THE SUPREME COURT AND HOUSE OF LORDS IN THE WAR ON TERROR: *INTER ARMA SILENT LEGES?*

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INTRODUCTION

The period since the terrorist attacks of September 11, 2001 has witnessed the implementation of aggressive counter–terrorism measures around much of the Western world. This trend is exemplified by the United States and the United Kingdom, the two jurisdictions with which this

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Article is concerned. Many of these counterterrorism measures raise questions about the appropriate boundaries of state power and have serious implications for individual liberty. As affected individuals brought litigation, the United States Supreme Court and the United Kingdom's House of Lords, the highest courts in their respective jurisdictions,[1] were forced to grapple with these difficult issues.

This Article is an attempt to situate the major decisions of the Supreme Court and the House of Lords concerning aspects of the War on Terror in the historical context of judicial behavior in times of war or crisis. The conventional account of judicial behavior during such times posits that courts are ineffective guarantors of individual liberty because they inevitably defer to executive claims of national security. Only after the period of war has passed do the courts reassert themselves, resulting in a cyclical pattern of contraction and expansion of liberty.[2]

How do the relevant post–9/11 decisions of the Supreme Court and House of Lords fit within this pattern, if at all? This Article considers five possible ways of understanding the relevant decisions in light of the conventional account of judicial behavior described above. First, the decisions of the Supreme Court and House of Lords since 9/11 may represent a break in the historical pattern of judicial deference. Second, the conventional account may simply be incorrect or incomplete. Three further explanations are largely consistent with the conventional account. First, these cases may be sufficiently remote in time from the relevant events such that courts feel confident in reasserting their authority. Second, the courts may view the War on Terror as being in some way qualitatively different from traditional war. The final explanation is that the relevant post–9/11 decisions, while appearing to be different, continue to exhibit deference in a manner consistent with the conventional account.

Part I of this Article sets out the conventional account in greater detail, together with supporting decisions from each jurisdiction. Part II outlines the recent decisions of the Supreme Court and House of Lords that have concerned aspects of the War on Terror. Part III provides an extended discussion of the five possible ways of reconciling the conventional account with the recent decisions. Part IV draws some conclusions as to the most pertinent explanations.

I. THE CONVENTIONAL ACCOUNT AND ITS BASIS

During times of emergency, those charged with protecting national security and public safety have exhibited a historical tendency to overreact.

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1. In October 2009, the Supreme Court of the United Kingdom replaced the Appellate Committee of the House of Lords.

2. This idea is encapsulated in the Latin maxim that appears in the title ("In the midst of war, the law falls silent").

As Laurence Lustgarten and Ian Leigh state, "official responses to emergencies which were overwhelmingly viewed at the time as not merely justifiable but compelling, have consistently turned out to be excessive, unnecessary, and often shameful."[3] Allied with this phenomenon, according to the conventional account of judicial behavior in times of war and crisis, is the ineffectiveness of the courts in checking the excesses of the executive because they tend to defer to executive claims of national security.[4]

According to Lord Steyn, deference "refers to the idea of a court, exceptionally, out of respect for other branches of government and in recognition of their democratic decision-making role, declining to make its own independent judgment on a particular issue."[5] Similarly, Aileen Kavanagh states that deference is where "judges assign varying degrees of weight to the judgment of the elected branches, out of respect for their superior competence, expertise and/or democratic legitimacy."[6]

There are two main reasons why the courts are reluctant to get involved in cases involving national security, and thus have a tendency to defer in such matters. The first concern is that it is not constitutionally appropriate for the judiciary to deal with such issues, and that proper recourse in such a policy-driven area lies with the political branches.[7] The second concern is practical. Courts may lack the information needed to determine the case and

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3. LAURENCE LUSTGARTEN & IAN LEIGH, IN FROM THE COLD 19 (1994).

4. *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1034 (2003) ("Notwithstanding statements about the courts' role in safeguarding human rights and civil liberties precisely when those rights and liberties are most at risk, when faced with national crises, the judiciary tends to 'go[ ] to war.'"); Joseph W. Bishop, Jr., *Law in the Control of Terrorism and Insurrection: The British Laboratory Experience*, 42 LAW & CONTEMP. PROBS. 140, 187 (1978) ("[I]t is more instructive to look at what the courts do than at what they say; in England, as in the United States, they have not been disposed straitly to confine the powers granted the executive by statute in what they perceive as a real emergency."); CONOR GEARTY, CIVIL LIBERTIES 188 (2007) ("[A]ny answer to these points must take into account . . . the historically very bad record of the entire judiciary in protecting civil liberties in the face of executive and parliamentary action. The lesson of the past is that it is delusional to rely on judges to lead on in the hard work of civil libertarian protection.") [hereinafter GEARTY, CIVIL LIBERTIES]; DAVID DYZENHAUS, THE CONSTITUTION OF LAW 17 (2006) ("[T]he judicial record in enforcing the rule of law in [emergency] situations is at worst dismal, at best ambiguous."). *See also* Eyal Benvenisti, *National Courts and the "War on Terrorism," in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 307, 309–17 (Andrea Bianchi ed., 2004); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2568–71 (2003) [hereinafter Cole, *Judging the Next Emergency*].

5. Lord Steyn, *Deference: A Tangled Story* P.L. 346, 349 (2005).

6. AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 169 (2009). *See also* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 948 (1999) (describing the principle of deference as the idea that "judges should not second-guess the decisionmaker under review or impose their own judgments about the wisdom of a policy.").

7. LUSTGARTEN & LEIGH, *supra* note 3, at 329.

face difficulties with maintaining the secrecy of sensitive information given the adversarial process.[8] Whatever the precise reasons behind this judicial reticence with regard to national security, there is certainly a corpus of judicial decisions in each jurisdiction that forms the basis of the conventional account.[9] These cases are discussed further below.

A. The United States

In 1798, in the context of a looming war with France and bitter political and ideological division between the Federalists and Republicans, the Federalist–controlled Congress enacted the Alien and Sedition Acts.[10] The Alien Acts authorized the President to detain and expel any alien he considered a threat to the United States as well as any enemy alien during a declared war.[11] The Sedition Act criminalized "false, scandalous and malicious writing" critical of the government, Congress or the President.[12] This Act became a weapon to silence political dissent from the Francophile Republicans.[13]

The judges who heard cases involving the Sedition Act, including three Supreme Court Justices on circuit, upheld it.[14] However, the Act turned public sentiments against the Federalists, and the Republicans swept into power in the 1800 elections.[15] The newly elected President Jefferson pardoned those convicted under the Act; Congress later repaid the fines imposed under the Act with interest.[16] The Supreme Court itself later stated that "the attack upon [the Act's] validity has carried the day in the court of history."[17]

During the Civil War, President Lincoln authorized significant restrictions on civil liberties. Lincoln's suspension of habeas corpus, for

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8. *Id. See also* KAVANAGH, *supra* note 6, at 211–13.

9. *See generally* George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1, 10–32 (1984); Daniel C. Kramer, *The Courts as Guardians of Fundamental Freedoms in Times of Crisis,* 2 UNIVERSAL HUM. RTS. 1, 3–9 (1980).

10. GEOFFREY R. STONE, PERILOUS TIMES 25-29 (2004).

11. Alien Friends Act, ch. 58, 1 Stat. 570 (1798) (expired in 1800); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (Act remains in force). *See* 50 U.S.C. §§ 21–24 (2006).

12. Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596 (1798) (expired in 1800).

13. STONE, *supra* note 10, at 33–38.

14. William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. Y.B. HUM. RTS. 11, 12–13 (1988). The Supreme Court, however, had yet to assert the power of judicial review. *See* Arthur H. Garrison, *The Internal Security Acts of 1798: The Founding Generation and the Judiciary during America's First National Security Crisis*, 34 J. SUP. CT. HIST. 1, 24 (2009).

15. STONE, *supra* note 10, at 71.

16. *Id.* at 73.

17. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964). *See also* Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 155 (1961) (Black, J., dissenting).

which he later obtained legislative sanction, resulted in the military detention of some 20,000 persons suspected of being sympathetic to the South.[18] Some of these persons were simply detained without trial, while others were tried before military tribunals.[19] In a rare judicial decision that attempted to restrain the executive in a time of war, Chief Justice Taney, sitting as a circuit judge, ruled Lincoln's suspension of the writ of habeas corpus unconstitutional on the basis that only Congress had the power to suspend the writ.[20] Despite this, Lincoln paid little heed to Taney's decision.[21]

The most famous Supreme Court decision to come out of the Civil War was *Ex parte Milligan*, where the Court ruled that civilians in Indiana could not be tried by military tribunal.[22] Milligan was accused of being part of the Sons of Liberty, a rebel group that had undermined the Union war effort. He was arrested by the military, tried and convicted before a military tribunal, and then sentenced to death. The Court ruled unanimously that the military tribunal lacked the jurisdiction to try a civilian such as Milligan.[23] However, the Court divided on the reason for this outcome. Five Justices were of the view that due process dictated the result.[24] The remaining four were of the view that the problem was a lack of proper Congressional authorization.[25]

The period around World War I witnessed the prosecution of many anti-war agitators and socialists for adopting positions opposing the war effort.[26] In a series of cases, the Supreme Court upheld the convictions of these radicals under the Espionage Act of 1917.[27] In 1919, the Court decided *Schenck v. United States*.[28] The defendants in *Schenck* had been convicted of conspiring to violate the Espionage Act by distributing leaflets that urged draftees to resist the draft. The leaflets in question argued that the draft was illegal, immoral and only benefited capitalists.[29] Justice Holmes, writing for a unanimous Court, enunciated the notable "clear and present danger" test, but upheld the defendants' convictions. Justice Holmes stated that free speech protection was necessarily different during a time of war, and

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18. Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 482–83 (2005).

19. Brennan, *supra* note 14, at 13.

20. *Ex parte* Merryman, 17 F. Cas. 144, 149 (1861).

21. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 38 (1998).

22. 71 U.S. 2 (1866).

23. *Id.* at 122.

24. *Id.* at 120–21.

25. *Id.* at 137 (Chase, C.J., dissenting).

26. *See* Mark Tushnet, *Defending* Korematsu*?*, *in* THE CONSTITUTION IN WARTIME 124, 126 (Mark Tushnet ed., 2005) [hereinafter Tushnet, *Defending* Korematsu*?*].

27. Ch. 30, 40 Stat. 217 (1917) (repealed 1948).

28. 249 U.S. 47 (1919).

29. *Id.* at 50–51.

rejected the argument that the leaflets were protected by the First Amendment:

> When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[30]

The Court continued to uphold convictions under the Espionage Act for similar speech-based acts in decisions such as *Debs v. United States*,[31] and *Abrams v. United States*,[32] which considered the Act after its amendment by the Sedition Act of 1918.[33] Justice Holmes wrote for a unanimous Court in *Debs*, but penned a famous dissent in *Abrams*.[34] He was joined in dissent by Justice Brandeis, but their view of the First Amendment remained a minority one into the 1920s,[35] and only became the mainstream view many decades later.[36]

World War II provided further instances of judicial acquiescence towards draconian executive measures. The case of *Ex parte Quirin* arose out of a group of eight Nazi saboteurs who landed on the east coast of the United States in June 1942.[37] They arrived wearing German military uniforms, which they buried at the beach before continuing on in civilian clothing. All were quickly captured by the Federal Bureau of Investigation, partly because one of the saboteurs turned himself in.[38] President Roosevelt directed that the saboteurs be tried by military commission and denied access to civilian courts.[39] The saboteurs petitioned the Supreme Court, arguing that they were entitled to be tried in civilian court. The Court, after convening a special term, heard the case in July 1942.[40] It rejected all the saboteurs' claims, but did not issue a full opinion until October. By this time all of the saboteurs had been tried and found guilty by the military commission; six of them had already been executed.[41] Given this *fait accompli*, the Court's full decision unsurprisingly upheld the trial of the saboteurs by military commission. Writing some sixty years later, Justice

30. *Id.* at 52.
31. 249 U.S. 211 (1919).
32. 250 U.S. 616 (1919).
33. Ch. 75, 40 Stat. 553 (repealed 1921).
34. Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).
35. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925); *see, e.g.*, Whitney v. California, 274 U.S. 357 (1927).
36. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).
37. 317 U.S. 1, 21 (1942).
38. Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 62–64 (1980). *See also* LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER 93 (2005).
39. Belknap, *supra* note 38, at 65.
40. *Id.* at 69.
41. *Id.* at 77.

Scalia observed that *Quirin* "was not [the Supreme Court's] finest hour."[42] Others have offered even harsher critique.[43]

The most notorious instance of an abridgment of civil liberties from World War II, however, was the Japanese internment. President Roosevelt's Executive Order 9066,[44] together with supporting legislation subsequently enacted by Congress,[45] formed the legal basis for the forced evacuation and eventual internment of more than 110,000 people of Japanese heritage, most of them American citizens.[46] The majority were detained in ten internment camps behind barbed wire and guard towers for three years, despite the absence of any documented instance of sabotage or disloyalty on the part of a Japanese person living in the United States.[47]

Aspects of the internment were challenged in a series of cases. In *Hirabayashi v. United States*,[48] the Court considered the legality of a dusk–to–dawn curfew imposed on "all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry" residing in a defined area.[49] Hirabayashi launched a test case by deliberately violating the curfew. He was prosecuted and convicted for knowingly disregarding restrictions of a military commander in a military area.[50] The Court unanimously upheld his conviction. Although a number of the Justices were troubled by the case, the Court ultimately deferred to the executive on a matter relating to war:

> Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. . . . Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.[51]

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42. Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004).

43. *See* Belknap, *supra* note 38, at 95 (accusing the Court of falling "into step with the drums of war.").

44. 7 Fed. Reg. 1407 (Feb. 19, 1942).

45. National Emergencies Act, Pub. L. No. 77–501–503, § 56, Stat. 173 (1942), *repealed by* P.L. No. 94–412 § 501(e), 90 Stat. 1255 (1976).

46. *See* JENNIFER ELSEA, CONG. RESEARCH SERVICE, DETENTION OF AMERICAN CITIZENS AS ENEMY COMBATANTS, 21–22 (Mar. 31, 2005), *available at* http://www.fas.org/sgp/crs/natsec/RL317 24.pdf.

47. STONE, *supra* note 10, at 287.

48. 320 U.S. 81 (1943).

49. *Id.* at 88.

50. *Id.* at 83.

51. *Id.* at 93.

The Court was again confronted with the internment in *Korematsu v. United States*.[52] Korematsu defied the military's order to leave his California home;[53] he was subsequently arrested and convicted of remaining in a military area contrary to a military order that required the exclusion of "all persons of Japanese ancestry."[54] The Supreme Court upheld his conviction by six to three. Justice Black, writing for the majority, accepted the Executive's claims of military necessity underlying the exclusion of Japanese on the American West Coast without question:

> Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that, at that time, these actions were unjustified.[55]

The end of World War II was followed by the onset of the Cold War, and the focus shifted to the threat of communism. The fear of what was perceived as a worldwide communist movement dedicated to overthrowing the United States government, together with an unstable and uncertain international environment, left the American people with what Geoffrey Stone describes as a "pervasive sense of fear".[56] It was in this broader context that the Supreme Court decided a number of decisions implicating the First Amendment.[57] Among these was the Court's 1951 decision of *Dennis v. United States*,[58] which considered the appeals of leaders in the

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52. 323 U.S. 214 (1944). The other Supreme Court cases were Yasui v. United States, 320 U.S. 115 (1943) and *Ex parte* Endo, 323 U.S. 283 (1944).

53. He did so for personal reasons: he wanted to remain with his Italian–American girlfriend. *See* STONE, *supra* note 10, at 299.

54. *Korematsu*, 323 U.S. at 215–16.

55. *Id.* at 223–24. The claim of military necessity was actually very weak. Even before President Roosevelt signed Executive Order 9066, top military officers had testified before a House committee that the probability of attack on the West Coast was virtually zero. They also testified that there was no known instance of Japanese residents in Hawaii or the West Coast spying for Japan. *See* STONE, *supra* note 10, at 295. *See also* Eric L. Muller, Hirabayashi: *The Biggest Lie of the Greatest Generation*, UNIV. N.C. LEGAL STUDIES RESEARCH, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1233682.

56. STONE, *supra* note 10, at 323.

57. *Id*. at 395–423.

58. 341 U.S. 494 (1951).

Communist Party against their convictions for conspiring to advocate the overthrow of the United States, an offence under the Smith Act.[59] A majority of six Justices upheld the convictions.[60] As Stone observes, *Dennis* "involved the direct criminal prosecution of the leaders of Communist Party at the height of the nation's anxiety over Communist subversion."[61] So the outcome is perhaps unsurprising. Indeed it was only from 1957—after the Korean War, after the death of Stalin, and as McCarthyism waned—that the Court's endorsement of aggressive anti-Communist measures ended.[62]

B. The United Kingdom

During World War I, the Defence of the Realm Acts 1914-1915 delegated broad powers to the executive branch, allowing it to make regulations to secure public safety or the defense of the realm.[63] In June 1915, in order to deal with a perceived threat from those who were not technically enemy aliens,[64] the government promulgated Regulation 14B under the authority of the Defence of the Realm (Consolidation) Act 1914.[65] Regulation 14B permitted the internment of any person of hostile origin or association, where the Secretary of State for the Home Department (Home Secretary) considered it expedient for securing public safety or defense.[66] In addition to some 30,000 enemy aliens interned under the exercise of the prerogative,[67] approximately 160 people were interned under Regulation 14B's authority.[68]

Regulation 14B was challenged in the case of *R v. Halliday, ex parte Zadig*.[69] In *Halliday*, a majority of the House of Lords ruled that the general words of the empowering statute were sufficient to impliedly authorize

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59. Pub. L. No. 670, 54 Stat. 671 (1940).

60. *Dennis*, 341 U.S. 494–95.

61. STONE, *supra* note 10, at 402.

62. *Id*. at 413.

63. *See* Defence of the Realm Act, 1914, 4 & 5 Geo. 5, c. 29; Defence of the Realm (No. 2) Act, 1914, 4 & 5 Geo. 5 c. 63, § 1 (Eng.); *See* Defence of the Realm (Consolidation) Act, 1914, 4 & 5 Geo. 5, c. 29, § 1 (Eng.). For later Acts, see Cornelius P. Cotter, *Constitutionalizing Emergency Powers*, 5 STAN. L. REV. 382, 387 n. 29 (1952–1953).

64. Tom Bingham, *Personal Freedom and the Dilemma of Democracies*, 52 INT'L & COMP. L. Q. 841, 846 (2003). *See also* Rachel Vorspan, *Law and War: Individual Rights, Executive Authority, and Judicial Power in England During World War I*, 38 VAND. J. TRANS. L. 261, 277 (2005).

65. 1914, 4 & 5 Geo. 5, c. 29, § 1 (Eng.).

