

Draft 2/2/12

**Civil Society Constitutionalism:**  
**The Surprising Resilience of Human Rights in the Decade after 9/11,**  
**and its Implications for Constitutional Theory**

By David Cole<sup>1</sup>

**Introduction**

Had someone told you, on September 11, 2011, that the United States would not be able to do whatever it wanted in response to the terrorist attacks of that day, you might well have questioned their sanity. The United States was the most powerful country in the world, and had the world's sympathy that day. Al Qaeda had few friends beyond the Taliban. As a historical matter, Congress and the courts have deferred to the executive in such times of crisis. And the American polity was unlikely to object to measures that sacrificed the rights of others—Arabs and Muslims, and especially Arab and Muslim foreigners—for Americans' security. Who would stop it?

---

<sup>1</sup> Professor, Georgetown University Law Center. I would like to thank Ahmad Chehab for able research assistance, the Damon Keith Center at Wayne State Law School for financial support of this project. Mort Halperin, Bernard Harcourt, Aziz Huq, Jameel Jaffer, Brian Leiter, Joe Margulies, Aryeh Neier, Deborah Pearlstein, Gerald Rosenberg, Nina Pillard, Mike Seidman, Sydney Tarrow, and Matt Waxman provided helpful comments on earlier drafts, as did numerous members of the faculty at the University of Chicago Law School and the Center for Transnational Legal Studies, where I presented the paper. Portions of this essay appeared in David Cole, *After September 11: What We Still Don't Know*, *New York Review of Books*, Sept. 29, 2012.

I was co-counsel in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), discussed herein. In addition, I have had and continue to have relationships with many of the civil society organizations discussed here. I am a Board Member of the Center for Constitutional Rights, am co-chair of the Liberty and Security Committee of the Constitution Project, served on the domestic advisory council of Human Rights Watch, represented the American-Arab Anti-Discrimination Committee in an immigrants' rights case, and have litigated many cases with lawyers from the American Civil Liberties Union.

Yet perhaps the most important and surprising lesson of the past decade is that constitutional and human rights, which seemed so vulnerable in the attacks' aftermath, proved far more resilient than many would have predicted. President George W. Bush's administration initially chafed at the constraints of constitutional, statutory, and international law, which it treated as inconvenient obstacles on the path to security. The administration acted as if no one would dare to – or could effectively -- check it. But in time, the executive branch of the most powerful nation in the world was compelled to adapt its response to legal demands.

Equally surprising is that the principal mechanism for imposing these restraints appears not to have been the formal mechanisms of checks and balances, but the informal influence of civil society -- albeit by advancing legal claims, both formally and informally, politically and legally. The American constitutional system is traditionally understood to rely on the separation of powers and judicial review to protect liberty and impose legal restrictions on government officials. But in the post-9/11 period, restraint of government was principally brought about neither by judicial enforcement nor by legislative checks, but by less formal pressures, fostered by civil society's demands for adherence to basic principles of human rights. After September 11, as in other periods of crisis in American history, the political and judicial branches were often compromised in their commitments to principles of liberty, equality, dignity, fair process, and the rule of law. By contrast, civil society groups dedicated to constitutional and rule-of-law values, such as the American Civil Liberties Union, the Center for Constitutional Rights, the American Bar Association, Human Rights Watch, Human Rights First, the Bill of Rights Defense Committee, the Constitution Project, the Muslim Public Affairs Council, and the Council on American Islamic Relations, performed estimably -- and in so doing reinforced the checking function of constitutional and international law. They issued reports identifying and

condemning lawless ventures; provided material and sources to the media to help spread the word; filed lawsuits in domestic and international fora challenging allegedly illegal initiatives; organized and educated the public about the importance of adhering to constitutional and human rights commitments; testified in Congressional hearings on torture, illegal surveillance, and Guantanamo; and coordinated with foreign and international nongovernmental organizations and governments to bring diplomatic pressure to bear on the United States to conform its actions to constitutional and international law.<sup>2</sup>

Scholars have long focused on the role played by constitutions and the formal structures of government that they create in reinforcing commitments to long-term principles when ordinary political forces are inclined to seek shortcuts. The experience of the decade after September 11 in the United States suggests that this focus is incomplete; we should pay at least as much attention to civil society groups devoted to constitutional and human rights. Much like

---

<sup>2</sup> “Civil society” and the “rule of law” can both mean many things to many people. I will use “civil society” in this essay as shorthand for a particular subset of nongovernmental organizations – namely, those that define themselves by their commitment to human rights, constitutional rights, and the rule of law. This is a subset of the broader civil society, provisionally defined by Ernest Gellner as “a set of diverse non-governmental institutions which is strong enough to counterbalance the state and, while not preventing the state from fulfilling its role of keeper of the peace and arbitrator between major interests, can nevertheless prevent it from dominating and atomizing the rest of society.” *The Conditions of Liberty: Civil Society and its Rivals* 5 (1994). There are, of course, nongovernmental organizations dedicated to a range of other issues, but they are not the focus of this paper.

In referring to the “rule of law,” I mean to describe not merely the Fullerian sense of procedural regularity, see Lon Fuller, *The Morality of Law* (1964), but the more colloquial modern-day version of that term, which is often used as short-hand to encompass commitments to liberty, equality, privacy, dignity, and the separation of powers. I will also refer to these as “constitutional and human rights” as I mean to refer not only to domestic constitutional law but to international human rights and humanitarian law, and to statutory restrictions that further such rights (such as the criminal torture statute). These commitments are reflected in the U.S. Constitution and international human rights and humanitarian treaties. I recognize that the concept of the “rule of law” as such is and always will be contested, and that other versions of “the rule of law” might be employed to further less satisfactory ends. But I will argue here that an appeal to constitutional and human rights by civil society played a part in checking executive overreaching, and that recognition of that fact has significant implications for constitutional theory and practice.

a constitution itself, such groups stand for, and can shore up, commitments to principle when those commitments are most tested. And while we often speak metaphorically about a “living Constitution,” civil society groups are actually living embodiments of these commitments, comprised of human beings who have joined together out of a shared, lived dedication to constitutional and human rights principles. As such, they are able to inform the polity’s and the government’s reactions in real time. They often do so, of course, through legal avenues and nearly always by asserting legal claims, but their work has traction beyond the formal confines of judicial opinions and enacted statutes, in its effect on the constitutional culture of the nation. In the first decade after September 11, civil society appears to have played at least as critical a role in the restoration of constitutional and human rights values as the formal institutions of government. We typically think of the Constitution and rule-of-law values as a constraint on politics enforced through formal governmental structures, but in this instance, the constraints operated through a symbiotic relationship of the law and what I will call “civil society constitutionalism,” in which law was as much a focal point for organizing political claims for adherence to the rule of law as a formal constraint in itself.

“Civil society constitutionalism,” like “popular constitutionalism”<sup>3</sup> and “democratic constitutionalism,”<sup>4</sup> calls for a reorientation of constitutionalism away from the traditional focus on courts to a consideration of the role of the people. All three concepts can be said to build upon Judge Learned Hand’s famous observation that “liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While

---

<sup>3</sup> For “popular constitutionalism,” see Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

<sup>4</sup> For “democratic constitutionalism,” see Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. Civ. Rts. Civ. Lib. L. Rev. 373 (2007).

it lies there it needs no constitution, no law, no court to save it.”<sup>5</sup> “Popular constitutionalism,” as articulated by Mark Tushnet and Larry Kramer, among others, is affirmatively antagonistic to courts, and seeks to take the Constitution away from judges in order to reinfuse the general public with responsibility for constitutional meaning. “Democratic constitutionalism,” advanced by Robert Post and Reva Siegel, is not hostile to courts, but stresses the important role that popular responses to constitutional disputes play in ensuring that constitutional law is responsive to contemporary constitutional commitments. As such, Post and Siegel view positively even what others lament as “backlash” to Supreme Court decisions, because such popular engagement with constitutional questions helps to ensure the living and evolving relevance of the Constitution. Both of these theories offer important insights into the role of politics in constitutional law. But these conceptions of constitutional law are vulnerable to the criticism that they rest on and fail to resolve an internal contradiction. . . If the Constitution is meant to constrain democratic politics, how can it be delegated to the people without losing its distinctive value as a check on such politics?

“Civil society constitutionalism” suggests that one way out of the internal contradiction in popular constitutionalism is to recognize the unique role that civil society organizations committed to constitutional rights play in bridging the gap between formal constitutional law and ordinary politics. Like “democratic constitutionalism,” and unlike “popular constitutionalism,” it expressly acknowledges the importance of judicial enforcement of constitutional law, because courts are best situated to give meaning to long-term constitutional principles in the face of short-term political pressures. But “civil society constitutionalism” maintains that by standing

---

<sup>5</sup> Learned Hand, *The Spirit of Liberty* (speech at “I Am an American Day” ceremony, Central Park, New York City (21 May 1944)).

up for constitutional rights at times when the political branches are likely to resist such rights, civil society groups help to reinforce the culture of rights that is essential to a living Constitution. They play an especially important role in times of crisis, when the populace at large, the political branches, and the judiciary are all likely to discount or dismiss constitutional commitments. Indeed it is precisely when all other forces are arrayed *against* constitutional rights that civil society organizations often thrive. As a result, they help reinforce a culture of resilience around constitutional rights at the very moment when the formal structures of government and ordinary politics are least able to do so.

To be sure, the more formal separation of powers also played a role in checking the president after September 11, and I do not mean to denigrate its importance. The Supreme Court imposed important limits on military detention and trial,<sup>6</sup> and Congress reinforced the universal application of the treaty ban on cruel, inhuman, and degrading treatment.<sup>7</sup> But these were exceptions; Congress and the courts much more often deferred to executive prerogative. The vast majority of curbs on arguably lawless initiatives were effectuated without a court order or enactment of a statute. And when the Court and Congress did play a checking role, their interventions were prompted, framed, and deeply informed by the work of civil society. Moreover, even these formal interventions may have been more significant as focal points for informal constitutional culture-building than as formal legal constraints as such.

In the first post-9/11 decade, then, constitutional and rule-of-law values were brought to bear on executive action by the interaction of the informal political and cultural work of civil society and the formal operation of law. This experience suggests that while it remains critical to

---

<sup>6</sup> Boumediene, Hamdan, Hamdi, Rasul.

<sup>7</sup> DTA, McCain Amendment.

adhere to and reinforce formal checks and balances, it is at least as important to build up a culture of resilience with respect to human rights and the rule of law. Civil society organizations dedicated to those values are uniquely situated to play that checking role, and constitutional scholarship would do well to look to the particular role civil society plays in achieving, building, and reinforcing the constitutional culture so central to meaningful constitutional protections. Civil society, in short, is where much of the work of democratic and popular constitutionalism is done.

