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## The Role of the Courts in Time of War

William C. Banks

*Syracuse University College of Law*

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# The Role of the Courts in Time of War

William C. Banks\*

## *Abstract*

*The role of the courts in judging the actions of government in wartime has ranged from extreme deference to careful probing of alleged government excesses over more than two centuries. The courts' record has reflected the nature of the armed conflicts the United States has engaged in and the legal bases for the actions at issue. In the aggregate, the courts have served as a necessary counterweight to government overreaching in times of national security crisis. It is easy to underestimate the institutional problems confronting judges who are asked to make momentous decisions in times of national crisis—difficulties of fact-finding and assessing the risks of being wrong, among others. Yet no other part of government is as equipped as the judiciary to anchor the nation to its core values during a storm.*

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\* Professor William C. Banks is an internationally recognized authority in national security law, counterterrorism, and constitutional law. Banks has helped set the parameters for the growing field of national security law since 1987, co-authoring two leading texts in the field: *National Security Law* and *Counterterrorism Law*. In 2008, Banks was named the College of Law Board of Advisors Distinguished Professor at Syracuse University, where he has been a member of the faculty for over 30 years. Banks is also the author or editor of numerous other books, book chapters and articles including *Counterinsurgency Law: New Dimensions in Asymmetric Warfare*, *Combating Terrorism* (with Mitchel Wallerstein and Renee de Nevers), *New Battlefields/Old Laws: Critical Debates from the Hague Convention to Asymmetric Warfare*, “Legal Sanctuaries and Predator Strikes in the War on Terror,” “Programmatic Surveillance and FISA – Of Needles in Haystacks,” and “Providing ‘Supplemental Security’ – The Insurrection Act and the Military Role in Responding to Domestic Crises.” Since 1998, Banks also has been a Professor of Public Administration in SU’s Maxwell School of Citizenship and Public Affairs. He was named the Laura J. and L. Douglas Meredith Professor for Teaching Excellence in 1998, a College of Law Board of Advisors Professor in 2005, and he became the founding director of the Institute for National Security and Counterterrorism at Syracuse University in 2003. He is also the Editor-in-Chief of the *Journal of National Security Law & Policy* (JNSL&P).

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*I. Introduction*

If there was a “war on the rule of law”<sup>1</sup> after 9/11, it was waged primarily by the Executive Branch, not the courts. To be sure, the courts often deferred to Executive Branch decisions during the unhelpfully labeled “war on terror.” Deference is generally appropriate when courts review actions of the elected branches. At other times, however, the courts overturned or limited Bush Administration national security decisions. The mixed judicial record continues during the Obama Administration and the ongoing armed conflict against al Qaeda and its affiliates.<sup>2</sup>

To the extent that a pattern of judicial deference may be traced through the war on terror disputes, the Bush-era decisions reflect tendencies that began with Supreme Court decisions in the 1970s, when the courts began to employ a special deference to actions taken by the military, ordered by a civilian commander in chief. Yet a series of war on terror-era Supreme Court decisions on military detention practices between 2004 and 2008 repudiated, or at least limited, the worst excesses of Executive unilateralism during the Bush presidency. It is too soon to tell whether those

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1. Wayne McCormack, *U.S. Judicial Independence: Victim in the “War on Terror”*, 71 WASH. & LEE L. REV. 305 (2014) (citation and internal quotation marks omitted). This Article is written as an invited response to Professor McCormack’s article.

2. See McCormack, *supra* note 1, at 312, 344–46 (describing the mixed set of decisions that courts have issued under the Obama administration).

decisions also signaled a renewed commitment for the courts to review carefully the merits of decisions involving the military.

There are at least two other dimensions to the story of the judicial role in wartime. Sometimes federal courts have been anything but deferent. First, judges may become activist lawmakers, providing remedies to victims of unlawful government conduct in countering terrorism, for example, or making new law in ruling for government contractors to immunize them from plaintiffs' claims.<sup>3</sup>

Second, federal judges also preside over criminal prosecutions of alleged terrorists. Even while the Bush Administration was unilaterally shaping the contours of its war on terror, the White House, Justice Department, and federal courts were implementing an important policy to use intelligence and law enforcement tools as part of a multi-faceted set of approaches to countering terrorism. Nearly 500 criminal prosecutions involving international terrorism have been concluded since 9/11,<sup>4</sup> and Supermax federal prisons house more than 350 convicted international terrorists.<sup>5</sup> The judges made evidentiary and other rulings in these cases, but juries decided guilt or innocence. The deference label simply does not fit the criminal cases.