66. DAVID BONNER, EXECUTIVE MEASURES, TERRORISM AND NATIONAL SECURITY 53 (2007); Cotter, *supra* note 63, at 389.

67. LUSTGARTEN & LEIGH, *supra* note 3, at 173; *see also* Vorspan, *supra* note 64, at 277.

68. A. W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS 17 (1992).

69. R v. Halliday, *ex parte* Zadig, [1917] A.C. 260 (Eng.) [hereinafter *Halliday*]; *see also* David Foxton, R. v. Halliday *ex parte* Zadig, *in Retrospect*, 119 L.Q. REV. 455, 455 (2003).

Regulation 14B, hence justifying the detention of Zadig, a naturalized British citizen of German descent.[70] Lord Shaw, in dissent, argued that if Parliament had intended to delegate such sweeping power to the executive, it would surely have done so more overtly. In Lord Shaw's view, clear and express words in the empowering statute were required.[71] To not require clear, specific statutory authorization was to casually "imply the repeal of laws and liberties fundamental to British citizenship."[72]

Immediately prior to the outbreak of hostilities in World War II, Parliament enacted the Emergency Powers (Defence) Act 1939.[73] Like its World War I predecessors, this Act delegated power to the executive to make regulations that appeared necessary for a number of purposes including public safety, the defense of the realm, and the efficient prosecution of the war; once again, the delegation of power essentially gave the executive *carte blanche*. However, unlike its predecessors, the Act expressly provided for the power to establish internment by regulation.[74]

As Nazi Germany gained military ascendancy in 1940, fears of a fifth column arose and the pressure to intern in the name of national security increased.[75] Some 28,000 enemy aliens were detained under the prerogative.[76] Additionally, the government promulgated Regulation 18B of the Defence (General) Regulations, which authorized the internment of British subjects considered security risks. Approximately 2,000 persons were so detained.[77]

A number of internment cases reached the courts. The most (in)famous was *Liversidge v. Anderson*, where the House of Lords rejected a challenge to Regulation 18B.[78] On its face, Regulation 18B permitted the Home Secretary to order a person detained "if he had reasonable cause to believe" the person was of hostile origin or associations, or that they had recent involvement in acts prejudicial to public safety or the defense of the realm.[79] A majority held that the regulation only required the Home Secretary subjectively believe the detainee had hostile origins or associations; the Home Secretary's order was not to be second–guessed with an inquiry into the grounds for his belief.[80] The majority reached this conclusion despite the

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70. *Halliday*, [1917] A.C. 260; LUSTGARTEN & LEIGH, *supra* note 3, at 173.
71. *Halliday*, [1917] A.C. 260 at 291–94.
72. *Id.* at 299.
73. 2 & 3 Geo. 6, c. 62 (Eng.).
74. SIMPSON, *supra* note 68, at 46; Bishop, *supra* note 4, at 144.
75. LUSTGARTEN & LEIGH, *supra* note 3, at 174.
76. SIMPSON, *supra* note 68, at 258.
77. *Id.* at 1. *See also* BONNER, *supra* note 66, at 64.
78. Liversidge v. Anderson, [1942] A.C. 206 (appeal taken from Eng.); *see also* SIMPSON, *supra* note 68, at 333–45, 355–66.
79. *Liversidge*, [1942] A.C. at 220.
80. *Id.* at 224 (Viscount Maugham), 254 & 258 (Lord MacMillan), 261 (Lord Wright), 282 (Lord Romer). There was a patina of due process in the form of an administrative appeal before an advisory committee, which was supposed to inform detainees

fact that the Regulation's original wording, which required that the Home Secretary merely be "satisfied," had been changed to "reasonable cause to believe" because of parliamentary pressure.[81] Although the majority left open a theoretical avenue of review in the form of an exception for bad faith,[82] the upshot of the decision was to make the Home Secretary's decision effectively unreviewable.[83]

Lord Shaw's earlier dissenting role was reprised here by Lord Atkin. Lord Atkin argued that, given the Regulation's wording, the courts were entitled to do more than simply accept the government's word on trust.[84] His dissent pulled no punches when it came to his judicial colleagues:

> I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. . . . In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. . . . In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.[85]

Subsequent court decisions during the Cold War continued the pattern of the wartime decisions, deferring to executive claims of national security even where the civil liberties of those concerned were severely affected.[86] In *Ex parte Hosenball*,[87] the journalist Mark Hosenball sought to challenge the Home Secretary's decision to have him deported using a discretionary power to order deportation where it was "conducive to the public good."[88] Where national security concerns formed the basis of a deportation, there was no right of appeal.[89] Instead there was an informal review process involving an advisory panel.[90] At a hearing before the panel, the person

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of the grounds for their detention, and having heard from detainees, render non-binding advice to the Home Secretary. In practice, the advisory committee was itself not often privy to the grounds underlying the detention of detainees. *See* SIMPSON, *supra* note 68, at 88–89; A.W.B. Simpson, *Rhetoric, Reality, and Regulation 18B*, DENNING L.J. 123, 133 (1988).

81. SIMPSON, *supra* note 68, at 58-65; LUSTGARTEN & LEIGH, *supra* note 3, at 176.

82. *Liversidge*, [1942] A.C. at 224 (Viscount Maugham), 258 (Lord MacMillan), 261 (Lord Wright) 278 (Lord Romer); *see also* SIMPSON, *supra* note 68, at 362.

83. *See* BONNER, *supra* note 66, at 67.

84. *Liversidge*, [1942] A.C. at 246–47.

85. *Id.* at 244. Lord Atkin was subsequently ostracized by his judicial colleagues, quite possibly because of the strong tone of his dissent. *See* R.F.V. Heuston, Liversidge v. Anderson *in Retrospect*, 86 L.Q.R. 33, 48 (1970).

86. GEARTY, CIVIL LIBERTIES, *supra* note 4, at 36.

87. [1977] 1 W.L.R. 766 (C.A.) (appeal taken from Eng.).

88. Immigration Act, 1971, ch. 77, § 3(5) (U.K.).

89. Immigration Act, 1971, ch. 77, § 15(3) (U.K.) (repealed). *See* LUSTGARTEN & LEIGH, *supra* note 3, at 183–84.

90. *See* Nicholas Blake, *Judicial Review of Expulsion Decisions: Reflections on the UK Experience*, *in* THE UNITY OF PUBLIC LAW 225, 235–36 (David Dyzenhaus ed., 2004).

could make representations and call witnesses, but could not hear or challenge the case brought against him. There was also no right to legal representation. After the hearing, the Home Secretary would reconsider the decision to deport in light of the panel's confidential advice.[91]

Hosenball was only notified that he had obtained information harmful to the national security of the United Kingdom, including information harmful to servants of the Crown.[92] He claimed that the deportation procedure was contrary to the principles of natural justice, because he had not been provided adequate notice of the allegations against him. This argument failed in the Court of Appeal.[93] Lord Denning cited with approval the majority judgments in *Liversidge* and *Halliday*, and stated that this too, was a case about national security. In such a case, even the principles of natural justice had to be relaxed.[94]

In 1983, the Minister of Civil Service, Margaret Thatcher, decided that union membership was to be banned at Government Communications Headquarters (GCHQ),[95] and issued an instruction to that effect. Those affected, the public servants who worked at GCHQ, sought judicial review, claiming that the principles of natural justice required prior consultation before changes were made to their employment conditions.[96] In the ensuing House of Lords decision, the majority ruled that the exercise of the prerogative, which was relied on as the source of power for Thatcher's actions, was in principle amenable to judicial review,[97] and that the established practice of consultation with the unions at GCHQ gave rise to a legitimate expectation that the practice would continue. This would ordinarily have been sufficient to hold the order banning union membership unlawful for breach of the principles of natural justice, but for the imperatives of national security.[98] Ultimately, the government prevailed because the Law Lords accepted that the decision to ban union membership was announced without prior consultation due to national security; any advance notice of the intention to abolish union membership might itself

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This process was modeled on the procedures set up for the administration of Regulation 18B in World War II. *See* DYZENHAUS, *supra* note 4, at 161.

91. *Hosenball*, [1977] 1 W.L.R. at 780. *See also* LUSTGARTEN & LEIGH, *supra* note 3, at 185.

92. *Hosenball*, [1977] 1 W.L.R. at 770–71. For a fuller account, see LUSTGARTEN & LEIGH, *supra* note 3, at 185.

93. *Hosenball*, [1977] 1 W.L.R. at 782–83. *See also* LUSTGARTEN & LEIGH, *supra* note 3, at 185–86.

94. *Hosenball*, [1977] 1 W.L.R. at 778–79.

95. GCHQ collects signals intelligence. It is the British counterpart of the National Security Agency.

96. Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374 (H.L.) 394 (appeal taken from Eng.) [hereinafter *GCHQ case*].

97. *Id.* at 399–400 (Lord Fraser), 407 (Lord Scarman) & 410 (Lord Diplock).

98. *Id.* at 401 (Lord Fraser), 412 (Lord Diplock).

have resulted in industrial action, the very thing that the decision was meant to prevent.[99]

Once national security was invoked, the judges quickly fell into line. Lord Diplock, for example, emphasized that national security was an area where the courts deferred: "It is par excellence a non–justiciable question."[100] Notably, the "ample evidence,"[101] as Lord Diplock put it, of the national security interest at stake consisted of a Cabinet Secretary's sworn assertion that the non–consultation with the unions had been motivated by the government's fears of provoking industrial action that would in turn threaten national security.[102] The House of Lords proved generously credulous, as this ultimately decisive national security argument appeared only after the government had lost at first instance.[103]

The case of *R v. Secretary of State for Home Affairs ex parte Cheblak* again concerned the power to deport for reasons of national security.[104] Cheblak, a Lebanese resident of the United Kingdom since 1975, was detained pending deportation upon the start of hostilities in the first Gulf War.[105] Like Hosenball, because national security concerns were the basis of his deportation, his only recourse was to appeal to the advisory panel. Cheblak subsequently challenged his treatment in court.

The legality of Cheblak's detention, and by extension those in the same situation as him,[106] turned on the contents of the notice provided. Cheblak's

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99. *Id.* at 403 (Lord Fraser), 412 (Lord Diplock). There had been seven industrial disputes at GCHQ between 1979 and 1981. *See* Gavin Drewry, *The GCHQ Case—A Failure of Government Communications*, 38 PARL. AFFAIRS 371, 376 (1985).

100. *GCHQ case*, [1985] A.C. at 412 (Lord Diplock).

101. *Id.*

102. *See* LUSTGARTEN & LEIGH, *supra* note 3, at 331. Lustgarten and Leigh are particularly critical of this aspect of the decision. *See id*. at 351.

103. *Id.* at 332. Lustgarten and Leigh emphasize that the judgments should be understood in the context of the Cold War:

> They arise from the fear-ridden atmosphere of the days when the Cold War divisions calcified into rival military blocks, and reflect unspoken political assumptions so long dominant and hence lying so deep that the Law Lords may not have been aware of how powerfully those assumptions had shaped their approach to the legal issues.

Id. at 329.

104. [1991] 1 W.L.R. 890 (C.A.) (Eng.).

105. Immigration Act, 1971, ch. 77, § 5(5), sch. 3 (U.K.); LUSTGARTEN & LEIGH, *supra* note 3, at 187. People with links to the Palestine Liberation Organization and Iraqi nationals with military links in particular were targeted on the basis that they might engage in terrorist attacks in the United Kingdom. *See* BONNER, *supra* note 66, at 126.

106. Cheblak himself was eventually not deported, but the case established an important precedent, particularly in relation to the 171 foreign nationals from the Middle East region served with deportation notices and detained. *See* Ian Leigh, *The Gulf War Deportations and the Courts* P.L. 331, 333 (1991). These detentions, too, proved to be an overreaction. *See* LUSTGARTEN & LEIGH, *supra* note 3, at 190. *See also* Nick Cohen, *Return of the H-Block* THE OBSERVER, Nov. 18, 2001 at 31; Home Affairs Committee, The Anti–

notice only stated that he was to be deported for reasons of national security, although in the course of proceedings, counsel for the government revealed that he was alleged to have unspecified connections to terrorism, making him a security risk.[107] The Court of Appeal rejected the argument that Cheblak had not been provided with sufficient reasons for his deportation. Lord Donaldson ruled that the court, in the absence of bad faith, was not in a position to second–guess a Home Office affidavit that stated further notice could not be given because further disclosure might threaten national security.[108]

The Court was plainly of the view that the first recourse should be the non–statutory advisory panel.[109] The Court claimed to be willing to review the fairness of the panel's procedures, but the fact that it was dealing with matters of national security also had to be taken into account.[110] As for the Home Secretary's decision, this was also theoretically subject to judicial review. However, given that the Home Secretary could not be compelled to produce any further information about what motivated his decision, the decision was for all intents and purposes unreviewable.[111]

C. Buyer's Remorse

The history of judicial deference during times of war or crisis (real or perceived) seems quite clear. After the war or crisis has passed, there is often a change of attitude. As David Dyzenhaus observes, after the fact the majority judgments tend to be regarded as "badges of shame," and it is the dissenting judgments that are seen as charting the correct course for the future.[112] This *ex post* regret is exemplified by *Korematsu* and *Liversidge,*

Terrorism, Crime and Security Bill 2001–2 (First Report of Session 2001-2002), Nov. 19, 2001, H.C. 351, at [32] (U.K.), *available at* http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/351/35102.htm.

107. [1991] 1 W.L.R. at 896.

108. *Id.* at 903, 905. For a critical view, see Leigh, *supra* note 106, at 334.

109. *Cheblak*, [1991] 1 W.L.R. at 906–08.

110. *Id.* at 902.

111. *Id.* at 905. The Court's retreat behind the accountability mechanisms of the advisory panel and the Home Secretary's accountability to Parliament is problematic. *See id.* at 902. The hearings before advisory panel did not match the rosy picture that the Court drew: the average hearing was over in 45 to 60 minutes. The Home Secretary's accountability to Parliament in practice amounted to little: there was no accountability for failure to follow the advisory panel's advice because the panel's recommendations were secret. *See* LUSTGARTEN & LEIGH, *supra* note 3, at 188–89.

112. David Dyzenhaus, *Cycles of Legality in Emergency Times*, 18 P.L. REV. 165, 165 (2007) [hereinafter Dyzenhaus, *Cycles of Legality*]. *See also* Tushnet, *Defending* Korematsu*?*, *supra* note 26, at 127 ("[T]he pattern commonly attributed to the civil liberties implications of government policies in wartime: The government acts, the courts endorse or acquiesce, and—sooner or later—society reaches a judgment that the action was unjustified and the courts mistaken."); BRUCE ACKERMAN, BEFORE THE NEXT ATTACK 60–61 (2006) (discussing the pattern of crisis, re-examination after the fact, followed by the "casting [of]

the two World War II-era cases that in many ways have come to represent the wartime phenomenon of executive overreaction coupled with judicial deference.

The failure of the Supreme Court to hold the government's evacuation and internment of Japanese in the United States unconstitutional in the face of claims of military necessity is well known. Over time, many participants, including government officials and Supreme Court Justices, came to regret their roles in the affair.[113] The *Korematsu* decision itself became a legal pariah.[114] More than forty years later, the United States government would apologize for the internment.[115] Similarly, the hands-off approach taken by the House of Lords in cases such as *Liversidge* has also met with criticism.[116] The case is most well remembered for Lord Atkin's celebrated dissent,[117] and in the court of history, Lord Atkin's view has seemingly prevailed.[118]

But despite the acknowledgement of past errors, the cycle seems to repeat as judges again revert to a deferential approach whenever national security is invoked by the executive, even when the case occurs in a context other than an actual war.[119] The result is a cyclical pattern of contraction and expansion of liberty as war and crises come and go.[120]

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doubt upon the constitutional propriety of the courts' momentary permissiveness."); STONE, *supra* note 10, at 544, 547 (observing a recurring pattern of excessive civil liberties restrictions in times of war and a judicial propensity to defer during crisis periods).

113. STONE, *supra* note 10, at 304–05.

114. *See, e.g.*, Eugene V. Rostow, *The Japanese American Cases—A Disaster,* 54 YALE L.J. 489, 489–90 (1945). *See also infra* text accompanying notes 260–262.

115. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).

116. *See* SIMPSON, *supra* note 68, at 418–19 (concluding that "the courts did virtually nothing" for those detained under Regulation 18B). *See also* LUSTGARTEN & LEIGH, *supra* note 3, at 178.

117. *See* SIMPSON, *supra* note 68, at 363 (providing criticism of the reasons behind Lord Atkin's dissent). Bonner implies that there is a little too much celebration of the dissent. *See* BONNER, *supra* note 66, at 67. Turpin and Tomkins argue that Lord Shaw's earlier dissent in *Halliday* is actually more praiseworthy. *See* COLIN TURPIN & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION 757 (6th ed. 2007).

118. *See* R v. Home Secretary *ex parte* Khawaja [1984] 1 A.C. 74, 110 (H.L.) (appeal taken from Eng.) ("The classic dissent of Lord Atkin in Liversidge v. Anderson is now accepted as correct not only on the point of construction of [R]egulation 18 (b) of the then emergency Regulations but in its declaration of English legal principle." (citations omitted)); R v. I.R.C. *ex parte* Rossminster, [1980] 1 A.C. 952 (H.L.) 1011 (appeal taken from Eng.) ("I think the time has come to acknowledge openly that the majority of this House in Liversidge v. Anderson were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right."); Ali v. Jayaratne, [1951] A.C. 66 (H.L.) 76 (appeal taken from Ceylon) ("[I]t would be a very unfortunate thing if the decision of *Liversidge's* case came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments."). *See also* Alec Samuels, *The Quietus of* Liversidge v. Anderson*?*, 14 STATUTE L. REV. 140 (1993); Heuston, *supra* note 85, at 53–68.

119. Dyzenhaus, *Cycles of Legality*, *supra* note 112, at 165.

120. Discussing the *Quirin* decision, Fisher writes, "Judicial rulings during World War II provided disturbing evidence of a Court in the midst of war forfeiting its role as the

II. THE RECENT WAR ON TERROR DECISIONS

Having discussed the cases that underlie the conventional account of judicial behavior in times of war and crisis, this part of the Article briefly outlines the recent War on Terror decisions. These are the decisions of the Supreme Court and House of Lords that, broadly speaking, deal with aspects of the War on Terror and were decided between September 11, 2001 and October 2009.[121]

A. The Supreme Court

In June 2004, the Supreme Court decided a trilogy of cases concerning the detention of terrorist suspects. Two cases, *Hamdi v. Rumsfeld*[122] and *Rumsfeld v. Padilla,*[123] concerned the predicament of American citizens detained indefinitely as enemy combatants. The third, *Rasul v. Bush*,[124] addressed the position of foreign detainees held at the Guantánamo Naval Base in Cuba.

Yaser Hamdi was captured in November 2001 in Afghanistan by Northern Alliance forces who subsequently turned him over to American forces. Initially detained at Guantánamo, Hamdi was later held as an enemy combatant at naval brigs in Virginia and South Carolina.[125] His father filed a writ of habeas corpus on his behalf, effectively beginning the litigation.[126] By the time Hamdi's case reached the Supreme Court, there were two issues to be resolved: first, whether there was legal authority to detain persons such as Hamdi, and second, to what extent, if any, persons in his position could contest their detention.

