court refused to decide this question by exercising its "equitable discretion" to avoid interjecting itself into sensitive issues of foreign affairs and activities by the military and intelligence community.<sup>499</sup> Serious separation-of-powers concerns would be raised by a "judicial attempt to enjoin the President in the performance of his official duties."<sup>500</sup> The same would be true of a court order granting declaratory and injunctive relief against the nation's top military and intelligence advisors regarding the use of force abroad, when such action was (purportedly) authorized by the President himself.<sup>501</sup>

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495. *See id.* at 17 (agreeing with defendants that the plaintiff's son had this alternative).

496. *See id.* at 20 (taking as true plaintiff's statements that he had his son's best interests in mind but finding that the statements were "nonetheless insufficient to establish that this lawsuit accords with Anwar Al-Aulaqi's best interests").

497. *See id.* at 19, 21 (concluding that Al-Aulaqi was "incommunicado" due to his own choice and noting that Al-Aulaqi "decried the U.S. legal system and suggested that Muslims are not bound by Western law" through his public statements).

498. *Id.* at 40.

499. *See id.* at 42 (noting that the court did not need to decide the sovereign immunity issue as it had "equitable discretion" not to grant plaintiff's requested relief because this was a "'sensitive' foreign affairs matter").

500. *Id.* at 43 (quotations omitted).

501. *See id.* (explaining that a court order against the military or intelligence would also evoke separation-of-powers concerns).

Finally, in a similar vein, the court concluded that the case was a nonjusticiable political question.<sup>502</sup> This doctrine exempts from judicial review those matters that are committed by the U.S. Constitution to the political branches, including the precise issue in this case—the decision to employ military force.<sup>503</sup> According to the court, resolution of the plaintiff's claims would require it to decide:

- (1) [T]he precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP;
- (2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States' current armed conflict with al Qaeda;
- (3) whether (assuming plaintiff's proffered legal standard applies)<sup>504</sup> Anwar Al-Aulaqi's alleged terrorist activity renders him a “concrete, specific, and imminent threat to life or physical safety . . . .”; and
- (4) whether there are “means short of lethal force” that the United States could “reasonably” employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests. . . . Such determinations, in turn, would require this Court . . . to understand and assess the “capabilities of the [alleged] terrorist operative to carry out a threatened attack, what response would be sufficient to address that threat, possible diplomatic considerations that may bear on such responses, the vulnerability of potential targets that the [alleged] terrorist[] may strike, the availability of military and nonmilitary options, and the risks to military and

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502. See *id.* at 46 (finding that the policy questions posed by the plaintiff's claims are nonjusticiable under D.C. Circuit precedent).

503. See *id.* at 48 (explaining that the decision to employ military force belongs to the legislative and executive branches and review of such decisions would thus produce major separation-of-powers concerns).

504. The standard advocated in Anwar al-Aulaqi's complaint would preclude targeted killing outside of armed conflict unless an individual “presents a concrete, specific, and imminent threat of life or physical safety, and there are means other than lethal force that could reasonably be employed to neutralize the threat.” *Id.* (citing Complaint for Declaratory and Injunctive Relief at 11, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469)).



nonmilitary personnel in attempting application of non-lethal force.”<sup>505</sup>

It is truly a mystery why a court should have to decide any of those questions to rule on whether a U.S. citizen abroad has due process or other legal rights before being executed by executive fiat. The judicial function consists of setting out the criteria for the Executive to follow in making those decisions.<sup>506</sup> The court confessed its concern that “there are circumstances in which the Executive’s unilateral decision to kill a U.S. citizen overseas is ‘constitutionally committed to the political branches’ and judicially unreviewable” but nonetheless concluded that it was barred from adjudicating the merits of the case.<sup>507</sup>

The United States then used aerial unmanned aircraft (drones) to execute not just Anwar but also his son Abdulrahman and a colleague, Samir Khan.<sup>508</sup> In July 2012, the ACLU filed a new suit on behalf of the families of all three, arguing that the killings violated the Fourth Amendment’s ban on unreasonable seizures, the Fifth Amendment’s right to due process, and the Bill of Attainder Clause.<sup>509</sup> In addition, the ACLU filed a FOIA request and subsequent legal action seeking records related to legal authority and factual basis for the targeted killing of the three individuals.<sup>510</sup>

In a masterly display of the various doctrines considered in this Article, on December 14, 2012, DOJ filed a motion to dismiss the damage action on the grounds of lack of standing, political question, qualified immunity, failure to state a claim under due

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505. *Id.* at 46.

506. This was precisely the approach taken by the Israeli High Court in *Public Committee v. Government*, HCJ 769/02 [2005] (Isr.); *see also* H.C. 680/88 Schnitzer v. Chief Military Censor 42(4) P.D. 617 [1989] (Isr.).

507. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 51 (D.D.C. 2010).