Meanwhile, Congress has forbidden the closure of the Guantanamo Bay detention facility and prohibited the Obama Administration from bringing Gitmo detainees to stand trial in the United States.<sup>6</sup> Yet the Administration has successfully

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3. See, e.g., *Al-Shimari v. CACI Int'l, Inc.*, 951 F. Supp. 2d 857 (E.D. Va. 2013), *vacated and remanded sub nom.* *Al-Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014); Benjamin Wittes et. al, *The Emerging Law of Detention 2.0: The Guantanamo Habeas Cases as Lawmaking*, Brookings (May 12, 2011), <http://www.brookings.edu/research/reports/2011/05/guantanamo-wittes> (last updated Mar. 29, 2013) (last visited Dec. 3, 2014) (on file with the Washington and Lee Law Review).

4. See HUMAN RIGHTS WATCH, *ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS 2* (2014) ("Since the September 11 attacks, more than 500 individuals have been prosecuted in US federal courts for terrorism or related offenses—40 cases per year on average.").

5. Fred Kaplan, *There Are Already 355 Terrorists in American Prisons*, SLATE (MAY 29 2009, 5:33 PM), [http://www.slate.com/articles/news\\_and\\_politics/war\\_stories/2009/05/there\\_are\\_already\\_355\\_terrorists\\_in\\_american\\_prisons.html](http://www.slate.com/articles/news_and_politics/war_stories/2009/05/there_are_already_355_terrorists_in_american_prisons.html) (last visited Nov. 26, 2014) (on file with the Washington and Lee Law Review).

6. See Ken Gude, *What Has to Happen to Close Guantanamo Bay This Year*,

transferred alleged terrorists apprehended overseas to civilian detention facilities in the United States and has prosecuted them in the federal courts,<sup>7</sup> over the loud and vitriolic complaints by critics in Congress and elsewhere that these suspects belong at Gitmo and should be tried by military commission.<sup>8</sup> In these instances the Administration relies on the federal courts as part of a whole-of-government effort to counter terrorism.

Throughout our history, the courts have been central participants in shaping the limits of governmental authority and the resultant scope of civil liberties during wartime. The war on terror—more accurately described as a war against al Qaeda, its affiliates, and the Taliban—was not our gravest crisis. Our nation was born through violent revolution, and the Civil War was the contemporary equivalent of an all-out nuclear attack on the nation. In their time, the two World Wars were potentially more calamitous than the 9/11 era. In each of these wars, the Judicial Branch was an active participant, sometimes generously deferent to the government's expansive interpretation of its wartime constitutional prerogatives, other times especially attentive to what have been viewed as unchanging constitutional values.

The war on terror likewise required judges to make critical judgments about the Constitution and other laws, and about the institutional role of the judiciary in a time of war. The record of the

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CTR. FOR AM. PROGRESS (Jan. 31, 2014), <https://www.americanprogress.org/issues/security/news/2014/01/31/83328/what-has-to-happen-to-close-guantanamo-bay-this-year/> (arguing the Obama Administration should push Congress to lift the transfer ban on Gitmo detainees) (last visited Nov. 26, 2014).

7. *E.g.*, Richard A. Serrano, *Detainee in Afghanistan to Face Charges in U.S. Court, Officials Say*, L.A. TIMES (Oct. 23, 2014, 6:17 PM), <http://www.latimes.com/world/afghanistan-pakistan/la-fg-afghanistan-detainee-us-court-20141023-story.html> (last visited Nov. 26, 2014) (on file with the Washington and Lee Law Review).

8. *See* Danny Gonzalez, *Terrorists Shouldn't Be Tried in the Same Courts as U.S. Citizens*, U.S. NEWS (Mar. 12, 2013, 1:59 PM), <http://www.usnews.com/debate-club/should-al-qaeda-spokesperson-sulaiman-abu-ghaith-be-prosecuted-in-federal-court/terrorists-shouldnt-be-tried-in-the-same-courts-as-us-citizens> (last visited Nov. 26, 2014) (asserting that “[t]he process of military tribunals currently in place at Guantanamo Bay is perfectly legal and satisfies the right of due process for terrorist suspects”) (on file with the Washington and Lee Law Review).

courts has been mixed, but not dramatically different from other periods of armed conflict.