The Supreme Court ruled five to four that the military could detain Hamdi as an enemy combatant because Congress had impliedly authorized such detention through the Authorization for the Use of Military Force

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guardian of constitutional rights. . . . With the war safely over, the Court began to reassert itself and place restrictions on military tribunals and courts–martial, gradually restoring the right of U.S. citizens to a jury trial in the civilian courts." *See* FISHER, *supra* note 38, at 254. Similarly, in discussing the House of Lords' inaction in *Liversidge*, Lustgarten and Leigh observe, "[t]he function of the courts in this situation was to be seen to assist the government to maintain the state through the crisis, so that in more normal times civil liberties could be restored and guaranteed long term." LUSTGARTEN & LEIGH, *supra* note 3, at 179; REHNQUIST, *supra* note 21, at 223–25.

121. The assumption of the judicial functions of the House of Lords by the United Kingdom Supreme Court in October 2009 provides a logical end date.

122. 542 U.S. 507 (2004).

123. 542 U.S. 426 (2004).

124. 542 U.S. 466, 470 (2004).

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

126. *Id.* at 511.

(AUMF) enacted shortly after 9/11.[127] However, a different majority concluded that the government's evidence was an inadequate factual basis for Hamdi's detention, meaning that further process in the form of a hearing was necessary.[128] Justice O'Connor's plurality opinion outlined a basic framework for conducting such a hearing. Significantly, Justice O'Connor suggested that it would not offend due process to permit the use of hearsay evidence, a presumption in favor of government evidence, and the use of military tribunals.[129]

The second decision concerned Jose Padilla, who had been arrested by FBI agents at Chicago's O'Hare Airport in May 2002. Although initially detained as a material witness, Padilla was subsequently designated an enemy combatant, transferred into military custody, and detained indefinitely. The allegation at the time was that Padilla was plotting a radiological "dirty bomb" attack on unknown targets within the United States.[130] Padilla's lawyer, who had been appointed to represent him in the earlier court proceedings, filed a writ of habeas corpus on his behalf in New York. The Supreme Court disposed of Padilla's case on procedural grounds without addressing its merits. In a five to four decision, the Court ruled that Padilla's petition should have been brought in South Carolina, the state where Padilla was physically being held.[131]

The third decision, *Rasul v. Bush,* concerned fourteen detainees who had been captured in Afghanistan and detained at Guantánamo. They subsequently sought writs of habeas corpus.[132] In the lower courts, the Bush Administration, relying on the World War II–era precedent of *Johnson v. Eisentrager*,[133] had successfully argued that the courts had no jurisdiction to hear claims from Guantánamo detainees, who were non-citizens detained outside American territory.[134] However, the Supreme Court held six-to-three that the Guantánamo detainees were entitled to petition American courts under the habeas corpus statute.[135] Justice Stevens' majority opinion distinguished *Eisentrager* in several ways: these detainees came from countries that were not at war with the United States, the detainees all denied engaging in hostile acts against the United States, none of the

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127. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Five justices accepted that the AUMF justified Hamdi's detention. *See Hamdi*, 542 U.S. at 507.

128. *Hamdi*, 542 U.S. at 509 ("[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.").

129. *Id*. at 533–34.

130. ELSEA, *supra* note 46, at 2–3.

131. *Padilla*, 542 U.S. 426.

132. *Rasul*, 542 U.S. at 471–73.

133. 339 U.S. 763 (1950).

134. *See, e.g.*, Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002); Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

135. 28 U.S.C. § 2241 (2006); *Rasul*, 542 U.S. 466.

detainees had ever been tried or convicted of any wrongdoing, and all of them had been detained for more than two years on territory over which the United States had exclusive jurisdiction and control.[136]

However, these factual distinctions were not the basis of *Rasul*'s holding. Rather, Justice Stevens stated that *Eisentrager* was concerned with the constitutional rather than statutory right to habeas corpus. The habeas corpus statute had been reinterpreted since *Eisentrager* to allow petitions from detainees of the United States held overseas.[137] Additionally, the presumption against the extraterritorial application of statutes was inapplicable because Guantánamo Bay was indefinitely within the "complete jurisdiction and control" of the United States.[138] Ultimately, there was no dispute that the District Court had jurisdiction over the detainees' custodians, and thus it also had jurisdiction to hear statutory habeas petitions from Guantánamo detainees.[139]

The next case to reach the Supreme Court concerned the Bush Administration's plans to try certain Guantánamo detainees before military commissions that had been established by Presidential Order in November 2001.[140] In July 2003, the first detainees were designated for trial before these military commissions.[141] Among them was Salim Hamdan, who was alleged to be Osama Bin Laden's bodyguard and driver. Hamdan was later charged with conspiracy to commit various war crimes.[142] However, the system of military commissions that had been established to try him on these charges, with its irregular procedures and relaxed evidential standards, was itself challenged.[143]

In November 2005, the Supreme Court granted certiorari.[144] In December, Congress enacted the Detainee Treatment Act of 2005 (DTA),[145] which purported to strip the courts of jurisdiction to hear habeas corpus applications from Guantánamo detainees, substituting instead a system that provided for limited review.[146] Nevertheless, in June 2006, the Supreme Court ruled five to three in favor of Hamdan.[147] The majority first rejected

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136. *Rasul*, 542 U.S. at 476.

137. *Id.* at 478–79.

138. *Id.* at 480–81.

139. *Id.* at 483–84.

140. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833, 57, 834–35 (Nov. 13, 2001).

141. Hamdan v. Rumsfeld, 548 U.S. 557, 569 (2006).

142. *See* Jonathan Mahler, *The Bush Administration vs. Salim Hamdan*, N.Y. TIMES MAGAZINE, Jan. 8, 2006, at 44.

143. *Hamdan*, 548 U.S. at 613.

144. *Id.* at 572.

145. Detainee Treatment Act of 2005, Pub. L. No. 109–148 §§ 1002-1003, 119 Stat. 2739, 2739–40 (2005). *See* Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257 (2006).

146. Detainee Treatment Act of 2005, § 1005(e)(1)–(3).

147. *Hamdan*, 548 U.S. 557 (2006).

the contention that the DTA left the Court without jurisdiction to review habeas corpus cases pending at the time of the DTA's enactment.[148] On the merits of the case, Justice Stevens ruled that Hamdan's military commission could not proceed because it violated the Uniform Code of Military Justice (UCMJ) and the 1949 Geneva Conventions. First, Hamdan's military commission violated the UCMJ's uniformity principle, which required that the procedures for military commissions and courts–martial be the same insofar as practicable.[149] Second, the military commission violated Common Article 3 (CA3) of the Geneva Conventions, applicable by way of Article 21 of the UCMJ's reference to the law of war, because it did not satisfy CA3's requirement of trial before a regularly–constituted court.[150]

The *Hamdan* decision led to the hasty enactment of the Military Commissions Act of 2006 (MCA).[151] The MCA effectively undid the *Hamdan* decision; it explicitly authorized the use of military commissions, albeit while making some procedural improvements.[152] Additionally, the MCA unequivocally removed the statutory right of all non-citizen detainees to seek habeas corpus.[153] This aspect of the MCA became the focus of the next case that came before the Supreme Court, *Boumediene v. Bush*.[154] The petitioners in *Boumediene* were a number of non–citizen detainees held at Guantánamo who sought habeas corpus. With the statutory avenue to habeas corpus closed by the MCA, *Boumediene* squarely addressed the entitlement of these detainees to the constitutional privilege of habeas corpus.[155]

The Court's decision turned on two issues: first, whether the petitioners, being non–citizens held outside the United States, could invoke the protection of the Suspension Clause; and second, whether the review process set up by the DTA was an adequate substitute for habeas corpus. Writing for a majority of five, Justice Kennedy ruled that the petitioners were entitled to seek the constitutional writ of habeas corpus, which could only be denied in accordance with the Suspension Clause.[156] Additionally,

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148. *Id*. at 616. Chief Justice Roberts, having earlier heard the case as a Judge on the D.C. Circuit, did not participate. *See* Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

149. *Hamdan*, at 619–25.

150. *Id.* at 630–35.

151. Military Commissions Act of 2006, Pub. L. No. 109–336, 120 Stat. 2600 (2006).

152. *See* Stephen J. Ellmann, *The "Rule of Law" and the Military Commission*, 51 N.Y.L. SCH. L. REV. 760, 793–96 (2006).

153. Military Commissions Act of 2006 § 7.

154. Boumediene v. Bush, 128 S. Ct. 2229 (2008).

155. *Id.* at 2240 ("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.").

156. *Id.* at 2262 ("We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now

the majority ruled that the substitute review process on which the government relied—military–run Combatant Status Review Tribunals (CSRTs) based on Justice O'Connor's suggestions in *Hamdi*, combined with review in the D.C. Circuit Court of Appeals per the DTA—was an inadequate substitute for habeas corpus.[157] The majority therefore held that Congress, in passing the MCA, had unconstitutionally suspended the writ of habeas corpus in violation of the Suspension Clause.[158]

Decided on the same day as *Boumediene* was *Munaf v. Geren*.[159] This case concerned two American citizens, Munaf and Omar, who had voluntarily travelled to Iraq, and subsequently been detained by Multinational Force Iraq (MNF–I) after allegedly committing crimes there. Petitions for habeas corpus were filed on behalf of both men by family members. In the lower courts, Omar had obtained a preliminary injunction barring his transfer to Iraqi custody. Munaf's petition had been dismissed for lack of jurisdiction.

The Supreme Court unanimously concluded that United States courts had jurisdiction over habeas corpus petitions filed on behalf of citizens such as Munaf and Omar, who were held by American forces operating as part of a multinational force. Both were in the immediate physical custody of American forces answering only to the American chain of command. This was enough to determine the issue of jurisdiction under the habeas corpus statute.[160]

Rather than remanding the case, the Supreme Court exceptionally reached the merits of the petitions, noting that these cases "involve habeas petitions that implicate sensitive foreign policy issues in the context of ongoing military operations."[161] According to Chief Justice Roberts, Munaf and Omar were effectively asking for court orders requiring the United States to prevent their transfer to a sovereign government seeking to try them for alleged crimes committed in its territory. Given that Iraq clearly had the sovereign right to prosecute them for their alleged crimes, it was inappropriate for United States courts to interfere.[162] The fact that the relevant criminal process might not comport with all American constitutional guarantees,[163] or that transfer to Iraqi custody might hypothetically result in their torture, did not alter this position.[164]

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before us, Congress must act in accordance with the requirements of the Suspension Clause.").

157. *Id.* at 2273.

158. *Id.*

159. 553 U.S. 674 (2008).

160. *Id.* at 686–88.

161. *Id.* at 692.

162. *Id.* at 694–95.

163. *Id.* at 695.

164. *See id.* at 703 (noting that the Court, despite Munaf and Omar's worry over potential torture in Iraqi custody, refused to address the issue due to the issue's absence in

The final Supreme Court decision discussed here, *Iqbal*, concerned a point of civil procedure.[165] But its facts arose out of the early days after 9/11. The plaintiff, Javaid Iqbal, was a Pakistani national arrested on criminal charges and detained in the immediate aftermath of the 9/11 attacks. Subsequently, Iqbal filed suit against federal corrections officers and officials, including former Attorney General John Ashcroft, and FBI Director Robert Mueller.[166]

More specifically, Iqbal's claim alleged that he had been subjected to various forms of mistreatment during his time in custody in the Administrative Maximum Special Housing Unit (ADMAX SHU).[167] In relation to Ashcroft and Mueller, Iqbal alleged that they had illegally classified him as being a person of high interest on account of his religion or national origin, and, in so doing, had violated the First and Fifth Amendments. Iqbal further alleged that his mistreatment at the ADMAX SHU was the result of a policy put in place and implemented by Ashcroft and Mueller.[168]

Writing for a majority of five, Justice Kennedy stated that in order to succeed, Iqbal had to plead sufficient factual matter to show that Ashcroft and Mueller had adopted the detention policies in question for the purpose of discriminating on the basis of race, religion, or national origin.[169] Justice Kennedy found that Iqbal's complaint fell short of this standard. Several of Iqbal's allegations were too conclusory and thus not entitled to be assumed true. Moreover, the factual allegations against Ashcroft and Mueller did not suggest an entitlement to relief because they did not plausibly show purposeful discrimination.[170]

B. The House of Lords

Secretary of State for the Home Department v. Rehman was decided by the House of Lords right around the time of the 9/11 attacks. *Rehman* concerned a decision by the Home Secretary to deport a Pakistani national on national security grounds because of his association with an organization involved in terrorist activities on the Indian subcontinent.[171] Rehman

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their *certiorari* filings; essentially it may be argued that the Court dodged the issue via Munaf and Omar's procedural error).

165. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

166. *Id.* at 1944.

167. *Id.* ("For instance, the complaint alleges that [Iqbal's] jailors 'kicked him in the stomach, punched him in the face, and dragged him across' his cell without justification … subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others … and refused to let him and other Muslims pray because there would be '[n]o prayers for terrorists'.").

168. *Id.*

169. *Id.* at 1948–49.

170. *Id.* at 1951–52.

171. Rehman, [2001] UKHL 47, [2003] 1 A.C. 153 (appeal taken from Eng.).

appealed to a specialist tribunal known as the Special Immigration Appeals Commission (SIAC).[172] SIAC ruled that "national security" had to involve a threat targeted at the United Kingdom and that Rehman was not a threat to national security so defined.[173] The House of Lords, however, disagreed with the narrow view of "national security" taken by SIAC, and emphasized that this was an area where the judiciary should defer to the views of the executive.[174] This attitude was strikingly expressed by Lord Hoffmann:

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.[175]

The first major legislative response to the 9/11 attacks was the enactment of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), which contained a battery of new counter–terrorism powers. The most severe was the authorization of a system of indefinite detention for terrorist suspects.[176] Prior to its eventual repeal, Part 4 of the ATCSA empowered the Home Secretary to certify a person a "suspected international terrorist" for the purposes of the ATCSA if the Home Secretary reasonably believed that the person's presence in the United Kingdom was a risk to national security and

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172. SIAC replaced the advisory panel that had previously operated in such cases. *See* BONNER, *supra* note 66, at 127–34. *See generally* Special Immigration Appeals Commission Act, 1997, c. 68 (Eng.); CONSTITUTIONAL AFFAIRS COMMITTEE, THE OPERATION OF THE SPECIAL IMMIGRATION APPEALS COMMISSION (SIAC) AND THE USE OF SPECIAL ADVOCATES 2004-05, Mar. 22, 2005, H.C. 323-I, (U.K.), *available at* http://www.publications.parliament.uk/pa/cm200 405/cmselect/cmconst/323/323i.pdf.

173. *See Rehman*, [2003] 1 A.C. at [4]–[6].

174. *Id.* at [26] (Lord Slynn) ("[The Home Secretary] is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him."), at [28] (Lord Steyn) ("Even democracies are entitled to protect themselves, and the executive is the best judge of the need for international co-operation to combat terrorism and counter-terrorist strategies."). *See also* Laurence Lustgarten, *National Security, Terrorism and Constitutional Balance*, 75 POL. Q. 4, 11 (2004).

175. *Rehman*, [2003] 1 A.C. at [62].

176. Anti–Terrorism, Crime and Security Act, 2001 c. 24 (Eng.). For an overview of the ATCSA, see Adam Tomkins, *Legislating Against Terror: the Anti-Terrorism, Crime and Security Act 2001*, P.L. 205 (2002).

suspected that the person was a "terrorist."[177] In instances where legal or practical considerations barred the United Kingdom from removing a non–citizen certified as a suspected international terrorist,[178] Section 23 of the ATCSA authorized indefinite detention.[179] The Home Secretary's certification decision could only be scrutinized in proceedings before SIAC,[180] which could cancel a certification if it concluded that there were no reasonable grounds for suspecting the person to be a terrorist as defined in Section 21(1).[181]

Part 4 of the ATCSA was controversial, not in the least because its indefinite detention regime plainly infringed Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR),[182] which protects the right to liberty and security of the person. Part 4 therefore required the British government to lodge a formal derogation from Article 5 in accordance with Article 15 of the ECHR.[183] Despite a number of different bodies recommending otherwise,[184] the Blair Government persisted with indefinite detention under the ATCSA.

Sixteen persons suspected of various terrorism–related activities were certified by the Home Secretary and detained at Belmarsh Prison in London.[185] Several detainees challenged the lawfulness of their detention. In

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177. Anti–Terrorism, Crime and Security Act, 2001 §§ 21(1), (2), (5). The term "terrorist" was itself broadly defined to include those involved in the commission of terrorist acts, members of international terrorist groups, and those with links with terrorist groups. *See id.* §§ 21(2), (4).

178. Typically, these cases arose where criminal prosecution was difficult, and where deportation was not feasible because of concerns that the certified person might be mistreated upon returning to his home country. *See* Chahal v. United Kingdom, 12 Eur. Ct. H.R. Rep. 413, 455 (1996) (holding that it violates Article 3 of the European Convention on Human Rights to deport or extradite a person where "substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.").

179. Anti–Terrorism, Crime and Security Act, 2001 § 23(1).

180. Anti–Terrorism, Crime and Security Act, 2001 §§ 21(8)–(9), 25, 26.

181. Anti–Terrorism, Crime and Security Act, 2001 §§ 25(2), (5).

182. Human Rights Act (Designated Derogation Order), 1998, S.I. 2001/3644 (U.K.).

183. *See Id.* Formal notice of the derogation order was lodged on 18 Dec. 2001. The United Kingdom also derogated from Article 9 of the International Covenant on Civil and Political Rights 1966. *See* A v. Secretary of State for the Home Department, [2004] UKHL 56, [2005] 2 A.C. 68 [11] (Lord Bingham) [hereinafter *A v. Secretary of State (No. 1)*].

184. PRIVY COUNSELLOR REVIEW COMMITTEE, ANTI–TERRORISM, CRIME AND SECURITY ACT 2001 REVIEW, 2003–4, H.C. 100, ¶ [205]–[243] (U.K.), *available at* http://www.archive2.official-documents.co.uk/document/deps/hc/hc100/100.pdf [hereinafter Newton Report]; JOINT COMMITTEE ON HUMAN RIGHTS, REVIEW OF COUNTER–TERRORISM POWERS, 2003–4, H.L. 158, ¶ [52]–[64] (U.K.), *available at* http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/158/158.pdf; JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: PROSECUTION AND PRE-CHARGE DETENTION, 2005–6, H.L. 240 (U.K.), *available at* http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/240/240.pdf.

185. Sangeeta Shah, *The UK's Anti–Terror Legislation and the House of Lords: The First Skirmish*, 5 HUM. RTS. L. REV. 403, 405–06 (2005) [hereinafter Shah, *Skirmish*].