Part I of this essay briefly reviews the arc of counterterrorism policy and practice in the United States in the decade since September 11. While the government's initial response seemed to dismiss human rights and basic legal constraints in the name of doing everything possible to avert another attack, over time the executive branch curtailed virtually all of its most aggressive ventures. As a result, the second Bush administration was more law-abiding in its counterterrorism policy than the first. And President Obama came to office condemning many of his predecessor's choices and vowing to restore a policy that sought national security through rather than in opposition to law. While there remain significant areas of concern from a constitutional and human rights perspective, the general landscape with respect to legality has improved substantially.

In Part II, I assess what caused the above changes. While much attention has been paid to the rather surprising role of the Supreme Court,<sup>8</sup> in fact neither the judiciary nor the legislature were the principal points of resistance or protection. The Court's decisions, while undoubtedly important as contributors to a cultural narrative about constitutional and rule-of-law values, were at the same time quite limited in what they actually required. Two decisions, *Rasul v. Bush* and

---

<sup>8</sup> CITE articles on S. Ct. decisions.

*Hamdan v. Rumsfeld*, rested entirely on statutory construction, which meant that Congress could – and in both cases promptly did – reverse their results through ordinary legislation. Two others, *Boumediene v. Bush* and *Hamdi v. Rumsfeld*, were constitutionally based, but also limited. *Boumediene*, the most significant of the four decisions, marked the first time the Court invalidated joint action of Congress and the President in the name of national security, and the first time the Court extended constitutional rights to putative “enemy” foreign nationals outside U.S. borders in wartime. But the decision established only the threshold right to a day in court, via a writ of habeas corpus, and said nothing further about what rights the detainees might have once their petitions were heard. *Hamdi* held that a U.S. citizen captured on the battlefield in Afghanistan allegedly fighting as part of a Taliban regiment could be detained as an “enemy combatant,” but was constitutionally entitled to a fair opportunity to be heard on the charges. The Court left the procedural details of the hearing to be worked out, however, and the executive managed to avoid elaboration of those constraints by releasing Hamdi (and its only other U.S. citizen military detainee, Jose Padilla) from military custody before further Supreme Court review.<sup>9</sup> As many commentators have previously noted, all four decisions were in fact quite minimalist.<sup>10</sup>

Less noted is the remarkable amount of doctrinal “work” the Court had to undertake to rule against the president. None of the results was foreordained by doctrine. What precedent

---

<sup>9</sup> It held only two citizens in military custody – Yaser Hamdi and Jose Padilla.

<sup>10</sup> Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 Colum. L. Rev. Sidebar 122 (2011); Neal Devins, *Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants*, 12 U. Pa. J. Const. L. 491 (2010); 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. 352 (2010); Owen Fiss, *The Perils of Minimalism*, 9 *Theoretical Inquiries in Law* \_\_\_\_ (2008); Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 Colum. L. Rev. 1013 (2008); Cass Sunstein, *Minimalism at War*, 2004 Sup. Ct. Rev. 47 (2004).

there was appeared to favor the president. And in two of the Guantanamo cases in particular, the legal standards that proved decisive were extremely open-ended, turning on questions of “practicability.” It would have been at least as easy, if not easier, to write decisions upholding the president’s power. Something was driving the Court, and it was not the independent force of legal doctrine.

I will argue that civil society played a critical role in driving these decisions, and ultimately in compelling the president to curb his initiatives in the many areas that never reached a judicial decision. Most of the president’s about-faces were neither ordered by a court nor compelled by legislative action. The source of compulsion must be found elsewhere. Even where law operated as a more formal check on the executive, one cannot understand that legal check without considering the political context shaped in large part by the work of civil society institutions devoted to constitutional and human rights. Legal battles provided a focal point for much of the politics; and the politics was suffused with appeals to law. But in the end, it was the interrelationship of civil society, law, and culture that succeeded in checking the executive.

In this section, I also consider contending accounts of what transpired in the first decade after September 11. I find unpersuasive contentions that constitutional and human rights were not in any significant way restored, and that we have simply normalized the exception. I acknowledge that there is a widely recognized “pendulum” effect, in which states typically overreact to crises initially, but correct themselves once the crisis has passed, but suggest that that the arc and speed of the pendulum is likely to be affected by the strength of civil society. And while there are certainly other factors that contributed to the pressure the Bush administration felt to conform its actions to legal norms, including widespread dissatisfaction

with the Iraq war, I maintain that civil society's work in advocating for human rights and humanitarian law values played an important role in shaping the response.

In the third and final section of the essay, I draw two conclusions about the role of civil society in preserving constitutional and human rights in times of crisis. First, and most importantly, civil society's work in developing and sustaining a robust and engaged culture of respect for constitutional values is as central to checking executive abuse as the more formal constraints of law and institutional checks and balances. This does not mean that politics is a sufficient substitute for law as a check on executive power, as Eric Posner and Adrian Vermeule have recently argued.<sup>11</sup> Politics per se is no panacea; day-to-day political forces are more likely to undermine than to reinforce the rule of law in times of crisis. Nor does it mean that we can rely on "the people themselves" to enforce constitutional checks through political means, as popular constitutionalists suggest. Constitutional law and human rights, after all, are designed to discipline and constrain politics. But the work of civil society plays a critical role in both reinforcing law's constraints on ordinary politics, and in deploying legal struggles as a focal point to foster a culture that values constitutional and human rights commitments. They mediate the relation of law and politics, and remind us of our long-term fundamental commitments, especially when, as in times of emergency, we are most tempted to overlook those commitments. They did so in the decade after September 11, and with substantial success. Thus, "civil society constitutionalism" suggests that the strength of constitutional and human rights commitments turns in significant part on the role of civil society organizations.

Second, the role of civil society in sustaining a politics of the rule of law has implications for the substance of constitutional law, for it underscores the fundamental importance of

---

<sup>11</sup> Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010).

preserving First Amendment safeguards for the freedoms of association and speech. In this sense, civil society is as dependent on constitutional law as constitutional law is dependent on civil society. Civil society operates under the umbrella of the First Amendment’s protection, and the First Amendment accordingly plays a structural role in sustaining the constitutional system writ large. While the culture of free dissent and criticism in the United States has been relatively healthy for the most part since September 11, there are troubling signs in the targeting of Muslim communities, the resurrection of guilt by association in the form of prohibitions on “material support” to proscribed political groups, and the Supreme Court’s excessive deference in its only decided case pitting free speech against national security since September 11, *Holder v. Humanitarian Law Project*.<sup>12</sup>

## **I. The Assault on Constitutional and Human Rights – and their Partial Restoration**

Much has undoubtedly changed since September 11. The United States launched two wars, one against the country that harbored al-Qaeda, the other against a country that did not. The federal government undertook the largest bureaucratic reorganization since the New Deal, creating the Department of Homeland Security, the Office of the Director of National Intelligence, and the National Counterterrorism Center. The FBI shifted its focus from law enforcement to intelligence-gathering and preventing terrorism, aggressively employing informants and provocateurs to “flush out” would-be terrorists before they acted – and sometimes, it seemed, even if the targets never would have taken any action absent government

---

<sup>12</sup> 130 S. Ct. 2705 (2010).

provocation.<sup>13</sup> Congress expanded the government’s authority to gather intelligence on people in the United States and to prosecute even speech and association that allegedly provided “material support” to groups labeled as terrorist, and ultimately authorized preventive detention and trial by military commissions.

### **A. Initial Measures**

The most radical changes in our security operations occurred in the first two years after September 11, 2001. The vast majority of them were undertaken unilaterally by the Bush administration, though some had congressional authorization via the USA Patriot Act or the Authorization to Use Military Force.<sup>14</sup> The Bush administration indefinitely imprisoned hundreds of people it called “enemy combatants,” sought to keep them beyond the reach of courts or the law, and denied them even basic Geneva Conventions protections, such as humane treatment—protections the United States had afforded its foes in all previous armed conflicts.<sup>15</sup> It “disappeared” suspects into secret CIA prisons, or “black sites,” holding them incommunicado

---

<sup>13</sup> See, e.g. Trevor Aaronson, *The Informants*, Mother Jones (Aug. 2011), available at <http://motherjones.com/politics/2011/08/fbi-terrorist-informants>.

<sup>14</sup> AUMF, Patriot Act. Congress also implicitly authorized some of these initiatives through its decisions to fund them. But many of the programs, including “enhanced interrogation techniques,” the CIA’s black sites, renditions, and the NSA’s warrantless surveillance, were covert, and therefore Congress as a whole was unaware of them. (The executive branch briefed the “Gang of Eight” (the leaders of the two parties from both the Senate and House of Representatives, and the chairs and ranking minority members of both the Senate Committee and House Committee for intelligence), but only on condition that these eight members not share what they learned with anyone else, including their colleagues. As a result, this “notification” did not in any meaningful sense put Congress on notice regarding the executive’s actions.

<sup>15</sup> President Bush took the position that the Geneva Conventions, including Common Article 3, did not protect Al Qaeda detainees, but stated that “as a matter of policy,” the military would treat detainees “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.” *Memo on Humane Treatment of Al Qaeda and Taliban Detainees* (Feb. 7, 2002). However, the Geneva Conventions recognize no exception to its principles for “military necessity.”

and refusing to acknowledge even the fact of their detention for years at a time.<sup>16</sup> It subjected suspects to systematic torture and cruelty, including waterboarding, forced nudity, slamming them into walls, and forcing them into painful stress positions for hours at a time.<sup>17</sup> It “rendered” still other suspects to security services in countries, such as Syria, Egypt, and Morocco, that we had long condemned for using torture as a tool of interrogation, apparently so that they could torture them for us and share any resulting intelligence.<sup>18</sup>

The Bush administration unilaterally created “military commissions” that would use summary process to try terrorists.<sup>19</sup> As originally formulated, the president’s rules would have permitted the execution of defendants on the basis of evidence gained from torture, without any independent judicial review.<sup>20</sup> The administration authorized the National Security Agency (NSA) to conduct warrantless wiretapping, including of U.S. citizens, despite a federal law that made such surveillance a crime. It subjected more than five thousand Arab and Muslim foreign nationals within the United States to preventive detention in the first two years after 9/11—not one of whom stands convicted of a terrorist offense.<sup>21</sup> And it insisted that, as commander in chief, the president had unchecked authority under Article II to take any action he deemed necessary to “engage the enemy,” even if Congress or international law expressly forbade it. In

---

<sup>16</sup> Dana Priest, [article on black sites], Wash. Post, DATE; Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* \_\_\_\_ (2008)

<sup>17</sup> Jane Mayer, *The Dark Side*, supra at \_\_\_\_; Mark Danner, [articles on torture], N.Y. Rev. of Books, DATE.

<sup>18</sup> Jane Mayer, *The Dark Side*, supra at \_\_\_\_.

<sup>19</sup> Military Order No. 1, Nov. 2001.