## *II. The Case Against the Bush Administration*

The Bush Administration claimed a practically limitless constitutional authority to act unilaterally during a war that lasted longer than World War II. As viewed by the Administration, terrorism and associated threats in the post-Cold War world simply outstripped past security threats against the United States. Their thinking was that these changed circumstances required a more flexible kind of executive power, one that cannot be readily accommodated with multi-branch deliberation.<sup>9</sup> In the face of these threats, the qualities that Alexander Hamilton identified as characteristic of the Executive alone—the capacity to act with “decision, activity, secrecy and dispatch”<sup>10</sup>—are overwhelming and essential advantages. When the nature of warfare against these unconventional enemies relies less on set-piece battles between nation-states and more on tools like intelligence gathering and covert action and quick strikes against terrorists in sanctuaries across sovereign boundaries from traditional battlefields, waiting for deliberation or even review or ratification by Congress or the courts would compromise America’s ability to defend itself. As a result, the institutional roles and individual rights that those traditional constitutional structures are designed to protect may be shortchanged along the way.

In the first few years after 9/11, the argument was used to justify unprecedented executive unilateralism in high profile disputes that found their way to our courts. The national security trump card allegedly overcame laws barring torture and cruel or degrading treatment;<sup>11</sup> supported the “outsourcing” of torture to

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9. See Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT’L SEC. J. 116, 122–23 (2014) (comparing the coordinated, multi-branch action against co-belligerents during World War II with the Bush Administration’s unilateral practices under the Authorization for the Use of Military Force (AUMF)).

10. THE FEDERALIST NO. 70 (Alexander Hamilton).

11. See Ray Sanchez, *Obama: U.S. ‘Crossed a Line’ and Tortured After 9/11 Attacks*, CNN (last updated Aug. 3, 2014, 3:14 PM) <http://www.cnn.com/2014/08/01/politics/obama-torture-comments/> (last visited

other countries, such as Syria and Egypt;<sup>12</sup> permitted detaining individuals, including Americans, indefinitely without any due process;<sup>13</sup> and allowed spying on Americans' phone calls and e-mails in violation of federal statutes and the Fourth Amendment.<sup>14</sup> The federal courts were complicit in some, though hardly all, of these excesses, but the driving force was the Executive.

### III. Historic Highlights

When Alexis de Tocqueville visited the United States in the mid-nineteenth century, he was struck by the central role that the courts play in our system of government: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."<sup>15</sup> It is true that our federal courts have sometimes turned Tocqueville's observation on its head by refusing to decide legal questions on various grounds. Nonetheless, the federal judiciary and its record over more than two centuries are celebrated worldwide for making principled decisions based on the rule of law and for the judges' independence from the elected branches of our government.

Early in our nation's history, the role of the federal courts in the constitutional framework for national security operated more or less as the Framers envisioned. In a trilogy of decisions

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Nov. 26, 2014) (noting that certain "enhanced interrogation techniques" likely constituted torture) (on file with the Washington and Lee Law Review).

12. Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, THE NEW YORKER, Feb. 14, 2005, at 106.

13. See Erik Kain, *President Obama Signed the National Defense Authorization Act—Now What?*, FORBES (Jan. 2, 2012, 11:56 AM) <http://www.forbes.com/sites/erikkain/2012/01/02/president-obama-signed-the-national-defense-authorization-act-now-what/> (last visited Nov. 26, 2014) (suggesting the National Defense Authorization Act may allow indefinite detention and claiming the federal government has been "overreacting" in response to terrorism after 9/11, "allow[ing] our fear to undermine our freedom we concede to the very terrorists we hope to defeat") (on file with the Washington and Lee Law Review).

14. See *Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724, 746–53 (S.D.N.Y. 2013) (finding that the plaintiffs did not succeed on their statutory or Fourth Amendment claims regarding the Government's bulk telephony metadata program).

15. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 280 (1945).

upholding the legality of the undeclared war with France, the Supreme Court actively participated in affirming the principle that the executive discretion to conduct an undeclared or limited war was prescribed by those actions authorized by Congress.<sup>16</sup> In one of the cases, *Little v. Barreme*,<sup>17</sup> the Court, speaking through Chief Justice Marshall, held that a Navy officer who had executed a presidential order during the war with France was liable to the owners of the vessel he had seized leaving from a French port.<sup>18</sup> One of the statutes enacted to authorize the war permitted the seizure of ships “bound or sailing to” any French port, while the President’s order said “to or from.”<sup>19</sup> Because “the legislature seem[s] to have prescribed . . . the manner in which this law shall be carried into execution,”<sup>20</sup> what might otherwise have been a reasonable order by the Commander in Chief could not make lawful the officer’s act. The Court did not abstain, nor did it defer to the presidential order.<sup>21</sup>

Similarly, in *United States v. Smith*,<sup>22</sup> Supreme Court Justice William Patterson (a Framer of the Constitution from New Jersey), sitting on circuit, upheld prosecution of Smith and others under the Neutrality Act,<sup>23</sup> a 1794 statute that makes criminal the mounting of any military operation against a nation with which

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16. See *Little v. Barreme*, 6 U.S. 170, 177 (1804) (upholding the legality of statutes of the United States prohibiting intercourse with France and its dependencies); *Talbot v. Seaman*, 5 U.S. 1, 29 (1801) (examining legislation of Congress, such as “An Act More Effectually to Protect the Commerce and Coasts of the United States,” in order to determine the “real situation of America in regard to France”); *Bas v. Tingy*, 4 U.S. 37, 43 (1800) (“The *United States* and the *French* republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authori[z]ed by the constitutional authority of our country.”).

17. 6 U.S. 170 (1804).

18. See *id.* at 179 (declaring that instructions from the Executive “cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass”).

19. An Act Further to Suspend the Commercial Intercourse Between the United States and France, ch. 10, § 8, 2 Stat. 7 (1800); *Little*, 6 U.S. at 178.

20. *Little*, 6 U.S. at 177–78.

21. *Id.* at 178–79.

22. 27 F. Cas. 1192 (C.C.D.N.Y. 1806).

23. An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, ch. 50, § 5, 1 Stat. 381 (1794).



the United States is at peace.<sup>24</sup> Smith sought immunity from prosecution on the grounds that the President had authorized his military plan against Spanish rulers in what is now Venezuela.<sup>25</sup> Justice Patterson ruled that “the president . . . cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.”<sup>26</sup>

The judicial branch also played a central role in some of the most important actions of the government during the Civil War. President Lincoln first responded to the attack on Fort Sumter by blockading the southern ports without going to Congress for a declaration of war. In *The Prize Cases*,<sup>27</sup> the Supreme Court sustained the President’s actions, by a 5-4 margin, and held that the Commander in Chief had a constitutional duty to repel the attack on the United States without awaiting special legislative authority, and that Congress’s ratification of the President’s blockade after the fact compensated for the lack of prior authorization.<sup>28</sup> Note that the Court did not decline to decide the case because of the political question doctrine or the immunity of executive officials for their official actions.

When early in the war President Lincoln unilaterally suspended the writ of habeas corpus and imposed military rule in Maryland, Chief Justice Taney ruled that the President lacked unilateral authority to suspend the writ.<sup>29</sup> Although Lincoln ignored Taney’s decision, at the end of the war the full Supreme Court ruled against the President’s effort to try civilian southern sympathizer Lambdin Milligan before a military commission in Indiana, at least in part because the civil courts were open and operating.<sup>30</sup>

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24. *See Smith*, 27 F. Cas. at 1230 (affirming that the power to make war is “exclusively vested in [C]ongress”).

25. *Id.* at 1228–30.

26. *Id.* at 1230–31.

27. 67 U.S. 635 (1862).

28. *See id.* at 668 (differentiating between the initiation of a war, for which the Executive cannot call, and situations in which “war be made by invasion of a foreign nation,” when “the President is not only authorized but bound to resist force by force”).

29. *Ex parte Merryman*, 17 F. Cas. 144, 148 (1861).

30. *Ex parte Milligan*, 71 U.S. 2, 121 (1866).