December 2004, a majority of the House of Lords ruled that the ATCSA detention regime was incompatible with the ECHR in *A v. Secretary of State for the Home Department* (also known as the *Belmarsh* case).[186] Although there was a public emergency sufficient to warrant derogation under Article 15 of the ECHR, indefinite detention under Section 23 of the ATCSA was not strictly required by the exigencies of the situation, resulting in a breach of Article 5 of the ECHR.[187] Additionally, the singling out of non–citizen terrorist suspects (but not citizen terrorist suspects) for detention amounted to discrimination in violation of Article 14.[188] Accordingly, the House of Lords quashed the derogation order and declared Section 23 of the ATCSA incompatible with Articles 5 and 14 of the ECHR.[189]

The House of Lords' decision forced the Blair Government to alter its detention policy; part of this involved repealing Part 4 of the ATCSA, and replacing it with the Prevention of Terrorism Act 2005 (PTA).[190] The PTA created a new legislative framework for detention by empowering the Home Secretary to impose control orders upon both citizen and non-citizen terrorist suspects who have "involvement in terrorism-related activity."[191] A control order imposes certain restrictions on the liberty of its target, the controlee, in order to restrict or prevent involvement in terrorism-related activity. It is an offense to breach an obligation in a control order without reasonable excuse.[192]

The PTA creates two types of control orders.[193] "Derogating" control orders impose sufficiently onerous infringements on an individual's liberty as to require derogation from Article 5 of the ECHR, and can only be

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186. [2005] 2 A.C. 68.

187. *Id.* at [43] (Lord Bingham), [81] (Lord Nicholls), [132]–[133] (Lord Hope), [156] (Lord Scott), [189] (Lord Rodger), [231] (Baroness Hale).

188. *Id.* at [68] (Lord Bingham), [138] (Lord Hope), [159] (Lord Scott), [189] (Lord Rodger), [232] (Baroness Hale).

189. *Id.* at [73] (Lord Bingham), [85] (Lord Nicholls), [139] (Lord Hope), [160] (Lord Scott), [239] (Baroness Hale), [240] (Lord Carswell). *See generally* Adam Tomkins, *Readings of* A v. Secretary of State for the Home Department, P.L. 259, 259–60 (2005); Conor Gearty, *11 September 2001, Counter-terrorism, and the Human Rights Act*, 32 J.L.S. 18 (2005).

190. By March 2005, nine of the *Belmarsh* detainees had been released on strict bail conductions, leaving no one physically detained under Part 4 of the ATCSA. They were later made subject to control orders. *See* Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism*, 59 STAN. L. REV. 1395, 1410 (2007) [hereinafter Walker, *Keeping Control*].

191. Prevention of Terrorism Act c. 2, § 1 (U.K.). Section 1(9) defines "terrorism-related activity". Written ministerial statement on control orders: 11 June 2010 – 10 September 2010, http://www.homeoffice.gov.uk/publications/parliamentary-business/written-ministerial-statement/control-orders-sep2010-wms/(last visited Oct. 28, 2010) ("As of September 2010, there were nine control orders in force, all of which were in respect of British citizens.").

192. Prevention of Terrorism Act § 9.

193. *See generally* Walker, *Keeping Control*, *supra* note 191 (discussing the control order regime comprehensively).

imposed by the High Court upon application by the Home Secretary.[194] "Non–derogating" control orders impose specific combinations of restrictions upon individuals such as curfew, electronic tagging, searches of residences and other premises, restrictions on association, and restrictions on the use of telephones and the Internet.[195] The Home Secretary may impose non–derogating control orders, although absent emergency, the High Court's permission is required.[196] The Home Secretary's decision is then reviewed in a full hearing before the High Court.[197]

Some of those who were made subject to non–derogating control orders (the controlees) brought litigation. There were two main grounds of challenge. The first was that the restrictions imposed by these non–derogating control orders were in fact so onerous as to amount to a deprivation of liberty in breach of Article 5 of the ECHR. In October 2007, a majority of the House of Lords held in *Secretary of State for the Home Department v. JJ* that non-derogating control orders that included an eighteen hour curfew as part of their restrictions amounted to a deprivation of liberty, and were thus invalid as they could not be imposed by the Home Secretary under the terms of the PTA.[198]

The second ground of challenge was based on the right to a fair hearing protected by Article 6 of the ECHR. This issue arose because the controlee was not entitled to see all of the factual material that underlay his or her particular control order. The PTA specifically authorizes procedural measures such as the non–disclosure of certain evidence, closed proceedings from which controlees and their lawyers are excluded,[199] as well as the appointment of special advocates to represent controlees in the closed proceedings.[200]

In *Secretary of State for the Home Department v. MB*, a majority of the House of Lords gave a qualified endorsement to this scheme.[201] The Lords emphasized that it was the fairness of the overall process that was important. The majority recognized the potential contribution of special advocates to fairness, but accepted that in certain cases the provision of a special advocate might not be sufficient to ensure compliance with Article

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194. Prevention of Terrorism Act § 4.

195. Prevention of Terrorism Act § 1, [4].

196. *Id.* at § 3, [1](a), (b). In cases where the Home Secretary does not have permission, the order must be immediately referred to court under § 3(3).

197. *Id.* at § 3, [2](c), [6](b), [6](c).

198. Secretary of State for the Home Department v. JJ, [2007] UKHL 45, [2007] 3 W.L.R. 642, [23]–[24] (appeal taken from Eng.).

199. Prevention of Terrorism Act sch, [4](2), [7]. *See also* Civil Procedure (Amendment No 2) Rules 2005, 2005 S.I. 2005/656, rules 76.22–25, 76.28, 76.29.

200. *See generally* John Ip, *The Rise and Spread of the Special Advocate*, P.L. 717 (2008).

201. Secretary of State for the Home Department v. MB [2007] UKHL 46, [2007] 3 W.L.R. 681 (appeal taken from Eng.).

6.[202] In cases where a special advocate was not enough to ensure fairness, the majority held that Section 3 of the Human Rights Act 1998 should be invoked to read down the relevant provisions of the PTA and its associated procedural regulations so that they only took effect where this was consistent with fairness.[203] In a subsequent decision, *Secretary of State for the Home Department v. AF*, the House of Lords clarified that Article 6 required the disclosure of the core of the case against the controlee so that the controlee could adequately brief the special advocate.[204]

The other part of the Blair Government's post–*Belmarsh* detention strategy—a renewed effort at deportation by securing diplomatic assurances from foreign governments not to mistreat deported terrorist suspects[205]—came under scrutiny in *RB(Algeria) v. Secretary of State for the Home Department*.[206] The Home Secretary sought to deport three men—one Jordanian (Othman) and two Algerians (RB and U)—on national security grounds. All three contended that the Home Secretary could not take this action because this would result in their exposure to a real risk of torture or inhuman or degrading treatment in violation of Article 3 of the ECHR.[207]

The British government had received specific diplomatic assurances from the respective governments that the returned men would not be subject to torture or other ill treatment.[208] At first instance, SIAC held that the assurances from the respective foreign governments were sufficient to satisfy the requirements of Article 3.[209] The House of Lords unanimously upheld this decision on appeal.[210] In effect, the House of Lords held that the assurances provided by the foreign governments in these cases meant that there were no substantial grounds for believing that the three men, if deported, would face a real risk of treatment contrary to Article 3.[211]

The House of Lords' two other post–9/11 War on Terror decisions dealt with issues other than detention and deportation. One concerned whether SIAC could take into account evidence procured through torture perpetrated by foreign agents when hearing appeals against certification under the

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202. *Id.* at [35], [66], [85], [90].

203. *Id.* at [44], [72], [84], [92].

204. *See* Secretary of State for the Home Department v. AF, [2009] UKHL 28 (appeal taken from Eng.).

205. *See* Mark Elliott, *United Kingdom: The "War on Terror," U.K. Style – The Detention and Deportation of Suspected Terrorists*, 8 INT'L J. CON. L. 131, 138–39 (2010).

206. [2009] UKHL 10 (appeal taken from Eng.).

207. *Id.* at [1]. *See generally Chahal*, *supra* note 180.

208. *RB(Algeria), supra* note 207, at [106]–[108].

209. *Id.* at [25]–[35], [45]–[52].

210. *Id.* at [120]–[126] (Lord Phillips), [192]–[196] (Lord Hoffmann), [241] (Lord Hope), [254] (Lord Brown), [265] (Lord Mance).

211. Othman also argued that there were substantial grounds for believing his deportation would lead to him facing a real risk of flagrant violations of Articles 5 and 6 of the ECHR. SIAC rejected these claims as well. These conclusions were also upheld on appeal. *Id.* at [130]–[154] (Lord Phillips).

ATCSA detention regime.[212] SIAC, being a special tribunal, was not bound by the law of evidence.[213] By the time these proceedings reached the House of Lords, Part 4 of the ATCSA had already been repealed. However, the appeals were allowed to continue.[214] While conceding that evidence obtained through torture with the involvement or complicity of British officials would be inadmissible and an abuse of process,[215] the Home Secretary's position was that the same did not apply to evidence obtained through torture by foreign agents. In *A v. Secretary of State for the Home Department (No. 2)* (the *Torture* case), the House of Lords ruled unanimously that no British court (including SIAC) could rely on evidence that might have been procured through torture, regardless of the nationality of the torturer.[216] However, the Lords disagreed on the standard of proof to be met before this prophylactic rule applied. A majority of four ruled that it had to be established to the balance of probabilities that the evidence was obtained via torture.[217]

The other decision, *R(Gillan) v. Commissioner of Police for the Metropolis*,[218] concerned the power of a senior police officer under the Terrorism Act 2000 to authorize blanket, suspicion-less stops and searches in a given geographical area.[219] Such authorizations, when confirmed by the Home Secretary, could run for renewable periods of up to 28 days.[220] Once an authorization was in place, a police officer was permitted to stop and search any vehicle or pedestrian for items that could be used in connection with terrorism without any requirement of individualized suspicion of involvement in terrorist activity.[221] The two appellants in *Gillan*, having been stopped and searched under these provisions, challenged their use.

The House of Lords dismissed their appeals. The Law Lords held that the executive actors by the terms of the provisions had considerable latitude in employing this power. The House of Lords was untroubled by the repeated authorizations and their wide geographical scope, and found that the authorization and confirmation in question had been lawful.[222] The Law Lords also ruled that the exercise of the stop and search power did not

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212. A v. Secretary of State for the Home Department (No. 2), [2005] UKHL 71, [2006] 2 A.C. 221 [8]–[9] (Lord Bingham) (appeal taken from Eng.) [hereinafter *A v. Secretary of State (No. 2)*].

213. Special Immigration Appeals Commission (Procedure) Rules 2003, S.I. 2003/1034, rule 44(3) (U.K.) [hereinafter Immigration Appeals Commission Rules].

214. Prevention of Terrorism Act, 2005 c. 2, § 16, [4] (U.K.).

215. *A v. Secretary of State (No. 2)*, [2006] 2 A.C. [66] (Lord Nicholls).

216. *A v. Secretary of State (No. 2)*, [2006] 2 A.C. 221.

217. *Id.* at [117]–[127] (Lord Hope), [145] (Lord Rodger), [156]–[158] (Lord Carswell), [172]–[173] (Lord Brown).

218. [2006] UKHL 12, 2 A.C. 307 (appeal taken from Eng.) [hereinafter *Gillan*].

219. Terrorism Act, 2000 c. 11, §§ 44–47 (U.K.).

220. *Id.* at § 46(2)–46(4).

221. *Id.* at § 45.

222. *Gillan*, [2006] UKHL 12, 2 A.C. at [16]–[19] (Lord Bingham).

breach the relevant ECHR rights, including Article 5 as well as Article 8, which affirms the right to respect for private life.[223]

III. RECONCILING THE RECENT DECISIONS WITH THE CONVENTIONAL ACCOUNT

As discussed in Part I, the executive's use of extraordinary powers during times of war or crisis has generally met with little judicial resistance in the United States and the United Kingdom. Since 9/11, despite familiar claims about the need for deference to the executive in matters of national security being made,[224] this pattern does not appear to have repeated itself, at least not to the same extent, in the cases discussed in Part II. How can this phenomenon be reconciled with the conventional account of judicial behavior in times of war? Five possible explanations are discussed below.

A. A Break in the Historical Pattern of Judicial Deference

The first and most optimistic explanation from a civil libertarian standpoint is that there has been a break in the cycle of judicial acquiescence followed by post–fact regret and the resulting pattern of contraction and expansion of liberty. So has the post–9/11 period seen the emergence of judges willing to stand firm in the face of executive claims of national security, or in David Dyzenhaus' terms, a "judicial 'coalition of the willing'"?[225]

Discussing developments in several jurisdictions, including the two under consideration, Eyal Benvenisti discerns a clear contrast between the recent crop of judicial decisions and historical judicial behavior.[226] Benvenisti argues that it is possible to now speak of a new era, where "executive unilateralism is being challenged by national courts in what could perhaps be a globally coordinated move."[227] Similarly, a number of

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223. *Id.* at [21]–[29].

224. *See*, *e.g.*, *A v. Secretary of State (No. 1)*, [2005] 2 A.C. [37] (Lord Bingham) ("[The Attorney General] submitted as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. . . . [M]atters of the kind in issue here fall within the discretionary area of judgment properly belonging to the democratic organs of the state. It was not for the courts to usurp authority properly belonging elsewhere."). *See also infra* text accompanying notes 234–236; Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts,* 102 AM. J. INT'L L. 241, 253 (2008) [hereinafter Benvenisti, *Reclaiming Democracy*].

225. David Dyzenhaus, *Introduction: Legality in a Time of Emergency*, 24 W.R.L.S.I. 1, 3 (2008). Dyzenhaus himself considers it too early to draw such a conclusion. *See id.*

226. Benvenisti, *Reclaiming Democracy*, supra note 224, at 256. *See also* DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE 264 (2007).

227. Eyal Benvenisti, *United We Stand: National Courts Reviewing Counterterrorism Measures*, *in* COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 251, 254 (Andrea Bianchi & Alexis Keller eds., 2008) [hereinafter Benvenisti, *United We Stand*].

British commentators have highlighted the contrast between the robust review of the House of Lords in the *Belmarsh* case and the earlier case law exemplified by *Liversidge*.[228]

The Supreme Court and the House of Lords have seemingly rebuffed a host of executive measures implemented in the name of national security since 9/11, so there appears to be some validity to this view. This section looks more closely at the support for the view that there has been a break in the cycle of judicial deference, and proposes several possible reasons why it might have occurred.

1. The United States

The conventional account of judicial behavior described above would suggest that the Supreme Court would subject the executive branch's post–9/11 national security policies to minimal scrutiny. Yet the Court did not behave consistently with this prediction, and consistently rejected many of the arguments advanced by the government.

The Supreme Court's 2004 decisions, for example, created a number of obstacles for the Bush Administration. This is probably least true of the *Padilla* decision, which as noted earlier, was decided on purely procedural grounds.[229] This decision, together with a few other procedural machinations, ultimately allowed the Bush Administration to avoid a potentially adverse Supreme Court decision.[230] The other two 2004 decisions posed more immediate problems for the Administration. Despite government claims that permitting judicial review would endanger national security,[231] the majority in *Rasul* stymied the Bush Administration's attempt

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228. *See* Brice Dickson, *Safe in Their Hands? Britain's Law Lords and Human Rights,* 26 L. STUD. 329, 339 (2006); Mary Arden, *Human Rights in the Age of Terrorism,* 121 L.Q.R. 604, 616-17 (2005); KAVANAGH, *supra* note 6, at 219.

229. *See Padilla*, 542 U.S. 426.

230. Padilla duly filed his case in South Carolina, where the District Court ordered him released. The Fourth Circuit overruled. In November 2005, shortly before a response to Padilla's petition for a second Supreme Court hearing was due, the Bush Administration transferred Padilla into the civilian court system where he was later convicted at trial. Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 COLUM. L. REV. 1013, 1036–37 (2008).

231. In its Supreme Court brief, the Bush Administration claimed that:

[a]ny judicial review of the military's operations at Guantanamo would directly intrude on those important intelligence-gathering operations. Moreover, any judicial demand that the Guantanamo detainees be granted access to counsel to maintain a habeas action would in all likelihood put an end to those operations—a result that not only would be very damaging to the military's ability to win the war, but no doubt be "highly comforting to enemies of the United States."

Brief for Respondents at 54, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03–334) (quoting Johnson v. Eisentrager, 339 U.S. 763, 779 (1950)).

to insulate Guantánamo from judicial scrutiny.[232] In the *Hamdi* litigation, the Administration again made bold claims of executive exclusivity in the national security arena.[233] Although Justice O'Connor's plurality opinion did not go as far as some of the other opinions,[234] it rejected these claims in the *Hamdi* decision's most quotable sound–bite.[235] But the rejection was not merely rhetorical. In holding that Hamdi must have some ability to challenge his designation as an enemy combatant, Justice O'Connor rejected the government's claims that no further fact-finding into the circumstances of Hamdi's capture was necessary,[236] and that proper respect for the separation of powers deprived the individual of any individual process.[237]

In the *Hamdan* litigation, the government made further claims of executive exclusivity. Indeed, in a brief to the D.C. Circuit, the government asserted that the mere fact litigation was possible was a potential danger to national security.[238] Such claims fell on deaf judicial ears in the Supreme Court. *Hamdan* was another rebuke to the Bush Administration, and delayed (temporarily, as it turned out) the Administration's plans for trying terrorist suspects by military commission.[239]

Two aspects of the decision were particularly significant. First, the holding that CA3 of the Geneva Conventions applied to the conflict with al

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232. *See Rasul,* 542 U.S. 466. *See* Dawn E. Johnson, *The Story of* Hamdan v. Rumsfeld*: Trying Enemy Combatants by Military Commission*, *in* PRESIDENTIAL POWER STORIES 447, 454 (Christopher H. Schroder & Curtis A. Bradley eds., 2009).

233. In the Supreme Court, the government contended that Hamdi's status as an enemy combatant justified "holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted." Hamdi, 542 U.S. at 510–11 (2004). The government also argued that "as long as a prisoner could challenge his enemy combatant designation when responding to interrogation during incommunicado detention he was accorded sufficient process to support his designation as an enemy combatant." *Id.* at 540–41.

234. Justices Scalia and Stevens dissented and held that the detention of an American citizen could only be legal after a conviction for a criminal charge or where the writ of *habeas corpus* had been suspended. *Id*. at 554–79. Justices Souter and Ginsburg joined the plurality opinion so as to vacate the lower court opinion. However, they disagreed with Justice O'Connor's conclusion that the AUMF impliedly authorized detention, and her suggestions about what might satisfy her due process framework for enemy combatants. *Id.* at 540–54. Only Justice Thomas accepted the government's legal position in its entirety. *Id.* at 579–99.

235. *Hamdi*, 542 U.S. at 536 ("[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.").

236. *Id.* at 526.

237. *Id.* at 527.

238. *See* Brief for Appellants at 12, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), (No. 04–5393), *available at* http://www.law.georgetown.edu/faculty/nkk/documents/hamdan-opening-brief2.pdf ("By permitting captured enemies to continue their fight in our courts, the district court's holding threatens to undermine the President's power to subdue those enemies.").