<sup>20</sup> *Id.*

<sup>21</sup> David Cole and Jules Lobel, *Less Safe, Less Free: Why America Is Losing the War on Terror* \_\_\_\_ (paperback ed., 2009).

short, in the administration's view, the Constitution effectively placed the president above the law when it came to engaging the enemy during wartime.<sup>22</sup>

Times like these test the limits of the rule of law. Carl Schmitt argued that legality and legitimacy diverge in times of emergency, and all that matters is legitimacy, which in turn is earned not by following the rules but by delivering security.<sup>23</sup> After the attacks of September 11, the nation wanted security, and the Bush administration took that demand as a mandate to thrust legal restrictions aside. And who could stop it?

### **B. Restoring Constitutional and Human Rights**

In retrospect, one of the most striking facts about the U.S. response is that the Bush administration felt compelled to modify its approach on all of its most aggressive initiatives. When the memorandum authorizing the CIA to use waterboarding and other forms of torture and cruelty was leaked and published by *The Washington Post*, the administration retracted it. When conservative *New York Times* columnist William Safire, among others, condemned the military commissions for the absence of judicial review, then White House Counsel Alberto Gonzales wrote an op-ed in the *New York Times* claiming that the President never meant to deny judicial

---

<sup>22</sup> CITE Yoo memo, cf. David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb*, \_\_\_ Harv. L. Rev. \_\_\_ (2008) and 121 Harv. L. Rev. 941 (2008) (showing that in fact Congress has historically regulated virtually all aspects of military decisions during wartime, and that the president's commander-in-chief power is largely limited to barring Congress from putting the direction of the troops under someone else's command); Jules Lobel, *Conflicts between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War*, 69 Ohio St. L. J. 691 (2008) (same); see also David Cole, 13 Wash. & Lee J. of Civ. Rts. & Soc. Justice 1 (2006) (arguing that the Bush administration's Article II theory cannot support its asserted authority to ignore a criminal statute regulating wiretapping).

<sup>23</sup> Carl Schmitt, *Legality and Legitimacy* (1932).

review—despite having said exactly that in his original order.<sup>24</sup> President Bush eventually moved all the detainees held in “black sites” to Guantanamo, where they were no longer “disappeared,” and where the International Committee for the Red Cross was, for the first time after years of detention for many, granted access to them. When European nations, among others, denounced renditions to torture, the administration seemed to have the program on hold, and reports of such extraordinary renditions ceased. And after *The New York Times* revealed the NSA’s illegal warrantless wiretapping program and the ACLU and the Center for Constitutional Rights challenged the program’s legality in court, the administration, which had been acting without a warrant, applied for and obtained a court order under the Foreign Intelligence Surveillance Act authorizing surveillance subject to judicial oversight. It ultimately sought amendments to that Act which made clear that the program could continue pursuant to legislative and judicial authorization.<sup>25</sup>

In a series of extraordinary cases reviewing the administration’s asserted authority to hold “enemy combatants” beyond the law’s reach, the Supreme Court thrice rejected the administration’s position that judicial review was unavailable, even after Congress had twice

---

<sup>24</sup> William Safire, *Seizing Dictatorial Power*, NY Times, Nov. 15, 2001, at A31; William Safire, *Kangaroo Court*, NY Times, Nov. 26, 2001, at A17; Alberto Gonzales, *Martial Justice, Full and Fair*, NY Times, Nov. 30, 2001, at A\_\_\_. The executive order creating the military commissions provided that for persons subject to the order, military commissions would have “exclusive jurisdiction,” and “the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.” Military Order of November 13, 2001, the War Against Terrorism, 66 Fed. Reg. 57833 (2001).

<sup>25</sup> See Jan. 17, 2007 Letter from Attorney Alberto Gonzales to Patrick Leahy and Arlen Specter, available at [http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales\\_Letter.pdf](http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf) (describing end of unilateral program and issuance of judicial order authorizing surveillance); Protect America Act of 2007, 110 Stat. \_\_\_\_ (2007) (cite provision authorizing NSA wiretapping pursuant to court order).

sought to insulate the detentions from judicial review.<sup>26</sup> The Court overruled the administration's position that the Geneva Conventions were inapplicable to al-Qaeda detainees, thereby confirming that they had a right to humane treatment.<sup>27</sup> The Court also refuted the administration's position that it could hold even U.S. citizens as "enemy combatants" without a hearing and an adequate opportunity to defend themselves.<sup>28</sup> And it declared President Bush's scheme for military commissions illegal.<sup>29</sup>

In each instance in which the administration reined in its programs, it did so reluctantly, only because it felt that it had no choice. Indeed, it was so reluctant that it sometimes sought to give the impression that it was complying with the law, while secretly continuing to act lawlessly. Thus, after the Justice Department retracted its August 1, 2002, "torture memo," it wrote, in secret, a series of further memos that continued to give the CIA a green light to employ waterboarding and other inhumane and coercive interrogation tactics, although in practice waterboarding ceased after its application to only three detainees.<sup>30</sup> And while it transferred detainees out of the CIA's secret prisons in Romania, Poland, and elsewhere after the Supreme Court ruled that al Qaeda detainees were protected by the Geneva Conventions, it kept the prisons open for potential future use. It never formally abandoned the "extraordinary rendition" program, even as reports of such renditions ceased. Still, by the second term of the Bush

---

<sup>26</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>27</sup> *Hamdan*, 548 U.S. 557 (2006).

<sup>28</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>29</sup> *Hamdan*, 548 U.S. 557.

<sup>30</sup> See David Cole, "[The Torture Memos: The Case Against the Lawyers](#)," *The New York Review*, October 8, 2009.

administration, U.S. counterterrorism policy had stepped back substantially from its immediate post–September 11 origins.

In his presidential campaign, Barack Obama vigorously attacked the Bush administration’s lawless ways, and promised meaningful reform. He did not feel constrained by the politics of fear to avoid these issues, or to echo President Bush’s bellicosity. Immediately upon taking office, President Obama closed the CIA’s secret prisons, barred the use of “enhanced interrogation techniques,” and vowed to close Guantánamo within a year. (As noted below, that promise has been frustrated by Congressional opposition to moving any Guantanamo detainees into the United States). He released the previously secret Justice Department memos that had authorized torture and cruel treatment, in the President’s own words, “to ensure that the actions described within them never take place again.”<sup>31</sup> In May 2009, he delivered a major speech on the importance of fighting terrorism within the rule of law, insisting that “time and again, our values have been our best national security asset.”<sup>32</sup>

President Obama expressly renounced his predecessor’s theory that the commander in chief had unilateral power to violate the law, and maintained instead that his authority was limited by the scope of Congress’s Authorization to Use Military Force, issued shortly after September 11. And when, in 2010, a panel of the U.S. Court of Appeals for the D.C. Circuit ruled that the president’s authority to detain was not bound by the laws of war, the Obama administration took the extraordinary step of arguing that the court had granted it *too much*

---

<sup>31</sup> White House, Statement of President Barack Obama on Release of OLC Memos, Apr. 16, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos](http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos).

<sup>32</sup> White House, Remarks of the President on National Security, May 21, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09).

*power*. It told the full court that the president’s authority is indeed constrained by the laws of war.<sup>33</sup> The full court then vacated the panel’s prior reasoning as unnecessary to the result.<sup>34</sup>

There remain many areas of concern, to be sure. The United States has a secret policy of targeted killing that it has used widely, including to kill an American citizen in Yemen, far from the battlefield in Afghanistan, without any apparent evidence that he was involved in an imminent attack on the United States.<sup>35</sup> The Obama administration has largely maintained its predecessor’s stance on the “state secrets” privilege, using the privilege not merely to protect secrets from disclosure, but to block altogether legal suits seeking to hold government officials and their collaborators accountable for torture and other criminal conduct.<sup>36</sup> The Obama administration defended an expansive reading of the “material support” statute, taking the position that it is a crime even to file an amicus brief in the Supreme Court if filed on behalf of a group labeled “terrorist.”<sup>37</sup> It opposed the extension of habeas corpus review to detainees held at Bagram Air Force Base in Afghanistan, even to those captured in other countries far from the battlefield, and brought to Bagram instead of Guantanamo. And as discussed in more detail below, it has opposed all efforts to pursue any accountability for the war crimes, including torture, authorized by high-level U.S. officials in the “war on terror.” Still, there is little doubt

---

<sup>33</sup> United States Brief in Response to Petition for Rehearing in *Al-Bihani v. Obama*, available at <http://www.scotusblog.com/wp-content/uploads/2010/05/US-response-re-rehear-Al-Bihani-5-13-10.pdf>.

<sup>34</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 871. 873-74 (D.C. Cir. 2010) (panel opinion); *id.* at 883-85 ... **rehearing** en banc (CHECK)

<sup>35</sup> See, e.g., Greg Miller, Under Obama, a drone network, *Wash. Post*, Dec. 28, 2011, at A1; Mark Mazzetti, Eric Schmitt, and Robert F. Worth, Two-Year Manhunt Led to Killing of Awlaki in Yemen, *NY Times*, Sept. 30, 2011, at \_\_\_\_; David Cole, Killing Our Citizens Without Trial, *New York Review of Books*, Nov. 24, 2011 at \_\_\_\_.

<sup>36</sup> CITES.

<sup>37</sup> Oral Arg’t Tr. at \_\_\_\_, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, available at \_\_\_\_ (quoting Solicitor General Elena Kagan).

that U.S. counterterrorism policy today is significantly less inconsistent with constitutional and international law than it was in the first couple of years after September 11.

These historical developments suggest that the values of constitutionalism and legality proved more tenacious than many cynics and “realists” would have predicted, certainly than many in the Bush administration imagined. The most powerful nation in the world was compelled to curb substantially each of its arguably lawless ventures. While the reforms were in most instances partial, and there remains further work to be done, it is important not to lose sight of the fact that reforms were indeed deemed necessary with respect to virtually all of these measures. In the following section, I turn to a consideration of the mechanisms by which this restoration was effectuated.

## **II. The Checking Role of Civil Society**

What led the United States to curtail so many of its legally dubious counterterrorism policies in the first decade after September 11? The framers of the Constitution created a divided government in order to limit overreaching by any one branch, and established judicial review to ensure that we would have a government “of laws, not men.”<sup>38</sup> In ordinary times, that structure functions reasonably well. But in times of crisis, it has repeatedly proved inadequate. In World War I, Congress made it a crime to speak against the war, the executive prosecuted hundreds for doing so, and the Supreme Court upheld the sentences.<sup>39</sup> In World War II, Franklin D. Roosevelt’s administration interned more than 110,000 people of Japanese descent, Congress did

---

<sup>38</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>39</sup> See, e.g., *Debs v. United States*, 249 U.S. 211 (1919); see generally Geoffrey Stone, *In Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (200\_).

nothing to challenge him, and the Supreme Court upheld the internment policy as constitutional despite recognizing that it discriminated on the basis of race.<sup>40</sup> And in the McCarthy era, Congress and the Truman administration imposed guilt by association on Communist “sympathizers,” and the Supreme Court did nothing to restrain them until the Senate had censured McCarthy, and he and his allies had lost power and public influence. In each crisis, the political branches were more likely to goad each other on to further excesses than to impose limits, and the Supreme Court either expressly affirmed what went on or looked the other way.