Fast forward to World War II. A few weeks after the attack on Pearl Harbor, in February 1942, President Roosevelt promulgated an executive order authorizing military commanders to prescribe “military areas” from which persons might be excluded.<sup>31</sup> Several such areas were created near the West Coast in the coming weeks, and Congress then made it a crime to remain in any military area contrary to applicable regulations. The military commander for the area then issued orders excluding all persons of Japanese ancestry from these areas. Fred Korematsu, an American citizen of Japanese ancestry, was convicted for remaining in one of the forbidden areas. His appeal, like that of Gordon Hirabayashi, who was convicted for violating a related curfew order, was representative of the 120,000 Japanese Americans who had been taken from their homes and placed in internment camps for the duration of the war. Although the Supreme Court exclaimed that the racial classification at issue in these appeals required “the most rigid” scrutiny, the Court accepted uncritically the judgment of the military authorities and of Congress that persons of Japanese ancestry presented a security risk to the United States.<sup>32</sup> The Court thus endorsed the government’s wholesale condemnation of the Japanese-American population without any record evidence of even a single instance of Japanese-American disloyalty. Careful scrutiny in theory was abdication of the Court’s role in fact.

World War II also provided a test of the open court rule adopted by the Supreme Court in *Milligan*<sup>33</sup> during the Civil War. In 1942, two German submarines landed eight saboteurs on beaches in New York and Florida. Before they could act, one of them quickly gave up the group to the FBI. President Roosevelt ordered that they be tried by military commission, which sentenced them to death. When the Supreme Court took up the legality of the military commission this time, in *Ex parte Quirin*,<sup>34</sup>

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31. Exec. Order No. 9,066, 7 Fed. Reg. 1,407 (Feb. 19, 1942).

32. *Korematsu v. United States*, 323 U.S. 214, 216, 223–24 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943). *But see Ex parte Endo*, 323 U.S. 283 (1944) (directing the issuance of a writ of habeas corpus to an admittedly loyal Japanese-American).

33. *Ex parte Milligan*, 71 U.S. 2 (1866).

34. 317 U.S. 1 (1942).

*Milligan* was distinguished.<sup>35</sup> Although one of the Germans was a dual citizen, all eight were part of the armed forces of a state on which we had declared war. The *Quirin* Court thus created a declared enemy exception to the open court rule.<sup>36</sup> On the one hand, it was extraordinary for the Supreme Court to entertain on its merits a high stakes challenge to the President's military commission when the outcome of World War II remained very much in doubt. On the other hand, the Court heard and decided the fate of the saboteurs hurriedly, without adequate preparation, and the Justices accepted uncritically dubious justifications for truncated trial procedures in the military commission.

The preeminent judicial decision in U.S. national security law was rendered during the Korean War. In *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>37</sup> the Supreme Court rejected President Truman's attempt to seize the nation's steel mills to avert what he feared would be a strike that would compromise the war effort.<sup>38</sup> Congress had considered but decided against expressly granting the President the seizure authority in the Taft-Hartley legislation, and the President's actions effectively nationalized a private industry thousands of miles from the theater of war.<sup>39</sup> Again, the Court did not decline to decide the merits of the case, and a majority agreed that important separation-of-powers principles protective of Congress's role in national security were at risk if the President's seizure was sustained.<sup>40</sup>

In more recent times, the courts began to exhibit a unique deference to the President's national security decisions involving the military.<sup>41</sup> For reasons that were never fully articulated, in the 1970s the Supreme Court characterized the military as "a society apart from civilian society," superior and more or less exempt from

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35. *Id.* at 19–20.

36. *Id.* at 29 (noting that "petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury").

37. 343 U.S. 579 (1952).

38. *Id.* at 588–89.

39. *See id.* at 586 ("When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency.").

40. *Id.* at 588–89.

41. DIANE H. MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER 1–15, 153 (2010).

civilian judicial oversight.<sup>42</sup> In a series of decisions, the Court did not ask the government to justify or even explain why an alleged military necessity justifies an intrusion on constitutional rights or the separation of powers.<sup>43</sup> The bare assertion sufficed. One effect of judicial deference to military decisions, of course, is to send a message that the military does not have the same legal obligations as other actors in our government. The other message is that the civilian commanders in chief may use the military to overcome legal limits on their actions.