239. *Hamdan*, 548 U.S. 557 (2006).

Qaeda had significant ramifications for the interrogation and treatment of detainees because of CA3's prohibition on the mistreatment of detainees.[240] Second, *Hamdan* had wider significance because it repudiated the idea that the President had constitutional *carte blanche* in prosecuting the War on Terror, even in the face of constraining legislation.[241] The decision thus reaffirmed the principle that even the President, the Commander–in–Chief in wartime, was constrained by law.[242]

The reaction of the political branches to *Hamdan*, namely the MCA, set the stage for a further confrontation in *Boumediene*, where the Court ruled that Guantánamo detainees had the constitutional right to seek habeas corpus and that the MCA was an unconstitutional suspension of that right.[243] As David Cole observes, the Court defied the predictions of the conventional account once more:

> For the first time in its history, the Supreme Court declared unconstitutional a law enacted by Congress and signed by the president on an issue of military policy in a time of armed conflict. While the Court has on rare occasions found that presidents exceeded their powers where they acted *contrary* to congressional will during wartime . . . this decision went much further, upending the joint decision of the political branches acting together on a military matter during a time of military conflict.[244]

2. The United Kingdom

The contrast between the conventional account and the apparently robust post–9/11 stance of the House of Lords has been widely noted by academic commentators.[245] The centerpiece of this new approach is the *Belmarsh*

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240. *Id.* at 627–33.

241. This idea was at the heart of many of the Bush Administration's more notorious counterterrorism policies. *See, e.g.*, Jay S. Bybee, Memorandum for Alberto R. Gonzales Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *in* THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB 172, 200 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). *See also* U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 34–35 (Jan. 19, 2006), *available at* www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf. *See generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 706-10 (2008).

242. *Hamdan*, 548 U.S. at 593 n. 23 (2006) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

243. *Boumediene*, 128 S. Ct. 2229 (2008). Richard Fallon, Jr. suggests that *Munaf's* upholding of jurisdiction can be viewed in similar terms. *See* Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 351, 380–81 (2010).

244. David Cole, *Rights over Borders: Transnational Constitutionalism and Guantánamo Bay*, 2008 CATO SUP. CT. REV. 47, 47–48 (2008) [hereinafter Cole, *Rights over Borders*].

245. Dominic McGoldrick, *Terrorism and Human Rights Paradigms: The United Kingdom after 11 September 2001*, *in* COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 111,

decision, in which a majority of eight Law Lords ruled against the government.[246] Lord Hoffmann, in an apparent turnaround from his earlier paean to deference in *Rehman*, held that the situation faced by the United Kingdom was not a public emergency threatening the life of the nation, meaning that derogation under Article 15 of the ECHR was unjustified:

> Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community. . . . The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.[247]

The other seven Law Lords in the majority decided the case on the basis that even though derogation was justified under Article 15, the measures taken were not strictly required by the exigencies of the situation.[248] In so ruling, these Law Lords proved willing to scrutinize decisions taken for the purposes of national security.[249]

The exceptionality of the *Belmarsh* decision has been widely noted. It was, as Adam Tomkins described, "an extremely rare example of a British court overturning the government's view of what was necessary in the interests of national security."[250] Conor Gearty expressed a similar view: "[t]he speeches of these eight senior judges amount collectively to what is

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224 (Andrea Bianchi & Alexis Keller eds., 2008). *See also* Fiona de Londras & Fergal F. Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 O.J.L.S. 19, 41–44 (2010); Rodney C. Austin, *The New Constitutionalism, Terrorism, and Torture*, 60 C.L.P. 79, 117 (2007); IAN LEIGH & ROGER MASTERMAN, MAKING RIGHTS REAL: THE HUMAN RIGHTS ACT IN ITS FIRST DECADE 206–07 (2008).

246. *See* Aileen Kavanagh, *Judging the Judges Under the Human Rights Act: Deference, Disillusionment and the "War on Terror,"* P.L. 287, 289 (2009); Benvenisti, *United We Stand*, *supra* note 227, at 253–54.

247. *A v. Secretary of State (No. 1)*, [2005] 2 A.C. [96]–[97].

248. *See supra* text accompanying notes 187–189.

249. *See, e.g.*, *A v. Secretary of State (No. 1)*, [2005] 2 A.C. [164] (Lord Rodger), [226] (Baroness Hale). *See also* Shah, *Skirmish*, *supra* note 185, at 416–17.

250. Adam Tomkins, *Readings of* A v. Secretary of State for the Home Department, P.L. 259, 259 (2005); *see also* David Feldman, *Proportionality and Discrimination in Anti-Terrorism Legislation*, 64 C.L.J. 271, 272 (2005) (describing the decision as unprecedented in that it examined "the legitimacy of measures adopted in good faith on national security grounds."). Even the ultimately skeptical Keith Ewing stated that "[t]he decision is perhaps the most important decision since *Entick v Carrington* (1765), not only for the fact that the House of Lords stood up so convincingly to the Executive but also for their manner of doing so." Keith Ewing, *The Futility of the Human Rights Act – A Long Footnote*, 37 BRACTON L.J. 41, 42 (2005).

the finest assertion of civil liberties that has emerged from a British court since at least *Entick v Carrington.*"[251]

In addition to the *Belmarsh* case, the House of Lords proved willing to scrutinize the executive on matters of national security in its decisions concerning control orders[252] and the use of evidence obtained through torture.[253] The outcomes of these recent War on Terror cases has led David Bonner to conclude that there has been a change: the historical judicial approach of deference in matters of national security, and being "at times more executive-minded than the executive," has been consigned to the past.[254]

3. Causes

David Dyzenhaus offers two explanations for the historical record of judicial deference during times of emergency. The first is that judges defer because of a lack of courage; the second is that judges defer out of prudence.[255] If Dyzenhaus is right about this, then what has happened to this lack of judicial courage or excess of prudence? The next section outlines three related causes for this change in judicial approach.

a. Social Learning

Mark Tushnet argues that a political community can learn from the mistakes of the past through a process he terms social learning. A draconian policy implemented by the executive in the name of national security may be accepted at the time, even by the courts. However, once an emergency is over, the reflection that takes place after the fact comes to the conclusion that the policy was unjustified, and that the judicial acceptance of it was wrong.[256] The outcome of this process is that society, and particularly its

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251. Conor Gearty, *Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?*, 58 C.L.P. 25, 37 (2005) [hereinafter Gearty, *Human Rights*]. *See also* Feldman, *supra* note 251, at 273 ("For all these reasons . . . the decision, perhaps the most powerful judicial defence of liberty since *Leach v. Money* (1765) 3 Burr. 1692 and *Somersett v. Stewart* (1772) 20 St. Tr. 1, will long remain a benchmark in public law."); Mary Arden, *Meeting the Challenge of Terrorism: The Experience of English and Other Courts*, 80 A.L.J. 818, 824 (2006). ("It must be one of the first times that the courts of the United Kingdom have dealt such a body blow to legislation enacted by Parliament to confer powers on the Executive to meet a threat to national security.").

252. *See, e.g.*, Secretary of State for the Home Department v. JJ and others, [2007] UKHL 45; Secretary of State for the Home Department v. MB, [2007] UKHL 46; Secretary of State for the Home Department v. AF, [2009] UKHL 28. *See generally* CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION 238 (2D ED. 2009) [hereinafter WALKER, BLACKSTONE'S GUIDE].

253. *A v. Secretary of State (No. 2)*, [2006] A.C. 221.

254. BONNER, *supra* note 66, at 350.

255. DYZENHAUS, *supra* note 4, at 17–18.

256. Tushnet, *Defending* Korematsu*?*, *supra* note 26, at 125.

courts, become more circumspect over time when faced with similar claims.[257]

> Knowing that government officials in the past have exaggerated threats to national security or have taken actions that were ineffective with respect to the threats that there actually were, we have become increasingly skeptical about contemporary claims regarding those threats, with the effect that the scope of proposed government responses to threats has decreased.[258]

This dynamic can be seen clearly in relation to *Korematsu*.[259] Rather than lying around like a "loaded weapon" as Justice Jackson feared,[260] *Korematsu* instead lies around as a salutary warning to society and as a kind of anti–precedent for the courts.[261] Several members of the current Supreme Court have disapproved of it.[262] The Court itself has never approved its result again.[263] The words of Judge Marilyn Patel, who granted Korematsu's writ of *coram nobis* and vacated his wartime conviction some forty years later, sum up the historical verdict on the decision:

> Korematsu remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.[264]

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257. *Id. See also* Thomas Poole, *Harnessing the Power of the Past? Lord Hoffmann and the Belmarsh Detainees Case*, 32 J.L.S. 534, 543 (2005). *See* Tushnet, *Defending* Korematsu*?*, *supra* note 25, at 132 (pointing out that the process of social learning may be imperfect).

258. Tushnet, *Defending* Korematsu*?*, *supra* note 25, at 126.

259. 323 U.S. 214 (1944).

260. *Id.* at 246 (Jackson, J., dissenting).

261. Cole, *Judging the Next Emergency*, *supra* note 4, at 2575 ("In short, Korematsu has not proved to be the 'loaded weapon' that Justice Jackson feared. To the contrary, it has served as an object lesson in what the Court and the government ought not do in future crisis.") (emphasis omitted); Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795, 841 (2004) ("[T]he decisions made in wartime have not withstood the test of time. Every law student knows, *Korematsu* is a major embarrassment.").

262. Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 103, 106–07 (2003).

263. STONE, *supra* note 10, at 307.

264. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

Explicit (and perhaps oblique) references to *Korematsu* appear in some of the post–9/11 decisions discussed in this Article, indicating at least an awareness of the mistakes of history. Justice O'Connor's *Hamdi* opinion seems to allude to *Korematsu* when it discusses the dangers of an "unchecked system of detention" in light of "history and common sense."[265] Later in the opinion, when arguing that military needs coexist with judicial scrutiny, Justice O'Connor specifically cites Justice Murphy's dissent in *Korematsu*.[266] Similarly, Justice Souter's opinion references *Korematsu* and the "cautionary example of the internments in World War II" in the course of discussing whether there was legal authority to detain Hamdi.[267] That *Korematsu* should be cited in *Hamdi* is not entirely surprising given the broad historical parallels in the subject matter. Additionally, in a powerful symbolic move, Fred Korematsu himself filed an amicus brief in the *Hamdi* and *Rasul* cases.[268]

Perhaps more surprisingly, Judge Patel's retrospective verdict on *Korematsu* appears in a part of Lord Bingham's *Belmarsh* judgment that discusses the importance of maintaining judicial supervision even in times of crisis,[269] suggesting that its anti–precedential quality may not be limited to the United States. In addition, Lord Hoffmann's *Belmarsh* judgment draws on similar historical lessons from closer to home:

> There have been times of great national emergency in which habeas corpus has been suspended and powers to detain on suspicion conferred on the government. It happened during the Napoleonic Wars and during both World Wars in the twentieth century. These powers were conferred with great misgiving and, in the sober light of retrospect after the emergency had passed, were often found to have been cruelly and unnecessarily exercised.[270]

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265. *Hamdi*, 542 U.S. at 530.

266. *Id.* at 535 ("While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. Cf. Korematsu v. United States, 323 U.S. 214, 233-34 (1944) (Murphy, J., dissenting).").

267. *Hamdi*, 542 U.S. at 542–45. On the relationship between the internment and the Non–Detention Act 1971 (18 U.S.C. §4001), see Roger Daniels, *The Japanese American Cases, 1942-2004: A Social History*, 68 L. & CONTEMP. PROBS. 159, 164–67 (2005). *See, e.g.*, Block, *supra* note 18, at 465–66.

268. *See* Brief of Amicus Curiae Fred Korematsu, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03–334) & Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03–6696), *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/97/Fred_Korematsu_amicusbrief1003.pdf.

269. *A v. Secretary of State (No. 1)*, [2005] 2 A.C. [41].

270. *Id.* at [89].

In sum, the social learning thesis suggests that the more skeptical and non–deferential approach evident in the Supreme Court and the House of Lords since 9/11 is the result of the courts paying heed to the lessons of the past, and being conscious of the need to avoid repeating their judicial predecessors' acquiescence in executive measures that later proved excessive.

b. The Rise of Civil Society

David Cole and Jules Lobel advance an explanation based on the existence of an increasingly strong civil society, including human rights groups, civil liberties groups, the domestic and foreign media, and foreign governments.[271] Cole and Lobel argue that the actions of these entities in scrutinizing and criticizing aspects of American counter–terrorism policy have "given the courts a stronger backbone than they have ever shown in confronting the executive in a time of crisis on national security matters."[272]

Many of these groups brought their views directly to the Supreme Court's attention by filing amicus briefs in support of the detainees in the major detention cases.[273] Similarly, in the United Kingdom, the human rights organizations Liberty and Justice have been prominent both in the public arena[274] and as intervening parties in most of the major cases before the House of Lords.[275]

An interesting transnational manifestation of this phenomenon is the criticism of detention at Guantánamo Bay by British judges both inside and outside the courtroom. In *R(on the application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs and another*,[276] the English Court of Appeal considered the situation of Abbasi, a British citizen detained by the United States at Guantánamo Bay. Abbasi's lawyers sought to compel the British Foreign Office to take action on his behalf. They were unsuccessful, but the decision is notable for the message the Court appeared to send to its judicial brethren in the United States:

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271. COLE & LOBEL, *supra* note 226, at 262–64. On the media more specifically, see Neal Devins, *Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants*, 12 U. PA. J. CONST. L. 491, 501–03 (2009– 2010).

272. COLE & LOBEL, *supra* note 226, at 264.

273. Devins, *supra* note 271, at 499–501.

274. *See, e.g.*, Denise Winterman, *Belmarsh - Britain's Guantanamo Bay?*, BBC NEWS, Oct. 6, 2004, *available at* http://news.bbc.co.uk/2/hi/uk_news/magazine/3714864.stm; Dominic Casciani, *Terror Suspects Win Legal Battle*, BBC NEWS, June 10, 2009, *available at* http://news.bbc.co.uk/2/hi/uk_news/8092763.stm.

275. With the exception of *Rehman* and *Gillan*, at least one of Liberty, Justice, or in some cases Amnesty International, intervened in the House of Lords cases discussed in this article.

276. [2002] EWCA Civ. 1598, [2002] All E.R. 70 (Eng.).

> The position of detainees at Guantanamo Bay is to be considered further by the appellate courts in the United States. It may be that the anxiety that we have expressed will be drawn to their attention. We wish to make it clear that we are only expressing an anxiety that we believe was felt by the [District Court] in *Rasul*. As is clear from our judgment, we believe that the United States courts have the same respect for human rights as our own.[277]

Likewise, Lord Steyn, speaking extra–judicially at a lecture at Lincoln's Inn, made a sustained critique of the detention of terrorist suspects at Guantánamo Bay and the plans to try certain detainees before military commissions. He called for the United States to live up to its professed values, and made none–too–subtle reminders that the eyes of the international community were watching.[278] It was, as Dyzenhaus observes, a suggestion that the Supreme Court "put [its] rule–of–law house in order."[279]

The reaction of civil society since 9/11 certainly provides a marked contrast to the reaction to, for example, the Japanese internment in World War II.[280] In the end, it is obviously difficult to ascertain the extent to which the activities of these various facets of civil society affected the judges concerned. But wider public awareness and scrutiny surely cannot have hurt the cause of litigants seeking redress from the courts.

c. Changes in the Law

A third cause relates to the great changes to the law that have occurred since World War II, particularly the development of international human rights and the law of armed conflict. The impact of legal change is especially apparent in relation to the Bush Administration's attempts to try terrorist suspects by military commission. These military commissions, as noted earlier, were established by the Presidential Order of November 13, 2001.[281] This Order was modelled on Roosevelt's Order that established the

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277. *Id.* at [107] (emphasis added).

278. *See also* Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L. Q. 1 (2004).

279. DYZENHAUS, *supra* note 4, at 169. *See* Steyn, *supra* note 278, at 1-3 (discussing Lord Steyn's cautionary examples: the historical record of excessive measures taken by democracies during crises and the record of judicial oversight, both exemplified by the *Liversidge* and *Korematsu* decisions). This is consistent with the social learning thesis. *See also* Poole, *supra* note 257, at 550.

280. *See* Daniels, *supra* note 267, at 162–64 (describing the general lack of public protest about the internment, and the inactivity of the media and groups traditionally devoted to protecting civil liberties). *See also* Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 CRIM. JUST. 52, 53 (2002).

281. Detention, Treatment, and Trial of Certain Non–Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833, 57, 834–35 (Nov. 16, 2001).

commissions unsuccessfully challenged in *Quirin*.[282] However, President Bush's Order received much more criticism.[283] Bradford Berenson, a lawyer in the White House at the time, later discussed the decision to follow the *Quirin* precedent: "[t]he legal foundation was very strong. F.D.R.'s [O]rder establishing military commissions had been upheld by the Supreme Court. This was almost identical. What we underestimated was the extent to which the culture had shifted beneath us since World War Two."[284]

Certainly, there have been major cultural changes in the sixty odd years since World War II, including greater skepticism of government and of unconstrained executive power—the consequence of events such as the Vietnam War and Watergate.[285] Additionally, there have been developments in American law since World War II, including significant changes to constitutional criminal procedure,[286] as well as courts–martial and military justice.[287] This alone would have made the reliance upon the 1942 *Quirin* precedent a risky proposition.[288] Moreover, quite apart from changes to American domestic law, the international legal arena also shifted (to say the least) over the same period of time. A large part of this shift was the post–war establishment of the system of international human rights.[289] The General Assembly of the United Nations adopted the Universal Declaration of Human Rights in 1948.[290] The Universal Declaration in turn gave rise to the International Covenant on Civil and Political Rights,[291] and the International Convention on Economic, Social and Cultural Rights in 1966.[292] Of course, these three foundational treaties have since been joined by a plethora of other human rights instruments.

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282. Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT'L. L. 35, 41 (2007). One difference is that Roosevelt's Order identified specific defendants, whereas Bush's order covered a class of potential defendants. *See* FISHER, *supra* note 38, at 168.

283. FISHER, *supra* note 38, at 172–79.

284. Jane Mayer, *The Hidden Power,* THE NEW YORKER, July 3, 2006, *available at* http://www.newyorker.com/archive/2006/07/03/060703fa_fact1?printable=true.

285. Cole, *Judging the Next Emergency*, *supra* note 4, at 2583–84; *See generally* Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002).

286. Goldsmith & Sunstein, *supra* note 285, at 283.

287. *See* FISHER, *supra* note 38, at 256.

288. *Id*. at 255.

289. Cole, *Rights over Borders*, *supra* note 244, at 52 ("These increasingly confident judicial assertions of authority in turn reflect global transformations in international law since the end of World War II, including most significantly international human rights law."); BONNER, *supra* note 66, at 347. *See also* Steyn, *supra* note 278, at 5–6.

290. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

291. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

292. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 2966, 993 U.N.T.S. 3 (entered into force January 3, 1976).