Scholars have long worried about this dynamic, expressing concern that if the judicial and legislative branches fail to impose checks on the executive in periods of crisis, there will be no limit to executive overreaching and abuse. In the first post-9/11 decade, however, executive overreaching was in fact checked, and checked in significant part by forces extraneous to the separation of powers. Civil society groups, using legal claims as focal points for their work, appear to have played an important role in checking the president. With some important exceptions, the checks were largely effectuated without an order from a court or Congress. While there are competing accounts for the last decade’s trajectory of U.S. counterterrorism policy, to be sure, none is sufficient to refute the central role that civil society played.

### **A. The Role of Civil Society**

The vast majority of the reforms introduced by the executive were not ordered by a court or compelled by statute. No detainee has been released by order of a court against the executive’s will, yet more than 600 of the 779 people once held at Guantánamo Bay have been released. Neither Congress nor any court ordered hearings or access to attorneys for Guantanamo

---

<sup>40</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

detainees, yet all detainees now have those rights. Neither Congress nor any court ordered the end of “enhanced interrogation techniques,” but President Obama banned these techniques, and rescinded and disclosed previously secret Justice Department memos that had twisted the law to give a green light to such methods. Neither Congress nor any court rejected President Bush’s claims of uncheckable authority as Commander in Chief under Article II of the Constitution, yet President Obama abandoned it. Neither Congress nor any court ordered suspension of the NSA spying program, but the executive suspended it in 2007, proceeding instead with a program approved by a FISA court. Neither Congress nor any court questioned the widespread preventive detention of Muslim and Arab immigrants in the United States in the first years after September 11, but that practice was widely condemned, and has not been repeated. Neither Congress nor any court has expressed any opinion on the legality of the “extraordinary rendition” program, but there have been no reports of rendition to torture in years. Neither Congress nor any court so required, but the CIA’s “black sites” are now closed. And neither Congress nor any court ordered cessation of the “special registration” program, a national program of ethnic profiling that selectively required foreign nationals of predominantly Arab and Muslim countries to be fingerprinted, photographed, and interviewed, but in April 2007, after much criticism, the government suspended the program.<sup>41</sup> While some of the reforms are attributable to President Obama, most were undertaken by President Bush himself.

If most of the administration’s curtailments of its legally dubious counterterrorism initiatives were attributable neither to judicial enforcement nor to congressional mandates, what was the moving force behind this restoration (albeit partial) of the rule of law? The answer is not

---

<sup>41</sup> 76 Fed. Reg. 23830 (Apr. 28, 2011); See Letter from Margo Schlanger, Officer for Civil Rights and Civil Liberties, Department of Homeland Security, to Colleagues (Apr. 27, 2011), available at <http://www.ilw.com/immigrationdaily/news/2011,0428-schlanger.pdf>.

to be found in the institutions of government, but in civil society—in the loosely coordinated political actions of concerned individuals and groups, here and abroad. Following September 11, many organizations took up the task of defending liberty, human rights, and the rule of law—among them the American Civil Liberties Union, the Center for Constitutional Rights, Human Rights First, Human Rights Watch, the Council on American-Islamic Relations, the Bill of Rights Defense Committee, the Constitution Project, the Muslim Public Affairs Council, and the American Arab Anti-Discrimination Committee. These organizations are all, in one way or another, committed to a “politics of the rule of law.” They consist of individuals drawn together by a common commitment to rule-of-law values, and they seek to further those values both politically and legally – doing public education, lobbying Congress and the executive, filing lawsuits, writing reports, and organizing grass-roots campaigns, all in furtherance of the rule of law.

Moreover, at the very time that the President, Congress, the courts, and the public at large were driven to emphasize security over all other values, these civil society organizations were actively advocating for the enforcement of constitutional and human rights. And they did “well” by doing so. Many of these organizations saw their membership and financial support grow dramatically in the wake of 9/11, despite (or because of) the fact that their claims were in tension with those of the majority. [Insert figures on ACLU, CAIR?] Thus, when the formal mechanisms of the separation of powers were least likely to check executive initiative, these organizations were in some measure at their strongest. As such, they provided a unique checking influence within the American political culture.

Critics of the administration also included prestigious bar associations, most importantly the American Bar Association, which adopted resolutions on torture, Guantanamo, military

commissions, and the “state secrets” privilege, and submitted amicus briefs in some of the Guantanamo cases.<sup>42</sup> In addition, the Association of the Bar of the City of New York published multiple influential reports on rendition,<sup>43</sup> interrogations,<sup>44</sup> and military commissions.<sup>45</sup> The International Commission of Jurists convened an international panel of eminent jurists, which issued an important report on preserving human rights in fighting terrorism.<sup>46</sup>

Human Rights First undertook an especially influential campaign, enlisting retired generals in opposition to the Bush administration’s decisions to deny detainees the protections of the Geneva Conventions and the Convention Against Torture. The generals issued statements, signed joint letters, and met with members of Congress and the executive branch. By most accounts, their intervention was deemed critically important in convincing Congress to reaffirm that the prohibition on cruel, inhuman and degrading treatment applied to all persons held by the United States, no matter what their nationality or where they were held, despite vigorous opposition from the White House.<sup>47</sup>

---

<sup>42</sup> See Neal Sonnett, Ten Years Later: The ABA Response to 9/11, Human Rights, vol. 38, no. 1 (2010-11) (listing ABA resolutions and amicus briefs).

<sup>43</sup> Torture By Proxy: International and Domestic Law Applicable to “Extraordinary Renditions,” available at <http://www.chrgj.org/docs/TortureByProxy.pdf>

<sup>44</sup> Human Rights Standards Applicable to the United States’ Interrogation of Detainees, available at <http://www.abcny.org/pdf/HUMANRIGHTS.pdf>.

<sup>45</sup> See, e.g., Inter Arma Silent Leges: Should the Laws be Silent?, available at [http://www.abcny.org/pdf/report/should\\_the\\_laws.pdf](http://www.abcny.org/pdf/report/should_the_laws.pdf).

<sup>46</sup> Int’l Comm. of Jurists, Assessing Damage, Urging Action, 2009, available at <http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/ici/ici-2009-eip-report.pdf>.

<sup>47</sup> See, e.g., Deborah Pearlstein, Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture, 81 Ind. L.J. 1255, 1279-87 (2006) (detailing efforts of Human Rights First and retired senior military officers on issues of torture policy).

Many individual defenders of liberties also spoke out, including Lord Steyn, a former British Law Lord who labeled Guantánamo a “legal black hole”; 175 members of the U.K. Parliament who signed an amicus brief on behalf of Guantánamo detainees in the first detainee case to reach the Supreme Court; several retired US generals and admirals who insisted on the importance of adhering to the Geneva Conventions; and individual members of Congress, especially Senators Patrick Leahy, Richard Durbin, Russell Feingold, and Bernie Sanders, and Representatives John Conyers Jr., Jerrold Nadler, and Keith Ellison. These individuals echoed civil society’s insistence that the rule of law should not be abandoned in the pursuit of security.

The media also played a critically important role. It was the media that published the leaked Office of Legal Counsel memorandum authorizing waterboarding and other illegal tactics, disclosed the existence of CIA secret prisons, reported on many of the stories of rendition and abusive detentions, disseminated the photographs from Abu Ghraib, and revealed the existence of a massive and possibly criminal warrantless wiretapping program run by the National Security Agency at President Bush’s orders.<sup>48</sup> And the press wrote and published countless editorials questioning President Bush’s initiatives on detention, interrogation, ethnic profiling, surveillance, and other counterterrorism policies.<sup>49</sup>

---

<sup>48</sup> CITES

<sup>49</sup> Perhaps buoyed by civil society, lawyers and officials within the government also resisted government abuse. Navy General Counsel Alberto Mora personally intervened to pressure Secretary of Defense Donald Rumsfeld to rescind his order authorizing cruel and degrading interrogation tactics at Guantanamo. See Jane Mayer, [article on Mora], *New Yorker* Joseph Darby, an Army reservist in Iraq, delivered a CD containing photographs of abuse at Abu Ghraib prison to the Army’s Criminal Investigation Command, ultimately bringing those war crimes to the world’s attention. See Jameel Jaffer and Larry Siems, *Honoring Those Who Said No*, *N.Y. Times*, Apr. 27, 2011, at \_\_. Col. Morris Davis, an Air Force lawyer, resigned in 2008 from his position as Chief Prosecutor in the Guantánamo military commissions system, to protest plans to rely on evidence obtained through coerced testimony. Check and cite. Others risked criminal prosecution by disclosing secret information about programs that violated criminal law, including the CIA “enhanced interrogation techniques” and the NSA’s warrantless wiretapping program.

Significantly, the civil society that operated to bring pressure to bear on the United States to restore the rule of law was transnational. Domestic organizations played a leading role, to be sure; but perhaps more than in any prior crisis, international pressure had a key role. The internet and globalization have made it infinitely easier for civil society institutions to share information and tactics across national borders. A report by Human Rights First on the treatment of those rounded up after September 11, for example, is immediately accessible on its website from all parts of the world. And because most of the victims of U.S. government overreaching were nationals of other countries -- Guantanamo, for example, housed prisoners from 42 different nations -- the media in those countries were often keenly interested in reporting on what otherwise might be disregarded as the domestic affairs of another state. One civil society organization that was created to address detentions at Guantanamo, Reprieve, located in London, because it found that international pressure was more effective in freeing prisoners than the American legal system. Reprieve represented more than fifty prisoners, of whom all but fifteen have been released.<sup>50</sup> Only one, however, was ordered released by a federal court.<sup>51</sup>

Because the victims were largely foreign nationals, stories of rights violations often garnered more attention in the victim's country than in the United States. Consider, for example, Maher Arar, a Canadian citizen who the United States stopped at New York's JFK Airport as he was changing planes on his way home to Canada, and forcibly rerouted, via a federally chartered jet, to Syria, where he was tortured and locked in an underground cell the size of a grave for nearly a year. Arar is a household name in Canada. His return to Canada sparked a high-level commission of inquiry, which fully exonerated Arar. The Canadian Parliament issued Arar a

---

<sup>50</sup> CITE [check figures]

<sup>51</sup> *Id.*

formal apology, even though it was the United States, not Canada, that decided to send Arar to Syria. And Canada's government paid Arar ten million dollars (Canadian) for his injuries. In 2004, Time (Canada) named Arar its Person of the Year. In the United States, by contrast, the government successfully moved to dismiss a lawsuit Arar brought against the federal officials who sent him to be tortured, and it is likely that few people would recognize his name.