#### *IV. The Federal Courts after 9/11*

##### *A. Detention and Rendition*

Within weeks of beginning ground combat in Afghanistan in late 2001, the Bush Administration had to decide where and how to detain and adjudicate the fate of persons captured on the battlefields. Bush Administration officials determined that Guantanamo offered security as well as a location that was on Cuban soil and leased to the U.S., providing cover, they assumed, from habeas corpus petitions. The goal was to have the “legal equivalent of outer space.”<sup>44</sup>

President Bush relied on his commander-in-chief power and used the military to implement a program to apprehend and detain suspected terrorists without charge, without access to counsel or other due process protections, and without the prospect of release until the end of the war. The President’s Military Order formalized a detention system and a plan for eventual military commission trials that effectively made the executive the maker, enforcer, and adjudicator of law applied to the detainees, including American

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42. *Parker v. Levy*, 417 U.S. 733, 744 (1974); *see also* *Goldman v. Weinberger*, 475 U.S. 503 (1986) (describing judicial review of the military); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (discussing judicial deference for the military generally).

43. *See, e.g.*, *Brown v. Glines*, 444 U.S. 348, 353–61 (1980) (justifying regulations intruding upon the free speech rights of members of the Air Force by asserting that such regulations were necessary to maintain the integrity of the military command structure).

44. HAROLD H. BRUFF, *BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR* 182 (2009).

citizens.<sup>45</sup> Indeed, the Marine Corps base at Guantanamo Bay was selected for the military detention and trials *because* it was believed to be beyond the reach of our civilian courts.<sup>46</sup>

Detainees soon began filing habeas corpus petitions in the federal courts challenging the lawfulness of their detention and arguing that due process required hearings to permit them to contest their combatant status. Over a period of more than four years, the lower courts and then the Supreme Court decided a series of such challenges on the merits. In doing so, the courts curtailed to some degree the discretion of the Bush Administration to run the Guantanamo facility as a sort of law-free zone. Admittedly, the decisions in *Rasul v. Bush*,<sup>47</sup> *Hamdi v. Rumsfeld*,<sup>48</sup> *Hamdan v. Rumsfeld*,<sup>49</sup> and *Boumediene v. Bush*,<sup>50</sup> were not unequivocal victories for the detainees, nor were the decisions models for clear and consistent doctrinal decision making by the judiciary. But the courts ruled that habeas corpus jurisdiction was available to the Guantanamo detainees, due process required some kind of process for the detainees, military commission trials had to comply with statutory and law of war requirements for fair procedure, and habeas corpus could be granted to the detainees by the federal courts.<sup>51</sup>

Congress first enacted the Military Commission Act<sup>52</sup> in 2006 and effectively gave President Bush the discretion to have military trials similar to those he had authorized on his own authority.<sup>53</sup>

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45. See Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

46. Cf. *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (finding that federal courts may have jurisdiction over Guantanamo alien petitioners' habeas corpus claims).

47. 542 U.S. 466 (2004).

48. 542 U.S. 507 (2004).

49. 548 U.S. 557 (2006).

50. 553 U.S. 723 (2008).

51. *Boumediene*, 553 U.S. at 794–98; *Hamdan*, 548 U.S. at 632–35; *Hamdi*, 542 U.S. at 533–39; *Rasul*, 542 U.S. at 481–85.

52. Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, and 42 U.S.C.).

53. See, e.g., 10 U.S.C. § 948d (2012) (granting the Executive Branch the power to determine whether a detainee is an enemy combatant and vesting exclusive jurisdiction over enemy combatants in Executive-appointed military tribunals).

Since 2008, the federal courts in the D.C. Circuit have struggled to develop standards to review continuing detentions.<sup>54</sup> They are deciding cases, developing criteria for deciding who may be subject to continuing detention, and applying similar criteria to challenges arising from Afghanistan.<sup>55</sup> The courts have performed their role reasonably well under the circumstances, neither deferring entirely to the government nor imposing trial-type procedures for detainees.