The basic idea of human rights, namely that people have certain entitlements by virtue of their humanity, has an obvious transnational appeal. It therefore provides an obvious normative standpoint from which to critique counterterrorism policy. The constituents of the civil society discussed earlier—(most obviously) human rights groups, the media, foreign governments, as well as both the English Court of Appeal in *Abbasi*[293] and Lord Steyn[294]—have all employed the discourse of human rights in this way.

Allied with the establishment and development of human rights law were advancements in the law of armed conflict. The end of World War II saw the adoption of the four Geneva Conventions of 1949,[295] which have since gained universal acceptance.[296] These were followed in 1977 by the first and second Additional Protocols,[297] although they have not been ratified by the United States.[298] These developments in the law, which included the creation of Common Article 3 and its requirement of trial before a regularly constituted court, proved especially important in *Hamdan.*[299]

As far as the United Kingdom is concerned, the most important legal development has been the incorporation of the European Convention on Human Rights into the United Kingdom's domestic law via the Human Rights Act 1998 (HRA).[300] In the United Kingdom, legal rights were traditionally sourced in the common law rather than in a formal bill of

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293. *See generally* R(Abbasi) v. Secretary of State, [2002] EWCA Civ. 1598.

294. *See generally* Steyn, *supra* note 278.

295. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. *See generally* STEPHEN NEFF, WAR AND THE LAW OF NATIONS 340–41 (2005).

296. Christopher Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 27 (Dieter Fleck ed., 2d ed. 2008).

297. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609.

298. The United States does, however, accept that certain Articles, such as Article 75 of Additional Protocol I, are declaratory of customary international law. *See Hamdan*, 548 U.S. at 633; William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003).

299. *Hamdan*, 548 U.S. at 630–34. *See also id.* at 633 (where a plurality of the Court found Article 75 of Additional Protocol I to be declaratory of many of the "trial protections that have been recognized by customary international law.").

300. Human Rights Act, 1998, c. 42 (U.K.). Note that "incorporation" is a slightly inaccurate description, as the Act does not incorporate the entirety of the ECHR. *See* HELEN FENWICK, CIVIL LIBERTIES AND HUMAN RIGHTS 165 (4th ed. 2007).

rights.[301] This changed somewhat with the entry into force of the ECHR in 1953,[302] and the acceptance of the individual right to petition the European Court of Human Rights in 1966.[303] However, it was not until October 2000, with the coming into force of the HRA, that ECHR rights became domestically enforceable in the United Kingdom.[304]

The HRA is essentially a statutory bill of rights that provides for a soft form of judicial review of legislation: Section 3 of the Act requires that all legislation must be given effect to in a way that is consistent with the ECHR, "so far as it is possible to do so."[305] While the HRA was undoubtedly a significant constitutional development,[306] the extent to which it has made a difference to human rights protection in the United Kingdom remains contested.[307] The position taken here is that the HRA has made a difference in cases concerning national security and human rights in two ways.

First, the HRA led to the establishment of a new parliamentary committee, the Joint Committee on Human Rights (JCHR), which is tasked with reporting on human rights in the United Kingdom.[308] Among its activities is the checking of legislation for compliance with ECHR rights. Consequently, since 9/11, the JCHR has issued many highly detailed reports on different aspects of counterterrorism law and policy. Its reports are relied on by other human rights groups, members of Parliament as well as the courts.[309] Significantly, in the *Belmarsh* case, Lord Bingham drew upon the

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301. BONNER, *supra* note 66, at 347.

302. *Id.*

303. FENWICK, *supra* note 300, at 141.

304. McGoldrick, *supra* note 245, at 115. The right to petition the European Court of Human Rights remains available upon the exhaustion of domestic remedies. This has proved significant in several War on Terror cases. The Court's decision of A v. United Kingdom, (2009) 49 EHRR 625 (Grand Chamber) was the Strasbourg sequel to the *Belmarsh* case. This decision directly influenced the decision of House of Lords in AF. *See, e.g.*, Secretary of State for the Home Department v. AF [2009] UKHL 28, at [64]–[65] (Lord Phillips), [70]–[74] (Lord Hoffmann), [98] (Lord Rodger). *See also* Gillan & Quinton v. United Kingdom, (2010) EHRR 45 (ruling that the stop and search power under Section 44 of the Terrorism Act 2000 breached Article 8 of the ECHR, which ensures respect for private life). This decision of the ECtHR resulted in the suspension of the use of Section 44. *See* Home Office Media Centre, *Changes to Police Search Powers*, July 8, 2010, *available at* http://www.homeoffice.gov.uk/media-centre/news/changes-use-stop-search.

305. Human Rights Act § 3.

306. McGoldrick, *supra* note 245, at 115.

307. *See, e.g.*, K.D. Ewing, *The Futility of the Human Rights Act*, P.L. 829 (2004); *see, e.g.*, K. D. Ewing & Joo-Cheong Tham, *The Continuing Futility of the Human Rights Act*, P.L. 668 (2008) [hereinafter Tham & Ewing, *Continuing Futility*]; Anthony Lester, *The Utility of the Human Rights Act: A Reply to Keith Ewing*, 2005 P.L. 249. *See also* LUSTGARTEN & LEIGH, *supra* note 3, at 347 ("The judicial record under legal systems which give predominance to rights . . . does little to suggest that the adoption of a Bill of Rights in Britain would produce markedly different results in security cases.").

308. McGoldrick, *supra* note 245, at 118–19.

309. *Id.* at 119.

work of the JCHR, as well as the Newton Committee, a body which had been set up especially to review the ATCSA.[310] The support provided by the work of these bodies may be part of the explanation for the apparent change from the traditional deferential scrutiny applied in cases concerning national security.[311]

Second, the HRA has made a difference by elevating the judiciary as an institution, and giving it a firm mandate to act in cases involving human rights.[312] This is evident in Lord Bingham's response in the *Belmarsh* case to the Attorney General's claim that it was for the political branches to assess both the gravity of the threat facing the nation, and what measures might be appropriate in response; such issues, in the Attorney General's submission, fell within the purview of the democratically elected branches of the state.[313] Lord Bingham stated that he did not accept the full extent of the Attorney General's claim:

> I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true . . . that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. . . . The 1998 Act gives the courts a very specific, wholly democratic, mandate.[314]

This suggests that the HRA has been important at the institutional level: by giving the courts a much stronger sense of constitutional mandate on

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310. *A v. Secretary of State (No. 1)*, [2005] 2 A.C. [23], [64]-[65] (Lord Bingham).

311. Thomas Poole, *Tilting at Windmills? Truth and Illusion in the 'Political Constitution'*, 70 M.L.R. 250, 269-70 (2007); Gearty, *Human Rights*, *supra* note 251, at 40.

312. Discussing the recent decisions of the House of Lords as well as the Israeli High Court, Benvenisti argues that "the 'human rights revolution' did ultimately matter. Its real impact was, however, institutional rather than substantive: although the pull of the rights rhetoric elevated also societal interests to the status of individual rights and therefore essentially levelled the playing field between the completing rights, it also reallocated the authority to weigh these interests by transferring them from the political branches to the courts." *See* Benvenisti, *United We Stand*, *supra* note 227, at 268.

313. *A v. Secretary of State (No. 1),* [2005] 2 A.C. [37].

314. *Id.* at [42].

which to act, the HRA has likely contributed to the overcoming of the traditional judicial reluctance to act in cases concerning national security.[315]

d. Executive Excesses

Brian Simpson has described the traditional judicial attitude towards executive power in wartime as being subject to the "Reading Presumption of Executive Innocence."[316] Named for Lord Reading, this is the presumption that the executive "will act honestly and that its powers will be reasonably exercised."[317] The final cause then, is executive action that is sufficiently egregious to overcome this presumption. In the years after 2001, certain actions on the part of both the Bush Administration and the Blair Government may have been sufficiently egregious to make the judges reluctant to completely trust the good faith of the executive.

The Bush Administration took extreme positions in habeas corpus litigation in an attempt to exclude the possibility of judicial scrutiny over the detention of terrorist suspects.[318] However, the Administration's claims of exclusive and unreviewable authority over detention may have been undermined by its own overbroad detention policy,[319] particularly as more and more accounts of erroneous detention emerged.[320] The Administration did not help itself by setting up the cursory Combatant Status Review Tribunal (CSRT) review process in the wake of the Supreme Court's 2004 decisions.[321] Between July 30, 2004 and January 12, 2005, CSRTs confirmed the enemy combatant status of 520 out of 558 detainees.[322] In practice, the combination of non-disclosure of evidence, the presumption in favor of the government's evidence, and the acceptance of hearsay evidence

315. *See* BONNER, *supra* note 66, at 29; Kavanagh, *supra* note 246, at 299–300.

316. SIMPSON, *supra* note 68, at 29-30.

317. *Id.* at 29.

318. *See* Devins, *supra* note 271, at 498–99 (noting examples from Supreme Court litigation that indicate "the [Bush] [A]dministration sought to negate any judicial role in policing presidential war making").

319. *See* Neal Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2004 CATO SUP. CT. REV. 49 (2004).

320. See John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 TRANS. L. & CONT. PROBS. 773, 846–48 (2007) and sources cited therein.

321. CSRTs consisted of panels of military officers that decided whether "a preponderance of evidence" supported the detention of a detainee as an enemy combatant. A CSRT could consider hearsay evidence. There is also a presumption that the government's evidence was "genuine and accurate." Detainees had no access to any classified material. *See* Memorandum from Gordon England, Secretary of the Navy, on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantánamo Bay Naval Base, Cuba, for distribution (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

322. Kathleen T. Rhem, *38 Guantanamo Detainees to Be Freed After Tribunals*, AMERICAN ARMED FORCES PRESS SERVICE, Mar. 30, 2005, http://www.defenselink.mil/news/newsarticle.aspx?id=31063.

put the detainees at a great disadvantage, and reduced the CSRT process to a *pro forma* affair.[323] Indeed, there is speculation that it was a highly critical affidavit from intelligence officer Lieutenant Colonel Stephen Abraham, based on his experience of the CSRT process, which led the Supreme Court to reverse its initial decision to refuse certiorari in *Boumediene*.[324]

The Bush Administration's treatment of those it detained also likely undermined its position before the Supreme Court. The first photographs from Abu Ghraib prison in Iraq became public on the evening after the Supreme Court had heard the cases of *Hamdi* and *Padilla*, and one week after *Rasul* had been heard.[325] In the oral argument for *Padilla*, Justice Ginsburg had even questioned then–Deputy Solicitor General Clement about whether anything would prevent the President from authorizing torture. Clement replied that this was unthinkable because the executive branch of the United States did not do such things.[326] It is hard to suppose that the pictures from Abu Ghraib could have been far from the Justices' minds when they were considering the Bush Administration's claims of exclusive executive competence in national security matters. While there is no express mention of Abu Ghraib in any of the 2004 decisions, portions of those decisions, as Jenny Martinez observes, seem to be driven by concerns about the coercive interrogation and mistreatment of detainees.[327] Justice O'Connor's *Hamdi* opinion, for example, contains a reference to the AUMF definitely not authorizing "indefinite detention for the purpose of interrogation."[328] Justice Stevens' dissenting opinion in *Padilla* is also unequivocal in rejecting detention for the purpose of interrogation.[329] However, Martinez contends that it was the *Rasul* decision that was the

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323. *See* Mark Denbeaux & Joshua Denbeaux, No–Hearing Hearings CSRT: The Modern Habeas Corpus? 2–3 (Nov. 17, 2006) (unpublished manuscript), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf. Corine Hegland, *Guantánamo's Grip*, NAT'L J., Feb. 3, 2006, *available at* http://nationaljournal.com/about/njweekly/stories/2006/0203nj1.htm.

324. William Glaberson, *In Shift, Justices Agree to Review Detainees' Case*, N.Y. TIMES, June 30, 2007, at A1. *See also* PETER JAN HONIGSBERG, OUR NATION UNHINGED 124–26, 150–51 (2009).

325. Martinez, *supra* note 230, at 1050.

326. Linda Greenhouse, *The Supreme Court Asks: Who Will Guard the Guardians?*, N.Y. TIMES, May 9, 2004, at WK7.

327. Martinez, *supra* note 230, at 1051.

328. *Hamdi*, 542 U.S. at 521.

329. *Padilla*, 542 U.S. at 465 (Stevens, J., dissenting)("Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.").

most affected by Abu Ghraib: the majority's facially expansive approach to jurisdiction was "a signal to the executive branch about the possibility of judicial review of interrogation practices in far-flung places."[330]

By the time *Hamdan* was argued in the Supreme Court in 2006, more damaging material was in the public domain.[331] The notorious Bybee/Yoo memorandum had been leaked in June 2004.[332] This proved to be just one of many memoranda documenting and justifying the use of coercive interrogation.[333] By 2005, reports of secret CIA prisons and extraordinary rendition emerged.[334] In December 2005, there was the revelation that President Bush had authorized the National Security Agency to eavesdrop on Americans outside the parameters prescribed by statute.[335] Many of these policies rested upon the same expansive theory of Presidential power advanced in litigation by the Bush Administration. That the Supreme Court rejected this theory in *Hamdan* was thus significant, but at the same time, perhaps unsurprising.

The Blair Government's example of excess centered around the dossier of pre–war intelligence on Iraq that was allegedly given a "sexing up".[336] Then–Prime Minister Tony Blair presented the information in the dossier to Parliament in September 2002. Among his claims were that Saddam Hussein had the capability to launch weapons of mass destruction in forty–five minutes. This claim became central to Blair's case for supporting the American-led Iraq war.[337] The forty–five minute claim was later disavowed, eventually leading to a public inquiry into the intelligence on Iraq that was critical of the intelligence services.[338] Both David Bonner and Conor Gearty suggest that the scandal over the intelligence on Iraq and weapons of mass destruction may have led to greater skepticism about the Government's national security claims.[339] This "fiasco" receives an explicit mention in Lord Hoffmann's *Belmarsh* judgment.[340] Lord Scott, who had some

330. Martinez, *supra* note 230, at 1051.

331. *See* Johnson, *supra* note 232, at 456–62.

332. Bybee, *supra* note 241. *See generally* Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A1.

333. *See* Bybee, *supra* note 241.

334. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1.

335. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at 1.

336. *See British Iraq Dossier Surfaces, Without Crucial Weapons Claim,* N.Y. TIMES, Feb. 19, 2008, A11.

337. *Id.*

338. *Id.*

339. BONNER, *supra* note 66, at 30; Gearty, *Human Rights*, *supra* note 251, at 39 (referring to the "corrosive effect on confidence of the spurious WMD intelligence in Iraq.").

340. *A v. Secretary of State (No. 1)*, [2005] 2 A.C. [94] (Lord Hoffmann).

familiarity with the world of intelligence,[341] makes the point even more clearly:

> It is certainly true that the judiciary must in general defer to the executive's assessment of what constitutes a threat to national security or to "the life of the nation". But judicial memories are no shorter than those of the public and the public have not forgotten the faulty intelligence assessments on the basis of which United Kingdom forces were sent to take part, and are still taking part, in the hostilities in Iraq.[342]

B. The Conventional Account is Incorrect or Incomplete

Some commentators have argued that, although there is a wealth of historical evidence that supports the conventional account, civil liberties are not invariably infringed during wartime, and that there have been historical instances of courts protecting civil liberties during times of emergency or perceived emergency.[343] If this alternative account is correct, then there is less difficulty in accommodating the non–deferential decisions of the Supreme Court and the House of Lords since 9/11.

However, some of the Supreme Court decisions that are said to support the alternative account are, for varying reasons, problematic. Some decisions were actually made after the war or crisis was over.[344] A small number were decided *in media res*. For instance, in 1943, the Supreme Court took a firm stance against mandatory displays of allegiance toward the flag in *West Virginia State Board of Education v. Barnette*.[345] In doing so, the Court overruled *Minersville v. Gobitis*, its own decision from just three years prior in which it had upheld the expulsion of Jehovah's Witness children for refusing to salute the flag.[346] At the time of the decision, World War II was certainly ongoing, but as Michal Belknap notes, the case hardly presented "even an apparent threat to the war effort."[347]

Then there is the canonical Korean War–era *Youngstown* decision, in which the Court ruled that President Truman's Executive Order directing seizure of steel mills when confronted with the prospect of a steelworkers'

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341. LEIGH & MASTERMAN, *supra* note 245, at 211.

342. *A v. Secretary of State (No. 1)*, [2005] 2 A.C. [154]. Although Lord Scott seemed very close to finding that there was not a public emergency threatening the life of the nation for the purposes of Article 15 of the ECHR, in the end he gave the government the benefit of the doubt. *See id.*

343. STONE, *supra* note 10, at 550; *See also* Mark A. Graber, *Counter-Stories: Maintaining and Expanding Civil Liberties in Wartime, in* THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 95 (Mark Tushnet ed., 2005); Diane P. Wood, *The Rule of Law in Times of* Stress, 70 U. CHI. L. REV. 455, 465 (2003).

344. *See* discussion *infra* Part III.C.

345. 319 U.S. 624 (1943).

346. 310 U.S. 586, 600 (1940).

347. Belknap, *supra* note 38, at 90.

strike was unconstitutional.[348] Truman's order was framed in military terms, and warned that a strike would hinder the war effort and thereby impair national security.[349] That said, *Youngstown* did not directly concern national security policy as such. Alternatively, *Youngstown* may be an example of an exception to the rule, the result of a perfect storm of political and legal circumstances.[350]

The *Pentagon Papers* decision, in which the Court ruled against the government in its attempt to enjoin the publication of a secret study on the involvement of the United States in Vietnam, is another possible exception.[351] As Geoffrey Stone argues, "[i]n the *Pentagon Papers* decision, the Supreme Court, for the first time in American history, stood tall—in wartime—for the First Amendment."[352] At the same time, however, Stone acknowledges that the study was probably more an embarrassment than a threat to national security: it was at that time already three years old, concerned a prior administration's actions, and disclosed no military plans.[353] So once again, this decision did not represent a direct challenge to the executive branch's national security policies.

The most that could be said, as far as the United States is concerned, is that there is perhaps the odd anomalous decision. At most this requires a slight qualification of the conventional account: in wartime and during crises, the courts defer to the executive in the great majority of cases concerning national security.[354] Still, the number of post–9/11 decisions that seem to qualify as anomalies is considerably greater than the number of earlier decisions that might qualify. This would suggest that other factors are at work.

In the case of the United Kingdom, the pattern of historical judicial deference in wartime and crisis is even stronger; one struggles to find any historical examples of judicial resistance in national security cases,[355] which

348. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Block, *supra* note 18, at 487–88.

349. Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63, 65 (2002).

350. *Id*. at 71–75.

351. *See* N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

352. STONE, *supra* note 10, at 519.

353. *Id.* at 518.

354. *See, e.g.*, Cole, *Judging the Next Emergency*, *supra* note 4, at 2594 ("[T]he historical record does not demonstrate that courts will inevitably fold under the pressure of emergencies, but only that they will often do so.") (emphasis omitted).