Such international opprobrium, however, did make its way back to the United States. Many nations lobbied the United States to release its nationals from Guantanamo. The global nature of the terrorist threat required the United States to obtain the assistance and cooperation of intelligence and law enforcement agencies in many nations, and that need likely made the United States more sensitive to international criticism than it might otherwise have been. At the same time, international attention to U.S. abuses, especially at Abu Ghraib and Guantanamo, played into al Qaeda's hands, as it fueled resentment of the United States and recruitment for al Qaeda. The fact that Guantanamo had become a universal symbol of U.S. lawlessness by the time the case reached the Supreme Court almost certainly played a role in the Court's unwillingness to defer to executive claims that the prisoners there were beyond the protection of the law. Thus, the pressure brought to bear on the United States from civil society was distinctly transnational, and operated via a number of avenues outside the U.S. constitutional system altogether. This transnational element was a particularly important feature of civil society's appeal to rule-of-law values after 9/11, given American citizens' and politicians' historic indifference to the denial of foreign nationals' rights.<sup>52</sup> By involving other nations, civil society organizations were able, at least in some circumstances, to overcome that traditional indifference to the rights of "others."

---

<sup>52</sup> See David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (rev. ed. 2005).

But the restoration of constitutional and international human rights values cannot be attributed merely to the fact that American and international civil society mobilized in defense of liberty. Civil society mobilizes around a lot of issues, and as often as not it is unable to make much, if any, headway. (Think, for example, of global warming.) That civil society's criticism of government repression was ultimately so effective also attests to the residual power of the ideals encompassed in constitutional and human rights—liberty, equality, fair process, and dignity. Those values were strong enough, when pressed by a range of voices, to restrain the highest officials of the most powerful country in the world. Margaret Mead famously warned that one should “never underestimate the power of a few committed people to change the world.” One should also never underestimate the power of appeals to constitutional and human rights. The relative success of these claims implies that, the executive's initial reactions notwithstanding, a fairly robust culture of respect for constitutional and rule-of-law values was available to be called upon and mobilized. Civil society institutions were critical both to building that culture and to invoking it when much of the rest of society would just as soon have ignored it.

Indeed, the robustness of the culture of constitutionalism rests in significant part on the work of civil society groups long before September 11. For example, when the Supreme Court took up the *Rasul* and *Hamdi* decisions, it is certainly likely that at the back of its mind was its decision in *Korematsu v. United States*.<sup>53</sup> Indeed, the Brennan Center for Justice assured that the case would be more than at the back of the Court's mind, as it filed an amicus brief on Fred

---

<sup>53</sup> I am indebted to Steve Shapiro of the ACLU for this observation.

Korematsu's behalf in those cases.<sup>54</sup> In *Korematsu*, the Court upheld the race-based internment of Japanese Americans and Japanese nationals during World War II. But civil society did not accept that the issue was resolved by the Supreme Court decision. For decades, a number of Asian and Japanese nongovernmental organizations continued to fight for accountability and redress for the internees.<sup>55</sup> Lawsuits succeeded in disclosing, among other things, that the Justice Department misled the Supreme Court about key facts involved in the case, in particular its ability to distinguish those who posed a danger from those who did not. Some of the convictions were vacated on that basis.<sup>56</sup> Eventually, in 1988, Congress enacted the Civil Liberties Restoration Act, which officially apologized to the internees and paid reparations to them and their survivors. As a result of that sustained effort to achieve accountability, the *Korematsu* decision has come to be viewed as one of the Court's worst ever. And the Court was certainly aware of that fact when, in 2004, it was once again asked to defer blindly to executive claims about the need to detain without legal process. So, too, more broadly, efforts of constitutional rights and civil rights and liberties groups over the years prior to September 11 helped build a robust culture of commitment to constitutional rights, which it could then pull out and invoke to resist executive encroachments on basic rights thereafter.

## **B. The Role of the Courts**

---

<sup>54</sup> See Amicus Brief for Fred Korematsu in *Rasul v. Bush*, No. 03-334, 03-343 (2004), available at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/03-334/03-334.mer.ami.korematsu.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/03-334/03-334.mer.ami.korematsu.pdf).

<sup>55</sup> See Peter Irons, *Justice At War: The Story of the Japanese-American Internment Case* (1993).

<sup>56</sup> *Id.*

With few exceptions, the federal courts, including the Supreme Court, have generally deferred to the President on matters of national security in times of crisis.<sup>57</sup> There are isolated exceptions, to be sure; in the Korean War, the Court invalidated President Harry Truman's seizure of steel mills,<sup>58</sup> and near the end of the Vietnam War, the Court refused to block the *New York Times'* publication of the Pentagon Papers.<sup>59</sup> After 9/11, however, the Supreme Court broke from its past record, repeatedly rejecting presidential claims to deference on national security matters while the war and the crisis was very much ongoing. As noted above, the Court insisted that it was responsible for reviewing detentions during wartime, rejected claims that it must defer to the executive, ruled that military detainees must be accorded Geneva Conventions protections, and, most extraordinarily, kept the courthouse door open for the Guantánamo detainees even after Congress and the president, acting together, had unequivocally sought to close it. Yet it would be wrong to say to attribute to the Court the lion's share of the credit for checking the president's legally dubious counterterrorism measures. As detailed above,<sup>60</sup> the vast majority of the curtailments adopted by the executive branch were not ordered by any court.

Moreover, while they were undoubtedly significant in more informal and indirect ways, the Supreme Court's decisions were actually quite limited in what they demanded from the executive. Two decisions – *Rasul* and *Boumediene* -- addressed only whether Guantánamo detainees could be heard in court, and said nothing about the law that would apply once their

---

<sup>57</sup> See generally, Geoffrey Stone, *In Perilous Times: Free Speech in Wartime from the Sedition Act to the War on Terrorism* (200\_); William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (19\_\_)

<sup>58</sup> *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>59</sup> *New York Times Co. v. Sullivan*, 403 U.S. 713 (1971).

<sup>60</sup> See Section II.A. *supra*.

claims were adjudicated. Since then, many district courts have ruled that Guantánamo detainees should be released for lack of evidence, but those decisions can be appealed. Thus far, the Obama administration has won every case that it has appealed to the D.C. Circuit; the Supreme Court, in turn, has repeatedly declined to exercise further review. Thus, in nearly ten years, not a single detainee has been released by order of a court. (The administration has forgone appeals in some cases and released detainees, but given its record of success in the court of appeals, these releases were for all practical purposes a matter of choice, not truly legally compelled.)

The Supreme Court's ruling that a U.S. citizen was entitled to due process upon being held as an "enemy combatant" was limited to U.S. citizens, and therefore did not on its face apply to the vast majority of detainees in the ongoing conflict. (Outside of Iraq, there have been only two U.S. citizens detained by the military in that conflict – Yaser Hamdi and Jose Padilla). Moreover, even as to citizens, the Court failed to specify the particular procedures due, and the administration avoided further court review by releasing Hamdi on the condition that he resettle in Saudi Arabia. The Court's decision in *Hamdan v. Rumsfeld*, which declared President Bush's military commissions illegal, rested exclusively on statutory grounds, and the Court invited Congress to overrule it if it disagreed. Congress promptly did so, enacting the Military Commissions Act of 2006, which authorized military trials while making only modest improvements over the procedures that President Bush had provided unilaterally.

At the same time, while these decisions may not have formally demanded much from the administration, their indirect and informal effects were significant. The mere fact that the Court granted certiorari in *Rasul v. Bush* prompted the administration to introduce a number of reforms at Guantanamo, including the provision of hearings. The voting alignment in the Court's decisions on U.S. citizens held as enemy combatants suggested that a majority of the Court

would deny the President the power to detain a citizen captured within the United States in a case properly before it.<sup>61</sup> That prospect ultimately led the President to remove its only U.S. citizen captured in the United States from military detention before his case reached the Supreme Court. The Court's decision to extend habeas corpus review caused the military to grant access to the military base to counsel for the detainees, and to grant those lawyers access to classified evidence regarding their clients subject to a protective order and security clearances. And the Court's decision in *Hamdan v. Rumsfeld*, the military commission case, impelled the military to countermand the president's prior determination that Al Qaeda detainees were not protected by Common Article 3 of the Geneva Conventions.<sup>62</sup> More broadly, all four cases rejected the Bush administration's most extreme contention that as Commander-in-Chief, he had the final word on how to "engage the enemy." Thus, while the formal effects of the Court's decisions were minimal, their informal and indirect effects were considerable.

While many scholars have emphasized the minimalist character of the Supreme Court's formal rulings,<sup>63</sup> few have noted the prodigious amount of doctrinal work the Court had to do to rule against the president. The amount of work necessary to reach the Court's results suggests that doctrine did not "control" here, and that therefore some force beyond legal doctrine was at play even in the most formal legal defeats that the Bush administration suffered. In each of the three Guantanamo cases, for example, precedent seemed to favor the executive branch. In

---

<sup>61</sup> In *Padilla v. Rumsfeld*, four justices opined that the President lacked such power, but five justices concluded that his lawyers had filed in the wrong court. Justice Scalia, one of the five in *Padilla*, had taken the position in *Hamdi v. Rumsfeld* that the president lacked power even to impose military detention on a U.S. citizen captured abroad. Thus, there appeared to be five votes against military detention for U.S. citizens captured in the United States. CITES NEEDED.

<sup>62</sup> CITE Gordon England Memo of 2006 to all military officers.

<sup>63</sup> See supra note \_\_\_\_.

*Johnson v. Eisentrager*, the Court in 1950 had ruled that habeas corpus review was not available to “enemy aliens” held in a U.S. military prison outside our borders.<sup>64</sup> The statute at issue in *Rasul v. Bush* was the same statute as in *Eisentrager*. The *Rasul* Court nonetheless maintained that a subsequent judicial interpretation of that statute made habeas review available.<sup>65</sup> But as Justice Scalia argued in dissent, that conclusion was in no way dictated by the intervening case, *Braden v. 30<sup>th</sup> Judicial Circuit Court of Ky.*,<sup>66</sup> which involved the quite distinct issue of where a habeas petition should be filed when one state is detaining a prisoner at the behest of another state. *Braden* held that habeas could be filed in the district where the detaining authority was located, but it did not even mention, much less overrule *Eisentrager*. Moreover, the Court came to this argument largely on its own; the petitioners’ briefs in *Rasul* cited *Braden* only twice, both times in footnotes. Yet the Court made it the linchpin of its decision.<sup>67</sup>

*Johnson v. Eisentrager* also appeared to support the executive in *Boumediene*, as it had denied habeas review and had been interpreted by the Supreme Court as authority for the proposition that constitutional rights do not extend to non-citizens beyond the United States’s borders.<sup>68</sup> And another World War II precedent, *Ex parte Quirin*,<sup>69</sup> supported the president’s position in *Hamdan*, as it had upheld the president’s authority to try “enemy aliens” for war crimes in military commissions created by presidential order. In fact, President Bush’s order

---

<sup>64</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>65</sup> *Rasul*, \_\_\_ U.S. at \_\_\_.