508. *See Al-Aulaqi v. Panetta: Lawsuit Challenging Targeted Killings*, *supra* note 42 (explaining how the lawsuit alleges that drone attacks killed these individuals).

509. *See id.* (outlining these constitutional violations and also arguing that the attacks violated international law).

510. Complaint for Injunctive Relief at 8, *ACLU v. U.S. Dep’t of Justice*, No. 12 CIV 0794 (S.D.N.Y. 2012), [https://www.aclu.org/files/assets/tk\\_foia\\_complaint.pdf](https://www.aclu.org/files/assets/tk_foia_complaint.pdf).

process, and Executive freedom from the Bill of Attainder Clause.<sup>511</sup>

### V. Conclusion

The “head in the sand” attitude of the U.S. Judiciary in the past decade is a rather dismal record that does not fit the high standard for judicial independence on which the American public has come to rely. Many authors have discussed these cases from the perspective of the civil rights and liberties of the individual.<sup>512</sup> What I have attempted to do here is sketch out how the undue deference to the Executive in “time of crisis” has undermined the independent role of the Judiciary. Torture, executive detentions, illegal surveillance, and now killing of U.S. citizens, have escaped judicial review under a variety of excuses.<sup>513</sup>

To be clear, many of the people against whom these abuses have been levied are, or were, very dangerous if not evil individuals. Khalid Sheikh Muhamed and Anwar al-Aulaqi should not be allowed to roam free to kill innocent civilians. But hundreds of years of history show that there are ways of dealing with such people within the limits of restrained government without resort to the hubris and indignity of unreviewed Executive discretion. The turning of blind eyes by many, albeit not all, federal judges is a chapter of this history that will weigh heavily against us in the future.

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511. Defendant’s Motion to Dismiss at 4, *ACLU v. U.S. Dep’t of Justice*, No. 1:12-cv-01192 (RMC) (S.D.N.Y. 2012), [https://www.aclu.org/files/assets/tk\\_govt\\_motion\\_to\\_dismiss.pdf](https://www.aclu.org/files/assets/tk_govt_motion_to_dismiss.pdf). The Bill of Attainder Clause, U.S. CONST. art. I, § 9, cl. 3, prohibits any “law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 846–47 (1984) (citing *Nixon v. Adm’r Gen. Servs.*, 433 U.S. 425, 468 (1977)).

512. See, e.g., Timothy Bazzle, *Shutting the Courthouse Doors: Invoking the State Secrets Privilege to Thwart Judicial Review in the Age of Terror*, 23 *GEO. MASON U. C.R. L.J.* 29, 69–70 (2012) (concluding that judicial deference to state secrets privilege gives too much power to the Executive Branch and intrudes on an individual’s rights to be informed of the evidence against him and not be denied due process of law).

513. *Supra* Part IV.

No judge wants to feel responsible for the deaths of innocents. But direct responsibility for death lies with those who contribute to the act. Meanwhile, the judge has an ethical responsibility for abuses by government of which the Judiciary is a part. To illustrate the threat, one federal judge resigned from the secret FISA Court in “protest because the Bush administration was bypassing the court on warrantless wiretaps.”<sup>514</sup> To be fair, his public statement before Congress included the thought that the judges were independent but not making fully informed decisions.<sup>515</sup> It makes sense that this courageous judge (who also ruled against the Government in a major Guantanamo case<sup>516</sup>) would extol the independence of the federal Judiciary, but perhaps those of us outside the club can be forgiven for seriously challenging his assessment. Meanwhile, critics are voicing the belief that recent appointments to the FISA Court will be even more deferential to the Executive.<sup>517</sup>

To repeat, there is nothing “new” in the killing of innocents for religious or political vengeance.<sup>518</sup> This violence has always been with us and unfortunately will continue despite our best efforts to curb it. Pleas for Executive *carte blanche* power are exactly what judicial independence was developed to avoid, and what many statements in various declarations of human rights are all about. The way of unreviewed Executive discretion is the way of tyranny.

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514. Pema Levy, *Former Judge: Secret Court Needs Reform*, INT’L BUS. TIMES (July 9, 2013), <http://www.ibtimes.com/former-fisa-court-judge-secret-court-needs-reform-1338671a> (last visited Feb. 3, 2014) (on file with the Washington and Lee Law Review).

515. *Id.*

516. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173 (D.D.C. 2004), *rev’d*, 415 F.3d 33 (D.C. Cir. 2004), *aff’d*, 548 U.S. 557 (2006).

517. See Charlie Savage, *Roberts’s Picks Reshaping Secret Surveillance Court*, N.Y. TIMES, July 25, 2013, at A1 (arguing that Chief Justice Roberts’ appointments to the FISA Court have given it a very Republican makeup and noting that one scholar has proposed the President nominate judges for the Court).

518. *Supra* note 302 and accompanying text.