The courts' performance was also mixed in responding to the military detention of U.S. citizens—Hamdi and Jose Padilla—and resident alien student Ali al-Marri. Hamdi and Padilla each spent years in military detention in South Carolina, without counsel or any procedures to determine the lawfulness of detention. Hamdi was eventually deported after the Supreme Court upheld his detention but ordered that the government provide him due process.<sup>56</sup> Padilla and then al-Marri were each eventually transferred from military to civilian custody where they were tried and convicted (Padilla) or plead guilty (al-Marri) to providing material support to terrorism.<sup>57</sup> The courts acquiesced in executive branch shenanigans in shuffling them between military and civilian systems. Al-Marri received some credit at sentencing based on the harsh conditions of his military confinement, while Padilla and his mother brought civil lawsuits for wrongful

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54. See, e.g., *Aamer v. Obama*, 742 F.3d 1023, 1030, 1038 (D.C.Cir.2014) (concluding that Military Commissions Act did not preclude review of detention conditions at Guantanamo, even if it precluded review of “other actions” by detainees); *Wazir v. Gates*, 629 F. Supp. 2d 63, 67 (D.D.C. 2009) (finding that the powers granted to the executive in 10 U.S.C. § 948d were constitutional).

55. See, e.g., *Al Maqaleh v. Gates*, 605 F.3d 84, 88–99 (D.C. Cir. 2010) (assessing a habeas petition by Afghani detainees using the rubric developed in *Boumediene* and *Rasul*, filtered through a series of interpretive decisions about Guantanamo detainees made by the D.C. Circuit).

56. Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES (Oct. 12, 2004), <http://www.nytimes.com/2004/10/12/international/middleeast/12hamdi.html> (last visited Oct. 12, 2014) (on file with the Washington and Lee Law Review).

57. Abby Goodnough, *Jose Padilla Convicted on All Counts in Terror Trial*, N.Y. TIMES (Aug. 16, 2007), <http://www.nytimes.com/2007/08/16/us/16cnd-padilla.html> (last visited Oct. 12, 2014) (on file with the Washington and Lee Law Review); John Schwartz, *Plea Deal Reached With Agent for Al Qaeda*, N.Y. TIMES (May 1, 2009), <http://www.nytimes.com/2009/05/01/us/01marri.html> (last visited Oct. 12, 2014) (on file with the Washington and Lee Law Review).

confinement and mistreatment while in custody.<sup>58</sup> The lawsuits for damages were dismissed based on the immunities of the federal defendants for alleged misconduct within the scope of their official responsibilities.<sup>59</sup>

More extreme judicial deference to executive abuses was shown in the extraordinary rendition cases. In *El-Masri v. United States*,<sup>60</sup> federal courts ruled that the state secrets doctrine made it impossible for El-Masri to prove his case against the CIA.<sup>61</sup> In *Arar v. Ashcroft*,<sup>62</sup> Canadian citizen Maher Arar unsuccessfully brought suit in federal court following his detention for twelve days at Kennedy Airport and eventual rendition to Syria and torture over ten months in a Syrian prison.<sup>63</sup> Although the original detention by U.S. officials was based on intelligence provided by Canada, Arar later received a cash settlement from his home government.<sup>64</sup> Holding that Arar could not state a claim under an available federal statute nor a *Bivens* claim based on the Constitution, the Second Circuit dismissed his action.<sup>65</sup>

### B. Surveillance

Shortly after the 9/11 attacks, President Bush secretly ordered the National Security Agency (NSA) to intercept international telephone and email traffic without obtaining judicial warrants.<sup>66</sup>

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58. *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012); Schwartz, *supra* note 57.

59. *Lebron*, 764 F. Supp. 2d at 805–07.

60. 479 F.3d 296 (4th Cir. 2007).

61. *Id.* at 313.

62. 585 F.3d 559 (2d Cir. 2009).

63. *Id.* at 580–82.

64. *See Ottawa Apologizes and Compensates Arar for his Year in Hell*, National Post, <http://www.nationalpost.com/news/story.html?id=dcee6556-58fb-43b5-9d34-e4dc04cebbef&p=1> (last visited Dec. 1, 2014) (noting that Arar received a formal apology and approximately \$10.5 million in compensation from the Canadian government) (on file with the Washington and Lee Law Review).

65. *Arar*, 585 F.3d at 580–82.