<sup>66</sup> 410 U.S. 484 (1973).

<sup>67</sup> CITE Briefs in *Rasul*, Al Odah

<sup>68</sup> CITES.

<sup>69</sup> 317 U.S. 1 (1942).

creating the military tribunal before which Hamdan was to be tried was modeled directly on President Roosevelt's order. To rule against the president was far from impossible in light of these precedents; none was squarely on point. But considered purely in doctrinal terms, it would have been much easier to affirm the president's actions.

Perhaps more significant, the legal standards that proved determinative in *Hamdan* and *Boumediene*, arguably the Court's two most significant decisions, were exceedingly open-ended, permitting a court to reach any number of results. Both ultimately turned on questions of "practicability," an intensely pragmatic assessment that one might predict would favor deference to the executive, not a judicial line in the sand. In *Hamdan*, the Court ruled that the Uniform Code of Military Justice authorized military commissions, but required that they conform to the process available in a court-martial unless the latter procedures would be "impracticable." In *Boumediene*, the Court ruled that habeas corpus would extend to Guantanamo only if it were neither "impracticable" nor "anomalous" to do so. Considerations of "practicability" are not the kind of bright lines that courts might feel obligated to enforce against the political branches on matters of national security. They call for pragmatic, all-things-considered judgments that one might well consider the executive better suited to make, especially in wartime. Had the Court sought to defer, the law plainly permitted it to do so. Yet the Court rejected the president's claims on just these "practicability" grounds. The fact that these results were in no way foreordained by legal precedent, and that if anything legal precedent pointed in the opposite direction, suggests that the Court was driven by something other than the pure force of legal doctrine.

Similarly, the Court appeared to reach out almost *sua sponte* to address the Geneva Conventions issue in *Hamdan v. Rumsfeld*. Once the Court concluded that the military

commission procedures unjustifiably departed from the procedures established for courts-martial, it had a sufficient basis to rule for Hamdan. It need not have reached the independent ground that the commissions violated the laws of war. And again, the Court did so virtually on its own. Petitioners had relegated any discussion of Common Article 3 of the Geneva Conventions to the last three pages of their 50-page principal brief, and had not even argued that the conflict with al Qaeda was a non-international armed conflict.<sup>70</sup> Yet in what ultimately proved to be the Court's most important holding, the Court concluded that the conflict with al Qaeda was indeed a non-international armed conflict governed by Common Article 3, and that the commission procedures violated that provision. This proved the most important aspect of the case, not because of its implication for military commissions, but because Common Article 3 also prohibits any humiliating or cruel treatment of detainees, and thereby called into serious question the Bush administration's "enhanced interrogation techniques." Yet existing doctrine hardly compelled the result, and as in *Rasul*, the Court relied in critical measure on arguments barely even made by the parties.

It might be objected that doctrine rarely determines results in any case, especially at the Supreme Court level, where there are often splits in the circuit courts and reasonable arguments to be made on behalf of both parties to the dispute. In that sense, there is almost always something going on beyond mere legal doctrine. In the Guantanamo cases, however, there were no splits in the circuits; the cases came up from the D.C. Circuit, which had consistently and unanimously ruled for the president (even after being reversed by the Supreme Court). And the role of external forces is surely more significant where the Court departs from precedent –

---

<sup>70</sup> See Brief for Petitioner in *Hamdan v. Rumsfeld* at 48-50, available at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/05-184/05-184.mer.pet.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/05-184/05-184.mer.pet.pdf). [check reply brief and amicus briefs]

consider, for example, the political and economic forces at play when, with the “switch in time that saved nine,” the Supreme Court began to uphold New Deal statutes; the role of the civil rights movement and Cold War politics in the Court’s decision in *Brown v. Board of Education* to overturn *Plessy v. Ferguson*’s doctrine of “separate but equal”; or the role of the gay rights movement and changing social mores in the Court’s rejection of *Bowers v. Hardwick* in *Lawrence v. Texas*, which held unconstitutional a Texas law criminalizing homosexual sodomy. The Court’s military detention and trial cases did not directly overrule any precedents, but their general purport departed substantially from the Court’s historical deference to executive claims of national security in times of crisis. Thus, it is especially appropriate here, as in the New Deal, segregation, and sodomy cases, to look to influences outside of the law itself.

What unites and explains the decisions is not legal doctrine, but a culture of commitment to constitutional and human rights and rule-of-law values. At stake in each case was a claim that the executive’s actions were beyond the law’s reach. In each case, the Court resisted that claim, insisting, above all, that constitutional, statutory, and/or international law must have a role to play in regulating and constraining the nation’s response to the threat of terrorism. Thus, the question in both *Rasul* and *Boumediene* was whether persons whom the president had sought to hold beyond the law’s reach could bring law to bear on their detentions (and on the executive’s authority) by pursuing a writ of habeas corpus. The same threshold issue was presented in *Hamdan*, and once again the Court insisted that law must have a role to play. Moreover, the *Hamdan* Court’s holding that the conflict with al Qaeda was a “non-international armed conflict” governed by Common Article 3 of the Geneva Conventions similarly brought law to bear, by insisting Common Article 3’s baseline of *legal* human rights protections for all detainees applied.

In short, all three cases are best understood as insisting that the president's "war on terror" must be subject to the rule of law, specifically statutory dictates and the law of war.

In *Hamdi*, the question was less starkly put, but similar. By the time that case reached the Supreme Court, the Bush administration conceded that a U.S. citizen held in military custody in the United States could file a writ of habeas corpus, and to that extent, therefore, all parties agreed that his detention was subject to law. But here, too, the executive argued that for all intents and purposes, the president was the judge of his own actions. It argued that the president's Article II authority as commander in chief permitted him to detain U.S. citizens absent any other authority, and even that a legislative restriction on that authority might be unconstitutional.<sup>71</sup> And it maintained that while habeas corpus was technically available, the reviewing court could only examine a two-page hearsay affidavit filed by an executive official, and should uphold the detention as long as that affidavit provided "some evidence" that the individual fell into the category of an "enemy combatant." In the administration's view, there was no place for any sort of judicial inquiry into the truth of the matters it asserted; the executive's word would have to be accepted on its face. The Court declined to accept these arguments. It concluded that Congress had indeed authorized detention of persons captured on the battlefield fighting for the Taliban, and therefore did not need to reach the president's Article II arguments. And it held that due process applied to any such detention, and required notice, a meaningful opportunity to respond, and a neutral trier of fact. In short, in *Hamdi* as in the Guantanamo cases, the Court insisted that law must govern the detention and trial of those

---

<sup>71</sup> CHECK and cite to US briefs in *Hamdi* re: argument that NDA could not constitutionally apply to pres's authority to detain in armed conflict.

accused of being “the enemy,” and consistently rejected arguments made by the president that, formally or practically, his actions were unconstrained by law.

Beyond the military detention and trial cases, however, the courts’ record is largely consistent with its traditionally deferential approach. In *Holder v. Humanitarian Law Project*, the Court in 2010 ruled that Congress could constitutionally make it a crime to advocate for peace and human rights on the ground that doing so provides “material support” to a group the administration had labeled terrorist, the Kurdistan Workers Party in Turkey.<sup>72</sup> The Court reached that result by applying a novel and extraordinarily deferential form of assertedly heightened scrutiny. The Court unanimously concluded that the statute penalized speech on the basis of its content, and therefore warranted heightened scrutiny.<sup>73</sup> Rather than requiring the government to demonstrate with evidence that the law was narrowly tailored to further compelling ends, the usual burden in such circumstances, the Court *sua sponte* advanced justifications that the government had never even suggested, much less supported with evidence, and then upheld the law based on the Court’s untested suppositions.<sup>74</sup> The Court also dismissed two suits against Attorney General John Ashcroft arising out of his sweeping use of preventive detention within the United States after September 11 -- one for mistreatment of persons detained in connection with the September 11 investigation, on grounds that the plaintiffs had insufficiently pleaded facts establishing Ashcroft’s responsibility;<sup>75</sup> and the other for abuse of the

---

<sup>72</sup> *Holder v. Humanitarian Law Project*, 130 S.Ct.2705 (2010).

<sup>73</sup> 130 S. Ct. at \_\_\_\_.

<sup>74</sup> *Id.* at \_\_\_\_\_. See Owen Fiss, *The World We Live In*, \_\_ Temple L. Rev. \_\_\_\_; David Cole, *The First Amendment’s Borders: Speech and Association with Foreign Organizations, and the Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, \_\_ Harv. L. & Pol. Rev. \_\_\_\_ (2012).

<sup>75</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

“material witness” statute to lock up a Muslim man without probable cause, on grounds of qualified immunity.<sup>76</sup>

And in many cases that did not reach the Supreme Court, or in which the Supreme Court denied review, lower federal courts have been extremely deferential to national security initiatives. Several courts of appeals have dismissed suits seeking damages for torture, on grounds of “state secrets,” immunity, or the treatment of national security as a “special factor” militating against recognition of a *Bivens* remedy.<sup>77</sup> The Court of Appeals for the Third Circuit upheld the deportation of foreign nationals for providing “material support” to organizations labeled terrorist even where the support consisted of providing a prayer tent and some food associated with a religious service attended by members of a guerrilla group.<sup>78</sup> The Court of Appeals for the Sixth Circuit dismissed for lack of standing a challenge to the president’s NSA warrantless wiretapping program because the plaintiffs could not prove that they were subjected to the program, all of whose targets were secret.<sup>79</sup> The D.C. Circuit permitted the government to keep secret the identities of hundreds of foreign nationals it had subjected to preventive detention in the United States after September 11, even though none was found to be a terrorist.<sup>80</sup> The

---

<sup>76</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

<sup>77</sup> *Mohammed v. Jeppeson Dataplan, Inc.*, 614 F.3d 1070 (9<sup>th</sup> Cir. 2010) (en banc) (dismissing damages case against independent contractor who provided flights for CIA renditions, on “state secrets” grounds), *cert. denied*, 131 S. Ct. 2442 (2011); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) (dismissing because national security and foreign relations raise “special factors” counseling against recognizing *Bivens* remedy for torture), *cert. denied*, 130 S. Ct. 3409 (2010); *El Masri v. United States*, 479 F.3d 296 (4<sup>th</sup> Cir.) (dismissing damages action for rendition and torture on state secrets grounds), *cert. denied*, 552 U.S. 947 (2007); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2010); *but see* Rumsfeld torture case in 7<sup>th</sup> Cir.?