355. *See* LUSTGARTEN & LEIGH, *supra* note 3, at 320 ("[A]nyone taking even a tally-sheet approach to judicial decisionmaking must be struck by the consistency of results in the cases . . . in virtually all of them the executive emerged victorious. Statistical randomness cannot explain so striking a pattern, and it is highly unlikely that all the unsuccessful litigants were asserting fanciful claims or suffered from poor representation."); TURPIN & TOMKINS, *supra* note 117, at 756 ("Courts in the United Kingdom have traditionally been notoriously weak in upholding civil liberties in the face of government claims to national security. This is

makes many of the decisions of the House of Lords since 9/11, such as the *Belmarsh* decision, seem even more anomalous.

C. The Passage of Time

As alluded to in the previous section, there are instances of the courts behaving in a non–deferential manner on matters of national security either right at the end of or after a war or crisis. This indicates that the point in time when a case reaches the court may be important: a challenge is most likely to succeed when the war or crisis is over, and normality has returned.[356] For example, the Supreme Court's *Milligan* decision is sometimes thought of as a landmark civil liberties decision, but it was decided after the Civil War had concluded, and after President Lincoln's death.[357]

The same pattern is discernible in *Duncan v. Kahanamoku.*[358] Martial law had persisted in Hawaii for three years until President Roosevelt revoked it in 1944. Martial law had included the trial of civilians before military tribunals. The Court observed that although the Hawaiian Organic Act, on which the government relied, permitted the Governor to invoke martial law, there was no explicit legislative authorization to close the civilian courts and supplant them with military tribunals for an extended period.[359] Accordingly, a majority of the Court ruled that the trials complained of were illegal, and the imprisoned civilians were entitled to be released.[360] But the case was only argued at the end of 1945; the Court's decision was only made after martial law had already been ended and after the war was over. The answer might have been different had the case come before the Court during the war.[361]

By contrast, *Quirin* was argued in July 1942. This was during the Battle of the Atlantic, when German U–boats were attacking American sailors and merchantmen in American waters.[362] Similarly, the internments in the United Kingdom under Regulation 18B occurred in the middle of 1940, a period when France was falling to the Nazis and Britain was being bombed on a nightly basis.[363] *Liversidge v. Anderson* was heard in September of

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a story that spans almost a century of case law, going all the way back to the First World War.").

356. *See* REHNQUIST, *supra* note 21, at 224 ("If the decision is made after hostilities have ceased, it is more likely to favor civil liberty than if made while hostilities continue.").

357. OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS 96 (2006).

358. 327 U.S. 304 (1946).

359. *Id.* at 324.

360. *Id.*

361. *See* REHNQUIST, *supra* note 21, at 221.

362. William M. Wiecek, *Sabotage, Treason and Military Tribunals in World War* II, *in* TOTAL WAR AND THE LAW 43, 49 (Daniel R. Ernst & Victor Jew eds., 2002).

363. LUSTGARTEN & LEIGH, *supra* note 3, at 17.

1941, and decided two months later.[364] At that time, Europe was in the hands of Nazi Germany, which had recently invaded Russia.[365] The United States had yet to join the war.

However, the passage of time is not always a guarantee of success. The Court's decisions concerning allegedly subversive speech in World War I were decided after the war's conclusion.[366] Similarly, *Korematsu* was argued in October 1944 and decided two months later.[367] Although World War II had not yet concluded—even putting aside evidence that indicates the military had long known that there was no real threat to the West Coast of the United States[368]—by late 1944, Japanese forces had certainly long lost the initiative in the Pacific Theatre.

The recent decisions of the Supreme Court and House of Lords indicate that timing may still be an important factor. By the time that cases worked their way up to the highest courts, more and more time had passed since the initial shock of the 9/11 terrorist attacks. This made the context in which those cases were decided more like *Milligan* and *Duncan*, and less like *Quirin* and *Liversidge.* Peter Spiro makes this point in relation to the Supreme Court's *Hamdan* decision:

> The putative boldness of the Court's action in *Hamdan* might also be discounted by the context in which it was decided. Query whether the case counts as a wartime decision. The administration's aggressive characterizations notwithstanding, in the absence of another major terrorist attack (post-9/11), the perception of an acute threat may have subsided.[369]

Thus, in the relative safety and calm of early 2006,[370] the Court could afford to be more confident in asserting itself. [371] The same logic applies to the 2004 decisions, which were decided a little under three years after the 9/11 attacks. Had they reached the Court earlier, and been decided closer to 9/11, their outcomes might well have been different.[372]

The same observation can be made about the House of Lords. The *Rehman* decision, in which a number of Law Lords expressed the view that

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364. Liversidge v. Anderson [1942] A.C. 206.

365. *See* Heuston, *supra* note 85, at 40.

366. Brennan, *supra* note 14, at 15. The end of World War I was, however, immediately followed by the "Red Scare." *See id*. at 15–16.

367. 323 U.S. 214.

368. *See* Muller, *supra* note 55.

369. Peter J. Spiro, *International Decisions:* Hamdan v. Rumsfeld, 100 AM. J. INT'L L. 888, 894 (2006).

370. *Hamdan* was heard in March 2006 and decided at the end of June 2006. *Hamdan*, 548 U.S. 557.

371. Spiro*, supra* note 369, at 894.

372. *Id. See* Martinez, *supra* note 230, at 1071–72 (arguing that the use of procedural mechanisms to delay the final resolution of substantive issues related to the War on Terror may be to ensure a sufficient amount of time has passed such that clear reflection occurs.).

national security was the prerogative of the executive,[373] came out the month after 9/11. One year later, in October 2002, the English Court of Appeal ruled in favor of the government in the *Belmarsh* case.[374] At the time, there was an expectation of further terrorist attacks.[375] As it turned out, by the time the House of Lords decided the *Belmarsh* case, some two years later, there had been at that point been no further attacks.[376] Conversely, the terrorist bombings in London of July 2005 would surely have been in the minds of the Law Lords when they were deciding the *Torture* case later that same year.[377] Indeed, the stricter standard of proof insisted upon by the majority in that decision may reflect a concern not to unnecessarily hamper the executive's ability to protect national security.[378]

D. Qualitative Differences Between Traditional War and the War on Terror

The fourth explanation why judges may be acting in a less deferential manner is because they perceive the War on Terror to be something other than a war or crisis. The first difference that could be drawn is one about the quality of the threat. Bruce Ackerman, for example, contrasts a physical threat to a population with a threat to a polity. He contends that terrorism, unlike the threats faced during World War II and the Civil War, poses a physical threat to populations, but not to the continued existence of government.[379]

A similar view is evident near the conclusion of Lord Hoffmann's judgment in the *Belmarsh* case. Lord Hoffmann was alone in concluding that derogation from the ECHR was unjustified because there was not a public emergency threatening the life of the nation. Lord Hoffmann drew a distinction between the predicament faced by the United Kingdom in the dark days of early World War II and threat it faced from al Qaeda:

> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung

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373. *See Rehman*, [2001] UKHL 47, [2003] 1 A.C. 153.

374. A v. Secretary of State for the Home Department, [2002] EWCA Civ. 1502 (U.K.).

375. Gearty, *Human Rights*, *supra* note 251, at 39.

376. The House of Lords heard the case in October 2004, and issued its decision in December 2004. *See A v. Secretary of State (No. 1)*, [2005] 2 A.C. 68.

377. *A v. Secretary of State (No. 2)*, [2006] A.C. 221.

378. *See* Sangeeta Shah, *The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues*, 6 HUM. RTS. L. REV. 416, 432 (2006).

379. ACKERMAN, *supra* note 112, at 20–21. *See also* Thomas Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 S.M.U. L. REV. 221, 232 (2008).

> in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.[380]

Related to this is the debate about whether the War on Terror can sensibly be conceived of as a war. Some have argued that the War on Terror is a constructed (and bad) idea,[381] but the War on Terror paradigm continues to have purchase.[382] But even if one accepts that the War on Terror is properly considered a real war rather than a metaphorical one, it looks like a different kind of war. In earlier conflicts such as the two World Wars, the nation as a whole felt it was at war. A larger proportion of the population was directly affected in some way, for example by serving in the armed forces, or working in war-related industries. There was conscription, rationing of food, and other forms of domestic sacrifice.[383] By contrast, for the vast majority of the population today, life goes on as before the 9/11 attacks.[384]

The War on Terror also differs from earlier wars in some other significant respects. Unlike past wars, there are for the most part no armies massing on battlefields; indeed there are no clear distinctions between the battlefield and non–battlefield.[385] Most significantly, the War on Terror has no obvious end. Historically, courts have been unwilling to rule on when a war has ended for legal purposes, and thus when executive war powers

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380. *A v. Secretary of State (No. 1),* [2005] 2 A.C. [96]. Goldsmith and Sunstein also highlight the differences between World War II and the post–9/11 period in the American context. *See* Goldsmith & Sunstein, *supra* note 285, at 280.

381. *See, e.g.*, Conor Gearty, *The Superpatriotic Fervour of the Moment*, 28 O.J.L.S. 183, 196 (2008); David Dyzenhaus & Rayner Thwaites, *Legality and Emergency - The Judiciary in a Time of Terror*, *in* LAW AND LIBERTY IN THE WAR ON TERROR 9, 9 (Andrew Lynch, Edwina MacDonald & George Williams eds, 2008).

382. *See, e.g.*, *Boumediene*, 128 S. Ct. at 2262 ("They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history."). *See generally* Adam Roberts, *Countering Terrorism: A Historical Perspective*, *in* COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 1, 27–41 (Andrea Bianchi & Alexis Keller eds., 2008).

383. Scheindlin & Schwartz, *supra* note 261, at 840–41.

384. Indeed after 9/11, Americans were urged to consume. *See, e.g.*, Lizette Alvarez, *House Passes a War-Bond Bill, but Bush Is Not Enthusiastic*, N.Y. TIMES, Oct. 26, 2001, at C7 ("While calling the bill a good patriotic gesture, the Bush [A]dministration is not going out of its way to promote the [war bonds] legislation, arguing that in today's economy it is important to encourage consumers to spend.").

385. The Bush Administration claimed the power to detain captives as enemy combatants regardless of whether they were captured on a traditional battlefield. *See Boumediene*, 128 S. Ct. at 2241 ("Some of these [detainees] were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia."). *See also In re* Guantánamo Detainee Cases, 255 F.Supp. 2d 443, 475 (D.D.C. 2005).

cease to operate.[386] In the War on Terror, there will probably not even be an event that can be marked as the date the war factually ended.[387]

Most obviously, these differences may have affected how the Supreme Court viewed the executive's detention decisions. There is plainly a much lower risk of wrongfully detaining a uniformed German soldier captured on a battlefield in Normandy than a terrorist suspect captured in civilian clothing in Pakistan. The prospect of wrongful detention lasting for potentially a captive's lifetime adds to the stakes.[388]

More generally, the prospect of an indefinite war on terror lasting for generations renders the dichotomy between war/crisis and peace/normality inadequate.[389] Michael Rosenfeld proposes a useful intermediate category between the two poles by drawing a distinction between times of crisis and times of stress.[390] Times of crisis involve some kind of threat to the existence of the state, and may have multiple causes, including war. Such times are to be contrasted with ordinary times. Somewhere in the middle of the spectrum are times of stress. There is of course overlap between times of crisis and stress, but the less acute and more diffuse and long–term a threat is, the more likely that it will cause a period of stress. If a threat is severe and occurs in a short space of time, it will probably cause a period of crisis.[391] In terms of Rosenfeld's tripartite framework, the War on Terror amounts to "conditions of stress" rather than crisis.[392]

If the Supreme Court and House of Lords considered the post–9/11 period to be a period of stress rather than crisis associated with traditional war, then this makes the generally non-deferential approach more explicable. The clearest indication of this appears in Justice Kennedy's *Boumediene* opinion:

> Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.[393]

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386. *See* Ludecke v. Watkins, 335 U.S. 160 (1948). *See also* R v. Bottrill *ex parte* Kuechenmeister [1947] 1 K.B. 41 (Eng.).

387. Michael Rosenfeld, *Judicial Balancing in Times of Stress*, *in* COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 357, 392 (Andrea Bianchi & Alexis Keller eds., 2008) ("Whereas conventional wars are generally limited in duration, the war on terror must be *conceived* as a war without end.").

388. *Boumediene*, 128 S. Ct. at 2238 ("[T]he consequence of error may be detention of persons for the duration of hostilities that may last a generation or more . . . [the risk of error] is a risk too significant to ignore.").

389. *See* GROSS & AOLÁIN , *supra* note 357, at 174–80.

390. Rosenfeld, *supra* note 391, at 359.

391. *Id.*

392. *Id.* at 357. *See also* Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, *in* THE CONSTITUTION IN WARTIME 39, 45 (Mark Tushnet ed., 2005).

393. *Boumediene*, 128 S. Ct. at 2277.

Put simply, the courts have not deferred to the executive in the way that they have in past wars and crises because they perceive the War on Terror as being a prolonged and indefinite period of stress—something other than a war or crisis—thus justifying a different approach.

E. Less than Meets the Eye: Continued Judicial Deference?

The final explanation is the most pessimistic from a civil libertarian standpoint. This is that the break in the historical pattern of deference in wartime or crisis has been at least partially misdiagnosed in two ways. First, the decisions that are said to herald a new dawn of judicial assertiveness almost exclusively concern detention. The picture becomes more ambiguous once decisions concerning other aspects of the War on Terror are considered.[394] Second, even some of the lauded decisions of the Supreme Court and House of Lords have had less impact than often claimed, and have aspects that are more accommodating to the needs of the executive than might first appear.

The Supreme Court's *Iqbal* decision illustrates the first point.[395] In ruling as it did, the Court makes it difficult for persons like Iqbal to seek redress. The decision itself turns on Iqbal's allegations against Ashcroft and Mueller being implausible. That is, it is implausible to suppose that in the aftermath of the 9/11 attacks, Iqbal's detention and alleged mistreatment were the result of instructions from above. This is, to say the least, a charitably trusting attitude.[396]

The Supreme Court's detention decisions illustrate the second point. These decisions certainly had some effect upon the Executive, and they were typically portrayed as being setbacks for the Bush Administration.[397] But the Bush Administration's claims were often so extreme that the Court even hearing the case was essentially a setback, regardless of how the Court ruled.[398]

Moreover, not all forms of judicial intervention are created equal. Judicial intervention may involve a court inquiring into whether the

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394. *See also* Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 630 (2010) (arguing that "[a] critical approach argues that a *full accounting* [of the Supreme Court's War on Terror decisions] requires looking at more cases, ranging from rulings on relief other than habeas to the claims that the Supreme Court did not reach, either through jurisprudential doctrines or by declining to grant review") (emphasis added).

395. *See supra* text accompanying notes 165–170.

396. *See* Michael C. Dorf*, Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 227–28 (2010).

397. *See, e.g.*, Editorial, *Reaffirming the Rule of Law*, N.Y. TIMES, June 29, 2009, at A26 (referring to the Supreme Court's 2004 decisions of *Rasul* and *Hamdi* as being a "a stinging rebuke" to the Administration). *See also* Jonathan Mahler, *Why This Court Keeps Rebuking This President*, N.Y. TIMES, June 15, 2008, at WK3.

398. *See supra* text accompanying notes 231–238.

executive has the legal authority to act in the way it has, or it may involve a court considering whether the executive has acted in accordance with substantive legal and constitutional principles.[399] Most of the Supreme Court's decisions, which were based on separation of powers principles, the absence of congressional authorization,[400] or other process–based points, fall into the first category.[401] The Court's decisions have thus tended to impose certain broad boundaries, but leave the details to be worked out by the lower courts or the executive.

In *Hamdi*, a majority of the Court accepted that there was sufficiently clear legal authorization for detaining Hamdi in the form of the AUMF. A different majority held, however, that Hamdi was entitled to more of an opportunity to challenge his designation as an enemy combatant.[402] But beyond that, there was little guidance that other than Justice O'Connor's skeletal due process framework that formed the basis for the CSRTs.[403] *Rasul* was also a narrow decision in that it only established that the courts had the statutory jurisdiction to hear habeas petitions from Guantánamo detainees; the courthouse door, in other words, was open, only to be shut again when the habeas statute was subsequently amended.[404] *Rasul* raised, but did not resolve, other questions, such as whether its holding applied to terrorist suspects held by the United States outside of Guantánamo.[405] The decision also said little about the substantive claims detainees might raise, leaving only a tantalizing hint in the last footnote of the majority opinion.[406]

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399. Benvenisti, *United We Stand*, *supra* note 227, at 255. For a fuller account of Benvenisti's ladder of judicial review and how it applies to various post–9/11 judicial decisions, see *id.* at 255–63.

400. On this point, see Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, *in* THE CONSTITUTION IN WARTIME (Mark Tushnet ed., 2005). *See also* David Fontana, *The Supreme Court: Missing in Action*, 55 DISSENT 68, 68 (2008).

401. Martinez, *supra* note 230, at 1064–71. It could be argued that this is in fact desirable. *See* Anthony J. Colangelo, *Brief Remarks on the Supreme Court's Role after 9/11: Continuing the Legal Conversation in the War on Terror*, 62 S.M.U. L. REV. 17 (2009).

402. *See supra* text accompanying notes 127–128.

403. *See supra* text accompanying note 129. Justice Souter, with Justice Ginsburg joining, agreed with the plurality in ordering the case remanded. However, they did not agree with the plurality's suggestions as to the applicable procedure. *See Hamdi*, 542 U.S. at 553–54.

404. *See supra* text accompanying notes 145–146.

405. Justice Scalia's dissent suggested that, under *Rasul,* habeas jurisdiction would logically extend to parts of Iraq and Afghanistan. *See Rasul*, 542 U.S. at 501 (Scalia, J., dissenting). The majority's ambiguity on this point may have been deliberate. *See supra* text accompanying note 330.

406. *Rasul*, 542 U.S. at 483 n. 15 ("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.'"). Jenny Martinez interprets this

Similarly, although *Hamdan* invalidated the Bush Administration's military commissions, and held that CA3 of the Geneva Conventions applied to the conflict with al Qaeda, the decision primarily turns on the lack of proper congressional authorization, a point that comes through particularly clearly in Justice Breyer's concurring opinion.[407] Accordingly, in the wake of *Hamdan*, the Bush Administration quickly made plans to have Congress enact a statutory regime that would authorize revised military commissions and limit the scope of the Court's ruling on CA3. The result was the MCA, which largely cancelled out the decision.[408]

Even *Boumediene* was ultimately about a question of process: whether detainees at Guantánamo had the constitutional right to seek habeas corpus.[409] As with the other decisions, the Court left open questions of substance, such as the class of person legitimately subject to detention, and questions of implementation.[410] The consequence has been continuing uncertainty about key issues related to detention at Guantánamo, even after more than eight years and several Supreme Court decisions.[411]

Munaf follows this pattern of process over substance. The decision affirms the right of two citizens detained without trial to seek habeas corpus.[412] Indeed this point does not turn on Munaf and Omar's citizenship. However, the Court's munificence here is immediately followed by a denial of relief across the board, and a notably deferential attitude with respect to Munaf and Omar's claims that they might face torture in Iraqi custody.[413]

In the case of the British judiciary, Conor Gearty observes that the judges, aside from the odd exceptional decision, have continued their

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footnote as a "strong signal" from the Court. But as she observes, the political branches did not get the hint. *See* Martinez, *supra* note 230, at 1051–53.