66. *See 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) (last visited Dec. 1, 2005) (noting that President Bush signed an executive order approving the spying program within months of the September 11th

What became known as the Terrorist Surveillance Program (TSP) was flatly inconsistent with Congress's regulation of foreign intelligence surveillance in the Foreign Intelligence Surveillance Act (FISA).<sup>67</sup> When the program came to light, the President defended it in large part on the basis of his commander-in-chief powers and argued that the program had "helped detect and prevent possible terrorist attacks on the United States and abroad."<sup>68</sup> The full scope of the NSA programs remained hidden until the Edward Snowden disclosures in 2013 led to a raft of declassifications and statements from Administration officials. Beyond the FISA violations, the NSA program may have violated Fourth Amendment privacy and First Amendment free expression rights of innocent Americans who were subjected to surveillance without suspicion of wrongdoing or judicial process. The TSP also threatened the separation of powers by simply ignoring the express limits of FISA.

Once the TSP was exposed by the *New York Times* in December 2005, lawsuits were filed challenging the lawfulness of surveillance. The public interest plaintiffs ultimately failed to persuade a court to hear the merits of their FISA and Fourth Amendment claims due to a lack of standing—they could not show that any particular conversation had been intercepted.<sup>69</sup> After Congress authorized sweeping programmatic electronic surveillance in the 2008 FISA Amendments Act,<sup>70</sup> and the Snowden documents showed the wholesale NSA collection of metadata of Americans under the authority of a USA PATRIOT Act<sup>71</sup> amendment to FISA, lawsuits were filed challenging the bulk collection. To date, district courts have reached the merits and split

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

67. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1885(c) (2012)).

68. President George W. Bush, Radio Address to the American People, Dec. 17, 2005, 2005 Wkly. Comp. Pres. Doc. 1880.

69. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1154–55 (2013).

70. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified at 50 U.S.C. §§ 1801–1885(c) (2012)).

71. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8, 12, 15, 18, 20, 31, 42, 49, and 50 U.S.C.).



on whether the metadata collection violates FISA and the Fourth Amendment.<sup>72</sup> Appeals are pending.<sup>73</sup>

### C. Targeting

When the media reported rumors that American-citizen-turned-al Qaeda-operative Anwar al-Aulaqi may be on a target list for U.S. drone strikes in the campaign against al Qaeda in Yemen, al-Aulaqi's father filed a lawsuit seeking to enjoin any lethal action against his son. Applying traditional standing doctrine, his lawsuit was dismissed, unsurprisingly.<sup>74</sup> A father lacks standing to sue on behalf of his son. After al-Aulaqi's death in a drone strike in 2011, a second lawsuit brought by his parents seeking damages for a constitutional tort was dismissed because of "special factors" counseling hesitation by the courts under the *Bivens* doctrine.<sup>75</sup> The *Bivens* doctrine and its application to constitutional torts in national security settings have never been clear or adequately illuminated by the courts. More recently, however, FOIA litigation produced more transparency in the targeting debate, when a federal court ordered the release of an Office of Legal Counsel memorandum written in 2010 that concluded that targeting al-Aulaqi would be lawful.<sup>76</sup>

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72. See *Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724, 746–53 (S.D.N.Y. 2013) (concluding that FISA authorized substantially all metadata collection and that the collection did not violate the Fourth Amendment); *Klayman v. Obama*, 957 F. Supp. 2d 1, 9 (D.D.C. 2013) (concluding that the court lacked jurisdiction to hear plaintiffs' FISA claims but that the plaintiffs demonstrated a "substantial likelihood of success on the merits of their Fourth Amendment claim").

73. Notice of Appeal, *Klayman v. Obama*, No. 14-5209 (D.C. Cir. Aug. 28, 2014); Notice of Civil Appeal, *Am. Civil Liberties Union v. Clapper*, No. 14-42 (2d Cir. Jan. 6, 2014). The *Clapper* appeal was argued on September 2nd.

74. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 54 (D.D.C. 2010).

75. *Al-Aulaqi v. Panetta*, No. 12-1192, 2014 WL 1352452, at \*6, \*19 (D.D.C. Apr. 4, 2014).

76. *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 124 & app. A (2d Cir. 2014).

*V. Conclusion*

Over time and with varying degrees of conviction, the courts have served as a necessary counterweight to government overreaching in times of national security crisis, when passions and momentary impulses are most likely to affect policy. On the one hand, it is easy to underestimate the institutional problems confronting judges who are asked to make momentous decisions in times of national crisis—difficulties of fact-finding and assessing the risks of being wrong, among others. On the other hand, no other part of government is as equipped as the judiciary to anchor the nation to its core values during a storm. The risks of judicial tolerance or abstinence are simply too great now, as they have been in other times of war.