<sup>78</sup> *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004).

<sup>79</sup> *American Civil Liberties Union v. NSA*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008).

<sup>80</sup> *Center for National Security Studies v. U.S. Dept of Justice*, 331 F.3d 918 (D.C. Cir. 2003).

Court of Appeals for the Second Circuit upheld the pretextual use of immigration authority to detain foreign nationals after September 11 even where the individuals had agreed to leave the country, thereby vitiating any immigration purpose for their detention, and there was no evidence that the individuals were dangerous or a flight risk.<sup>81</sup> The same court upheld the Border Patrol's authority to detain and interrogate several Muslim citizens who had attended a religious conference in Toronto.<sup>82</sup> Several courts of appeals upheld the freezing of assets of U.S. charities denominated as "terrorist," without a warrant or probable cause, without notice of the charges, and largely on the basis of secret evidence not disclosed, even in unclassified summary form, to the affected entity, although some courts have more recently ruled otherwise.<sup>83</sup>

Thus, while the Supreme Court issued four important decisions rejecting in whole or in part the Bush administration's contentions regarding the detention and trial of "enemy combatants," those decisions did relatively little at least as a formal matter to compel the administration to change course. Most of the administration's adjustments were made without being ordered by a court to do anything. Moreover, the results in the Supreme Court's four cases decided on the merits were in no way dictated by precedent, and in several important respects the Court reached out to make arguments hardly even made by the parties. Whatever else one might say, the decisions appear to have been driven by something other than precedent; and as I will

---

<sup>81</sup> *Turkmen v. Ashcroft*, \_\_\_ F.3d \_\_\_ (2d Cir. 2009).

<sup>82</sup> *Tabaa*

<sup>83</sup> *Holy Land Fdn for Relief and Development v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7<sup>th</sup> Cir. 2002); but cf. *Al Haramain Islamic Found., Inc. v. U.S. Dept of Treasury*, \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir. Sept. 23, 2011) (holding that Treasury Dept violated Fourth Amendment by freezing designated entity's assets without warrant, violated Fifth Amendment by relying on classified evidence and failing to provide adequate notice and an opportunity to respond; and violated First Amendment by barring coordinated advocacy with the designated group); *KindHearts*, \_\_\_ F. Supp.2d \_\_\_ (N.D. Ohio 200\_) (holding that freezing entity's assets pending investigation on classified evidence violated the entity's Fourth and Fifth Amendment rights).

suggest below, the most likely candidate is the cultural pressures facilitated and reinforced by the work of civil society groups. And once one looks beyond those four cases, the more significant judicial trend since September 11 has been one of deference to the executive on matters of national security – largely in keeping with the courts’ historical role. If we are to look for the moving force in the taming of the United States’s most aggressive post-9/11 security measures, we must look beyond the courts.

### **C. The Role of Congress**

Congress did even less to respond to abuses of liberty and other rights in the wake of September 11.<sup>84</sup> It passed the USA Patriot Act shortly after the attacks, and while it did not give the president all that he asked for, the act expanded his authority to conduct surveillance, gather intelligence, detain and deport foreign nationals on grounds of political association and belief, and freeze assets based on secret evidence, while relaxing judicial oversight and other constraints on these powers. As noted above, when the Supreme Court declared the president’s military commissions illegal, Congress made them legal by authorizing them in the Military Commissions Act of 2006. When the Court held that the habeas corpus statute extended to persons held without charge at Guantanamo, Congress repealed that portion of the statute in the Detainee Treatment Act.<sup>85</sup> It granted retroactive immunity to telecommunications service

---

<sup>84</sup> Congress did, of course, enact legislation *before* September 11 that provided some protections for liberty and privacy that continued thereafter, such as the Foreign Intelligence Surveillance Act. However, it watered those protections down in the USA Patriot Act, and, apart from the McCain amendment to the Detainee Treatment Act, adopted no affirmative legislation to *restrict* the president’s initiatives.

<sup>85</sup> CITE.

providers who, at the executive's request, engaged in warrantless electronic surveillance.<sup>86</sup> And Congress has repeatedly obstructed President Obama's efforts to close Guantanamo, barring the expenditure of any funds to transfer detainees to the United States, even to stand trial in a criminal court, and requiring certifications for any transfer to a foreign country that are so onerous that no such certification has been made.<sup>87</sup>

The one exception to Congress' otherwise abject deference was its reaffirmation, in the McCain amendment to the Detainee Treatment Act, that the international treaty prohibition on cruel, inhuman, and degrading treatment found in the Convention Against Torture (CAT) applied to all persons held by U.S. authorities, anywhere in the world, regardless of their nationality.<sup>88</sup> This provision, enacted over vigorous opposition personally directed by Vice-President Cheney, repudiated the Bush administration's alarming contention, initially made only in secret but disclosed in connection with the confirmation hearing on Alberto Gonzales's appointment as Attorney General, that the CAT prohibition did not apply to foreign nationals held outside the United States. That theory, counter to the text and spirit of the CAT, was driven by the administration's desire to inflict cruel and inhuman treatment on terror suspects, especially in the CIA's secret prisons. To its credit, Congress repudiated this interpretation when it learned of it. But while Congress reaffirmed that this human rights ban applied equally to all human beings, it provided no mechanism for enforcing the provision in cases where it was violated. Moreover,

---

<sup>86</sup> CITE.

<sup>87</sup> CITE NDAA and articles on that. David Cole, *Gitmo Forever? Congress's Dangerous New Bill*, NYR Blog, Dec. 8, 2011, available at <http://www.nybooks.com/blogs/nyrblog/2011/dec/08/gitmo-forever-dangerous-new-bill/>; David Cole, *A Bill of Rights for Some*, NYR Blog, Dec. 16, 2011, available at <http://www.nybooks.com/blogs/nyrblog/2011/dec/16/bill-rights-some/>.

<sup>88</sup> CITE.

foreseeing that it might lose the vote on the issue, the administration had already prepared a secret legal memorandum concluding that none of its “enhanced interrogation techniques” were in fact cruel, inhuman, or degrading in violation of CAT, even when inflicted in combination.<sup>89</sup>

However, Congress’s least deferential interventions in the “war on terror” have undermined, not reinforced, human rights and the rule of law. It has barred the expenditure of funds to transfer any Guantanamo detainee to the United States, and imposed such stringent conditions on release to other countries that releases from Guantanamo have halted.<sup>90</sup> The executive branch has determined that 89 of the 171 men remaining there are cleared for release, but in part because of Congress’s restrictions, it has been unable to release them. Thus, in this instance, Congress’s intervention has resulted in the continued detention of persons whom the military has determined do not need to be detained, the very definition of arbitrary detention.

Thus, the legislature has if anything proved a source of law violations and abuse, and has provided little or no enforceable check on executive overreaching.

#### **D. Competing Accounts**

There are, to be sure, alternative narratives regarding the lessons of the last decade. While it is not possible to establish causality with certainty, I suggest that some of these alternative accounts are unconvincing, and that others, while offering part of the story, do not displace civil society from a central role.

First, some have argued that there actually has not been that much change, and that the real story is not the restoration of rights and legality, but the institutionalization of “the state of

---

<sup>89</sup> CITE.

<sup>90</sup> CITE NDAA, Signing Statement, previous bill and signing statement.

the exception.”<sup>91</sup> On this view, Obama has largely continued the Bush initiatives, rendering them if anything more resistant to challenge because they are now cloaked in the false legitimacy of an administration seen as more sensitive to civil rights and civil liberties. This view is articulated by advocates on the left who are disappointed about the sufficiency of the changes Obama has made, and by advocates on the right who cite it as evidence that Bush’s policies were not as extreme as many critics portrayed them.<sup>92</sup> This version of events, strongly held in some circles, unfairly discounts the changes that have been made, and takes pre-9/11 peacetime rather than post-9/11 wartime as the appropriate benchmark.

The principal difference between the Bush and Obama administrations lies in their attitudes toward domestic and international legal constraints. Bush seemed to view the law in Schmittian terms as secondary, with security his only real mandate. His administration accordingly did all it could to avoid the dictates of law, reading some laws (such as the Geneva Conventions, the Non-Detention Act, and the prohibition on cruel, inhuman, and degrading treatment) as inapplicable altogether; implausibly interpreting other laws (such as the bans on torture and warrantless wiretapping) as inapplicable to conduct they were plainly meant to foreclose; and asserting an authority to disregard and override the law by virtue of his alleged Article II authority as Commander in Chief. President Obama, by contrast, has insisted from the

---

<sup>91</sup> See, e.g., Mark Danner, *After September 11: Our State of Exception*, NYRB, Oct. 13, 2011; Joseph Margulies and Hope Metcalf, *Terrorizing Academia*, 60 J. Leg. Educ. 433, 465 (2011) (“despite Obama’s campaign promises, his post-9/11 counter-terror policies are most striking for their similarity to Bush’s rather than their differences, which are mostly modest and incremental”); Jack Goldsmith, *The Cheney Fallacy: Why Barack Obama is waging a more effective war on terror than George W. Bush*, *The New Republic*, May 18, 2009; but cf. David Cole, *Breaking Away: Obama’s war on terror is not “Bush Lite,”* *The New Republic*, Dec. 8, 2010 (disputing these accounts, and arguing that Obama’s approach is distinct from Bush’s in important ways), available at <http://www.tnr.com/article/magazine/politics/79752/breaking-away-obama-bush-aclu-guantanamo-war-on-terror>.

<sup>92</sup> CITES

outset that he will fight terrorism within and pursuant to the rule of law, and that the nation will be stronger for doing so.<sup>93</sup> As noted above, he even argued in the D.C. Circuit that the court had erroneously granted him *too much* power, when a panel of that court ruled that Guantanamo detentions need not be cabined by the laws of war.<sup>94</sup>

From the left, the criticism that Obama is no different from Bush seems largely to stem from frustration that he has not ended the practices of military detention, military commissions, and targeted killing. The mantra of many in the human rights community has been “try or release;” they argue that if terrorists cannot be convicted in an ordinary civilian criminal court, they should be released. And terrorists should be apprehended and brought to trial, not assassinated by drones. But neither military detention, military justice, nor killing itself are *per se* violations of international law, international human rights, or domestic law, in wartime. On the contrary, all are customary elements of a nation’s arsenal when it is at war. The United States is still engaged in an ongoing armed conflict in Afghanistan and the border regions of Pakistan with al Qaeda and the Taliban, and the notions that it can hold people fighting for the other side in military detention pending the resolution of the conflict, or that it can use military criminal process to try them for war crimes, are hardly novel. There is of course substantial room for debate about the proper scope of the authority to kill, detain, and/or try in the military system, but the notion that there is *no* authority for such measures finds little support in precedent or international law.