407. *See Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes is necessary."). *See also id.* at 637 (Kennedy, J., concurring) ("If Congress, after due consideration, deems it appropriate to change the controlling statutes, it has the power and prerogative to do so.").

408. *See supra* text accompanying notes 151–153.

409. *Boumediene*, 128 S. Ct. at 2277 ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus.").

410. *See* Robert M. Chesney, Boumediene v. Bush, 102 AM. J. INT'L L. 848, 852–53 (2008).

411. Martinez, *supra* note 230, at 1029; *See* Resnik, *supra* note 394, at 629-30. President Barack Obama has undertaken to close the detention facility at Guantánamo. *See* Scott Shane, Mark Mazzetti & Helene Cooper, *Obama Reverses Key Bush Policy, but Questions on Detainees Remain*, N.Y. TIMES, Jan. 23, 2009, at A16.

412. *See supra* text accompanying notes 159–164.

413. Munaf v. Geren, 128 S. Ct. at 2225 ("This allegation [of torture] was raised in Munaf's petition for habeas . . . Such allegations are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the judiciary."). *See also* Harlan Grant Cohen, Munaf v Geren, 102 AM. J. INT'L L. 854, 858–59 (2008).

pattern of deference in cases involving national security.[414] Certainly this is true of the House of Lords' decisions of *Rehman*,[415] with its calls for deference to the expertise of the Home Secretary on the issue of national security,[416] *Gillan*,[417] with its apparent comfort with the repeated exercise of an exceptional power encompassing a wide geographical area in response to an amorphous terrorist threat,[418] and *RB*,[419] with its acceptance of the practice of obtaining diplomatic assurances from states with dubious human rights records to facilitate the deportation of terrorist suspects.[420]

As with the Supreme Court's detention decisions, Gearty's exceptions to the rule, which include the *Belmarsh* and *Torture* decisions, become more ambiguous upon closer inspection. The question in the *Torture* case,[421] the admissibility of evidence procured through torture carried out by a third party, arose because SIAC's procedural rules allowed it to receive evidence that would not be admissible in court.[422] There was no express mention of torture in either the rules or their authorizing statute. Absent express statutory authorization, the House of Lords was unwilling to allow SIAC to receive such evidence. As Lord Rodger put it, "the revulsion against torture is so deeply ingrained in our law that . . . a court could receive statements obtained by its use only where this was authorised by express words, or perhaps the plainest possible implication, in a statute."[423] But under the Westminster system, nothing stops Parliament from legislating express words overriding the exclusionary rule against torture. So, like *Hamdan*, the

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414. GEARTY, CIVIL LIBERTIES, *supra* note 4, at 48 ("[There is] plenty of evidence of the courts being very slow to challenge ministerial and police assumptions about what the exigencies of national security now require in this new era of alleged 'global terrorism'."). *See also* Clive Walker, *Intelligence and Anti-Terrorism Legislation in the United Kingdom*, 44 CRIME, L. & SOC. CHANGE 387, 407 (2005) [hereinafter Walker, *Intelligence*] ("The headlines about A and others v Secretary of State for the Home Department may create the impression of a judicial revolt. But one should be cautious about claims that an new era of judicial activism has dawned. . . this case must be set against the vast majority where executive decisions have been upheld.").

415. [2001] UKHL 47, [2003] 1 A.C. 153.

416. *See supra* text accompanying notes 171–175.

417. [2006] UKHL 12, 2 A.C. 307.

418. *Case Comment: Police Powers—Whether Authorisation Given Under Terrorism Legislation Lawful,* 2006 CRIM. L. R. 751, 754 ("[O]ne might argue that their Lordships here too easily accepted evidence of vulnerabilities (which are indeed diffuse and permanent and so can be used to justify the diffuse and de facto permanent powers) as equivalent to evidence of threats."). For a more sympathetic take on *Gillan*, see KAVANAGH, *supra* note 6, at 390–91.

419. RB(Algeria) v. Secretary of State for the Home Department [2009] UKHL 10.

420. *See* Elliot, *supra* note 205, at 140–41.

421. *A v. Secretary of State (No. 2)*, [2006] 2 A.C. 221.

422. *See* Special Immigration Appeals Commission (Procedure) Rules, *supra* note 213.

423. *A v. Secretary of State (No. 2)*, [2006] 2 A.C. [137] (Lord Rodger). *See also id.* at [51] (Lord Bingham), [114] (Lord Hope).

Torture case could be said to turn on the absence of legislative authorization.

Moreover, the majority prescribed a strict standard of proof to be met before the exclusionary rule applied.[424] The difficulty in satisfying the majority standard limits the practical effect of this decision, and renders the unanimous rejection of evidence obtained through torture largely symbolic, a holding with more bark than bite.[425] Viewed in this light, the *Torture* decision starts looking less like an exception, and more like an instance of disguised judicial deference.[426]

Even the flagship decision representing the changed attitude of the House of Lords, the *Belmarsh* case,[427] is more deferential than it might initially appear to be. In his submissions to the Court, the Attorney General reiterated the familiar position that decisions about national security were rightly the province of the political branches,[428] an argument to which the House of Lords had historically been receptive.[429] On the question of whether there was a public emergency threatening the life of the nation that justified derogation, most of the Law Lords stayed true to the historical pattern of deference.[430] It was only in relation to the question of whether the measures taken in response to the emergency were appropriate that the House of Lords could be said to have broken with historical precedent.

There is an element of inconsistency in the two positions that were adopted by most of the Law Lords.[431] Logically, expressing a view about the appropriateness of measures taken in response to an emergency required some kind of assessment as to the nature of the emergency itself. It may be the case that the facts of the *Belmarsh* case were simply *sui generis*: the measures taken in this case had such obvious flaws—applying only to non-citizens, and being easily circumvented by voluntary departure[432]—that

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424. The majority held that was that SIAC should refuse to admit the evidence if it concluded on the balance of probabilities that the evidence had been obtained through torture. *See id.* at [116]–[118] (Lord Hope). The minority view was that SIAC should not admit the evidence if it could not conclude that there was not a real risk that the evidence was so obtained. *See id.* at [56] (Lord Bingham).

425. *See* Shah, *supra* note 378, at 432. *See also* LEIGH & MASTERMAN, *supra* note 245, at 221–25.

426. Thomas Poole, *Courts and Conditions of Uncertainty in Times of Crisis,* 2008 P.L. 234, 252–53 [hereinafter Poole, *Courts and Conditions*].

427. *A v. Secretary of State (No. 1)*, [2005] 2 A.C. 68.

428. *Id.* at [37] (Lord Bingham).

429. *See* discussion *supra* Part I.B.

430. *See A v. Secretary of State (No. 1)*, [2005] 2 A.C. [29] (Lord Bingham), [116] (Lord Hope), [154] (Lord Scott), [226] (Baroness Hale). *See also* Brice Dickson, *Judicial Activism in the House of Lords 1995–2007*, *in* JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 351, 378–79 (Brice Dickson ed., 2007) (criticizing the majority of the House of Lords for their unwillingness to challenge the Government's position); Walker, *Intelligence*, *supra* note 414, at 407.

431. Poole, *Courts and Conditions*, *supra* note 426, at 239.

432. *See* Ip, *supra* note 320, at 830–33.

whatever view one took of the emergency, these measures were not strictly required by the exigencies of the situation.

A further point made by some commentators about the *Belmarsh* case is that it was followed by the establishment of the control order regime, and thus did not change much. As Joo–Cheong Tham and Keith Ewing argue:

> [B]y accepting that there [was] a national security threat on the most gentle standards of review, the House of Lords [gave] the green light to legislation almost as offensive to human rights as that which was declared incompatible with the European Convention, in the form of control orders.[433]

As noted earlier, the House of Lords does not have the power to strike down legislation, but merely has the power to declare a statute incompatible with rights in the ECHR.[434] Thus, the *Belmarsh* decision only declared that the ATCSA detention scheme was incompatible with the relevant articles of the ECHR. The decision about whether to repeal Part 4 of ATCSA remained with the political branches.[435] The decision effectively ended the ATCSA detention scheme, but it did so because the scheme became politically, rather than legally, untenable.[436]

It is true that the PTA's control order regime, which replaced the ATCSA detention scheme, was a careful response to the *Belmarsh* decision, particularly those portions where some of the Law Lords had suggested that lesser measures, such as electronic tagging and restrictions on travel and communications, would be a better way of responding to the terrorist threat.[437]

As for the House of Lords' control order decisions, they arguably flatter to deceive as well.[438] The *JJ* decision was in a sense a loss for the Government.[439] But the PTA's control order regime itself survived largely unscathed, and the House of Lords arguably gave an implicit endorsement

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433. Joo-Cheong Tham & K. D. Ewing, *Limitations of a Charter of Rights in the Age of Counter-Terrorism*, 31 MELB. UNIV. L. REV. 462, 493 (2007). *See also* Adam Tomkins, *The Rule of Law in Blair's Britain*, 26 U. QUEENSLAND L.J. 255, 287 (2007).

434. Human Rights Act, 1998 § 4 (U.K.).

435. *See* DYZENHAUS, *supra* note 4, at 33 ("[T]he fact that a decision under the Human Rights Act declares an incompatibility between a provision in a statute with human rights commitments without invalidating the provision can be seen as letting the judges off the hook.").

436. *See* Walker, *Keeping Control*, *supra* note 190, at 1407–08.

437. *See A v. Secretary of State (No. 1)*, [2005] 2 A.C. [35] (Lord Bingham), [155] (Lord Scott). Indeed, Thomas Poole argues that the Blair Government took parts of a decision that ruled against it, and used it to construct "its revamped, non-discriminatory (but still decidedly illiberal) counter-terrorist policy." *See* Poole, *supra* note 311, at 271.

438. *See generally* Tham & Ewing, *Continuing Futility*, *supra* note 307. *But cf.* Kavanagh, *supra* note 246, at 294–95.

439. *See generally* Secretary of State for the Home Department v. JJ, [2007] UKHL 45.

to the system subject to only a few minor modifications.[440] All that *JJ* required was a reduction in the particular control orders' period of curfew. The Government relied particularly on Lord Brown's stated tipping point of sixteen hours,[441] and adjusted various control orders accordingly—some from twelve to sixteen hours, and some from eighteen to sixteen hours.[442]

The same critique can be made of the Article 6 control order decisions. In *MB*,[443] the majority recognized that in certain cases—notably those where the key allegations against the controlee were contained solely in the undisclosed material—the provision of a special advocate might not be sufficient to satisfy Article 6.[444] But rather than declaring the scheme incompatible with Article 6, the majority instead adopted an interpretative solution via Section 3 of the HRA.[445] This eventually necessitated the follow–up decision of *AF*, which clarified that Article 6 required a certain minimum level of disclosure of the case against the controlee.[446] But once again, both decisions could be said to be mere tinkering around the margins of the control order regime.

IV. A CONFLUENCE OF EXPLANATIONS

As ever, it is a combination of the proffered explanations that best explains the post–9/11 decisions of the Supreme Court and House of Lords. The explanation that the conventional account of judicial behavior in times of war is incorrect or incomplete can largely be discounted. Although there are some decisions that support this view, many of these decisions, as discussed earlier, amount to judicial courage after the fact or are only loosely related to national security policy.[447] Many more decisions, especially those from the United Kingdom, are more consistent with the conventional account.

This then suggests that other forces are at work. The point in time when these cases were heard and decided is relevant. The Supreme Court's first decisions were decided close to three years after the 9/11 attacks. *Hamdan* and *Boumediene* were decided even later. The House of Lords' first decision in the immediate period after 9/11 was *Rehman*; the robust defence of liberty in *Belmarsh* was more than three years away.[448] However, the

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440. McGoldrick, *supra* note 245, at 184 ("The result of the series of judgments in the House of Lords in October 2007 was a mixed success for the government. The regime was upheld and orders could continue to be issued largely as they had been.").

441. Secretary of State for the Home Department v. JJ, [2007] UKHL 45 at [105].

442. McGoldrick, *supra* note 245, at 184.

443. Secretary of State for the Home Department v. MB, [2007] UKHL 46, [2007] 3 W.L.R. 681.

444. *Id.* at [35], [66], [85] & [90].

445. *See supra* text accompanying notes 199–203.

446. *See* Secretary of State for the Home Department v. AF, [2009] UKHL 28.

447. *See* discussion *supra* Part III.B.

448. *See supra* text accompanying notes 356–378.

same point might have been made of *Korematsu*, heard and decided in late 1944, more than two years after the internment had begun, and with the United States militarily ascendant. Similarly, *Iqbal* and *RB* are among the decisions of the Supreme Court and House of Lords most distant in time from 2001.

Another explanation for the greater judicial assertiveness is simply that the courts perceive the War on Terror to be different from a war or crisis. Lord Hoffmann's dissent in the *Belmarsh* case, for example, expresses the view that the threat of transnational terrorism does not equate with previous wartime threats. Further, the War on Terror differs from traditional wars in other ways, notably in terms of its potentially indefinite duration. Accordingly, the courts may see the War on Terror as being a prolonged period of stress, rather than a war or crisis, and thus not necessarily afford the executive the same measure of deference.[449] That said, the outcomes of the decisions in *Dennis*[450] and *GCHQ*,[451] both decided during a period of stress in the form of the Cold War, point to the relevance of the two remaining explanations, which are essentially competing narratives about the significance and impact of the War on Terror decisions of the Supreme Court and House of Lords.

There is something to be said for the view that post–9/11 decisions such as *Hamdi*, *Rasul*, *Hamdan*, and *Belmarsh* represent a break from the past.[452] These cases contain various references to historical judicial deference to excessive security measures implemented by the executive, and are suggestive of a process of social learning.[453] Additionally, there has been the growth of a civil society—including advocacy groups, the media, and foreign governments—that has provided the courts the extra backing and cover that was not there to the same extent previously.[454] There have also been great legal changes in the past sixty years, including the establishment of international human rights law and the modernization of the law of armed conflict. These developments not only provided a framework and terminology by which to evaluate and critique counterterrorism policies, but also constrained the freedom of the respective executives. This is true of the Bush Administration's plans to try terrorist suspects by military commission, and of the Blair Government's various schemes to detain terrorist suspects. In the case of the United Kingdom, the enactment of the HRA merits further mention. Although it would be too simple to state that the HRA changed everything, the Act was significant in that it elevated the House of Lords' perception of its institutional role and constitutional

449. *See supra* text accompanying notes 379–393.
450. *See supra* text accompanying notes 58–61.
451. *See supra* text accompanying notes 95–103.
452. *See supra* text accompanying notes 225–254.
453. *See supra* text accompanying notes 256–270.
454. *See supra* text accompanying notes 271–280.

mandate.[455] Finally, executive actions that were perceived as being excessive may have undermined in the eyes of judges the claim that the executive is uniquely competent in national security matters.[456]

At the same time, decisions such as *Munaf, Iqbal*, *Gillan*, and *RB* are generally consistent with the conventional account. Moreover, while the bulk of the post–9/11 decisions may represent a change from the historical pattern, their impact should not be overstated. Decisions such as *Rasul* and *Hamdan*, for example, turned on the interpretation of statutes. The Supreme Court's adverse interpretations in those cases were obstacles that were quickly overcome by a largely compliant Congress. *Hamdi* confirmed the executive's power to detain certain individuals as enemy combatants, subject to observing a modicum of due process.

For all the force of the House of Lords' rejection of the use of tortured evidence in the *Torture* case, the standard of proof required makes the decision's impact perhaps more rhetorical than real. For all the praise heaped upon the *Belmarsh* decision, the House of Lords did obligingly accept the existence of an emergency. Additionally, the Court declared one detention scheme incompatible with the ECHR, only for the government to enact another scheme that still raises significant human rights concerns. And so far, the House of Lords has only chipped away at the edges of the control order regime.[457]

However, given the centrality of Parliamentary sovereignty in the United Kingdom's constitutional arrangements and the consequent limitations on judicial review, it is hard to criticize the House of Lords for not doing more; the decision to create the control order regime was after all made by the political branches.[458] In any case, this chipping away has some real effects, namely incentivizing prosecution and reducing reliance on control orders.[459] Indeed, given the reluctance of the executive to disclose sensitive material, the *AF* case may presage the end of the control order system.[460]

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455. *See supra* text accompanying notes 281–315. This trend is likely to be further bolstered by the replacement of the Appellate Committee of the House of Lords with the Supreme Court.

456. *See supra* text accompanying notes 316–342.

457. *See supra* text accompanying notes 438–446.

458. Kavanagh, *supra* note 246, at 293–95.

459. WALKER, BLACKSTONE'S GUIDE, *supra* note 252, at 238.

460. A number of Law Lords mentioned this possibility. *See* Secretary of State for the Home Department v. AF [2009] UKHL 28 [70] (Lord Hoffmann), [87] (Lord Hope). *See also* Francis Gibb, *Terror Suspect's Release Expected to End System of Detention on Secret Evidence*, THE TIMES, Sept. 8 2009, *available at* http://www.timesonline.co.uk/tol/news/politics/article6825372.ece. The new Home Secretary, Theresa May, has since announced a major review of counterterrorism powers, including the control order regime: *Counter-terrorism powers to face government review*, BBC NEWS, July 13, 2010, *available at* http://www.bbc.co.uk/news/10619419.

CONCLUSION

In all likelihood, the truth lies somewhere in between the last two explanations discussed in the previous part. In the main, the decisions of the Supreme Court and the House of Lords since 9/11 exhibit a degree of deference in relation to matters of national security that is inconsistent with the conventional account. But by the same token, these decisions are not always the dramatic and unambiguous rebukes to the executive branch that they are sometimes portrayed to be.

It should also be borne in mind that most of the Supreme Court's decisions deal with counterterrorism policy embarked on during the early days of the War on Terror: all the decisions bar one in some way concern the Bush Administration's claims of exclusive authority to detain or try terrorist suspects without judicial oversight.[461] These were extreme cases.[462] By contrast, the House of Lords has heard a wider variety of cases. It has been most willing to closely scrutinize cases involving indefinite detention and control orders, but less willing in cases involving other aspects of the War on Terror.[463] For this reason also, it is in the end better to describe the post–9/11 decisions of the Supreme Court and House of Lords not as leading to a break in the cyclical pattern of contraction and expansion of liberty, but rather as leading to a dampening or flattening of that pattern.

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461. The one exception is *Iqbal. See* Fallon, Jr., *supra* note 243, at 367–68.

462. Indeed, the Court has decided not to hear other cases involving other aspects of the War on Terror. *See* Stephen I. Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox,* 43 U. RICH. L. REV. 893, 913–17 (2009).

463. WALKER, BLACKSTONE'S GUIDE, *supra* note 252, at 310; LEIGH & MASTERMAN, *supra* note 245, at 217, 232.