To be sure, if one takes as the appropriate benchmark the peacetime approach that predominated before the attacks of September 11, one might well concluded that we have

---

<sup>93</sup> See, e.g., Remarks by the President on National Security, May 2009, *supra* note \_\_\_\_.

<sup>94</sup> See note \_\_ *supra*.

“established a new normal,” as the ACLU recently maintained.<sup>95</sup> But this critique assumes that the appropriate lens through which to judge the government’s actions is the lens of peace, not the lens of war. If one accepts that there is an ongoing armed conflict with Al Qaeda and the Taliban, centered in Afghanistan, the appropriate lens is not peace, but war. And from that perspective, there are significant differences between President Bush’s initial measures and those that the United States is now employing.

A second account maintains that corrections are inevitable when the moment of crisis passes, and that all we have seen in the last decade is such an inevitable course correction.<sup>96</sup> It is certainly true as a historical matter that governments often overreact in the heat of a crisis, and that once the crisis cools, calmer heads typically prevail. There may well be aspects of human nature that would support such a pattern. In the heat of the moment, we are likely to panic and overestimate what is an appropriate or necessary response; as time passes and fear subsides, there may well be more room for rationality to return. But this account, often depicted as the swing of a pendulum, seems thin, and risks complacency to the extent that it portrays the shift as almost automatic. The pendulum does not swing of its own accord; there is no analogical force to gravity involved. It takes opposition, criticism, and dissent to create momentum for society and the government to move in the other direction. This is especially so given the weight of the forces arrayed on the side of overreaction. The power of fear, the sheer size of the national-security-industrial complex, and the fact that by and large the rights sacrificed have been of

---

<sup>95</sup> ACLU, *Establishing a New Normal* (July 22, 2011), available at <http://www.aclu.org/print/national-security/establishing-new-normal>.

<sup>96</sup> Joseph Margulies and Hope Metcalf, in a review of a wide range of legal scholarship, characterize this as the dominant narrative in post-9/11 scholarship. Margulies and Metcalf, *Terrorizing Academia*, *supra* note \_\_ at 434-35.

foreign nationals combine to create extraordinary pressure in favor of overreaching, and none of these elements produces a corrective of its own accord. The extent and vigor of opposition and dissent may well determine both the extent of the initial overreaction and the speed with which corrections are made. One critical source of the correctional force, I suggest, is civil society.

A third account focuses on the Supreme Court, and characterizes its interventions as driven largely if not exclusively by concern for its own power, and not for liberty or human rights.<sup>97</sup> This explanation, however, even if one were to accept it on its own terms as a rationale for the Court's conduct, addresses only a small part of the picture. As discussed above, most of the reforms were undertaken without an order from the Supreme Court. But this story is not even persuasive as an explanation of the Court's own role. First, the same institutional self-interest presumably existed in other crises, yet before the post-September-11 cases, the Supreme Court had almost uniformly deferred to claims of executive prerogative on issues of national security. Apart from the steel seizure case, this is the first time the Court intervened to restrain a president during wartime.<sup>98</sup> In World War I, World War II, and during the height of the Cold War, the Court remained on the sidelines or deferred to questionable assertions of national security need. Only when those conflicts came to an end did the Court assert itself. Thus, unless there is a theory of judicial self-interest that can distinguish the post-9/11 setting from previous crises, it is an unsatisfactory explanation.

---

<sup>97</sup> See, e.g. Stephen Vladeck, *The Passive-Aggressive Virtues*, supra note \_\_; Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 Wash. L. Rev. 661 (2009) (arguing that the courts after 9/11 "reinforced their critical role in the broader tripartite framework [] by grounding decision-making within their own area of expertise"); see *Hamdi*, \_\_\_ U.S. at \_\_\_ (noting that the Constitution "envisions a role for all three branches when individual liberties are at stake").

<sup>98</sup> *Address Ex parte Endo*, *Taney* and *habeas in Civil War*.

In addition, as history demonstrates, a Court concerned about conserving its own institutional power might well be inclined to defer during times of crisis. One cannot be certain in advance how the public will respond to a decision. Ruling for “the enemy” during wartime might be a risky proposition. A court primarily concerned about its own institutional power might therefore make the strategic choice to defer in times of crisis so as to avoid showdowns that could undermine its legitimacy, thereby preserving its power for ordinary times.<sup>99</sup> Accordingly, it is not obvious that the Court’s institutional interests necessarily push it in the direction of intervention rather than deference or avoidance in times of crisis. To the extent that the Supreme Court in the combatant cases viewed its choice as one of siding with law against lawlessness, as I have suggested above,<sup>100</sup> that seems likely to be the result of the successful framing that civil society organizations were able to achieve.

A fourth account points to the effect of the Iraq war in turning public opinion against the administration. The Bush administration’s insistence on pursuing a costly and unpopular war, coupled with the absence of weapons of mass destruction there, its ostensible reason for invading, dramatically undermined the public’s trust in the administration. The presidency was much weaker after going to war with Iraq than before, and that weakness made resistance possible.<sup>101</sup> There is undoubtedly some truth to this explanation, but it is insufficient standing alone. First, while the Iraq war weakened the presidency, in the absence of pressure from civil society on issues of constitutional and human rights, there is no particular reason that the president’s weakness on this subject would translate into strengthened human rights claims. On

---

<sup>99</sup> Indeed, Alex Bickel famously advised as much. See Alexander Bickel, *The Passive Virtues*, CITE.

<sup>100</sup> See notes \_\_--\_\_ supra.

<sup>101</sup> CITE Polls

the contrary, it might conceivably have created further pressure for even more extreme measures, to “reassure” a questioning public.

Second, what made the Iraq war debacle particularly influential with respect to human rights and the “war on terror” was that its problems echoed the broader problems of overreaction that characterized the rest of the administration’s counterterrorism policies. The Iraq war, like many of President Bush’s most questionable initiatives, was said to be driven by concern about terrorism. And as with the other national security initiatives surveyed above, the administration largely thrust law to the side with respect to Iraq. The U.N. Charter forbids invasion of another country without authorization of the Security Council except in response to armed attack. Many international law experts extend that rationale to a defense against an imminent but not yet launched attack. In the case of Iraq, however, we faced neither. Yet the administration went to war anyway, without approval from the U.N. Security Council. Thus, the Iraq war shared certain key features with Bush’s counterterrorism policy: a willingness to use the state’s most coercive authority to “prevent” speculative future attacks, in disregard of fundamental legal constraints, and on the basis of shoddy evidence.<sup>102</sup> The revelations of torture at Abu Ghraib prison, closely linked to the administration’s coercive interrogation practices at Guantanamo and elsewhere, dramatically reinforced the connections. In short, what was wrong with the Iraq war was also wrong with the administration’s preventive paradigm more generally. But again, absent a strong foundation for the broader critique of Bush’s policies, the Iraq war fallout might not have contributed to the restoration of legality in U.S. counterterrorism policy

---

<sup>102</sup> For an extended treatment of the Iraq war as a core feature of the Bush administration’s “preventive paradigm,” see David Cole and Jules Lobel, *Less Safe, Less Free: Why America Is Losing the War on Terror* [chapters on Iraq and preventive war] (2009).

Thus, claims that there has been no meaningful resurrection of the rule of law, that all we have witnessed is the inevitable swing of a pendulum, that it is all a matter of judicial self-interest, and that the unpopularity of the Iraq war drove the reforms, are each insufficient explanations for what happened, even if some bear elements of truth. We must look elsewhere for a more complete account – in particular, to civil society.

### **III. Lessons of the Post-September 11 Decade**

The lessons of the last decade have two important implications for constitutional theory and practice. First, if we are to resist executive overreaching in the future, developing and reinforcing a culture of resilience with respect to constitutional and human rights may be as important as the institutional checks and balances enshrined in the Constitution. And civil society organizations have a unique institutional role to play in fostering that culture and advancing those claims, especially when the more formal institutions of government are least reliable. Thus, constitutional theory would do well to pay as close attention to the checking function of civil society as it has to courts, Congress, and the separation of powers. Second, to ensure that there is room for such civil society organizations to operate, it is essential that First Amendment freedoms of speech and association are zealously safeguarded. Vincent Blasi argued long ago that the First Amendment serves a critical function in checking government abuse; but of course it is not the First Amendment itself, but the civil society that it protects, that actually does the checking.

#### **A. Civil Society Constitutionalism**

If political pressure from civil society, rather than the force of law itself or the separation of powers, is to be credited for much of the restoration of legality in the decade after September 11, then it is essential that we understand how that politics works, and in particular its relation to constitutionalism and human rights. I have suggested that the turnaround can be attributed neither to law in the formal sense, nor to ordinary politics, and that one cannot understand the transformation without considering the role of civil society groups committed to constitutional and human rights. Constitutional theory has traditionally looked to the Constitution itself and the separation of powers, especially judicial review, for the enforcement of legal limits on government power. But the post-9/11 experience suggests that a robust civil society dedicated to constitutional and human rights may be as important as the more formal elements of separation of powers in checking executive abuse. At the same time, as the Guantanamo cases illustrate, there is a complex interrelationship between the informal power of civil society and more formal legal constraints. Legal disputes and claims generally form the focal point of these civil society groups' activities, but their activities are by no means limited to seeking injunctive relief in court. They simultaneously bring their legal claims to the political sphere, calling on government officials and the population at large to live up to the commitments reflected in the Constitution and human rights instruments.

More recent constitutional theorists have criticized American constitutional law for its near-exclusive focus on courts.<sup>103</sup> They argue that courts are inherently conservative, passive institutions with severely limited remedial capabilities, and that even when they happen to issue

---

<sup>103</sup> Mark Tushnet, *Taking the Constitution Away From the Courts* (1999); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Michael Klarman, *Brown and Lawrence (and Goodridge)*, 104 *Mich. L. Rev.* 431 (2005); Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1993).

rights-protective decisions they may well spark backlash that does more harm than good. At the same time, they maintain, excessive focus on courts as the enforcers of constitutional rights makes the other branches of government and the people at large less likely to take the initiative themselves to effectuate the Constitution. So-called “popular constitutionalism” argues that we must “take the Constitution away from the courts,” and empower and inspire the people and/or their representatives to take on more constitutional responsibility.

I believe the extrajudicial constitutionalism movement recognizes an important truth, the same truth that Learned Hand articulated in 1944.<sup>104</sup> But the affirmative program for “popular constitutionalism” is flawed.<sup>105</sup> The Constitution, after all, is designed to constrain ordinary politics, precisely in recognition that the people and their representatives are likely to disregard long-term commitments to fundamental values when they conflict (as they often will) with short-term popular preferences. To “take the Constitution away from the courts” and assign its enforcement to Congress, the President, or the people themselves, is to ask the fox to guard the henhouse. In a fundamental sense, then, “popular constitutionalism” is a contradiction in terms.

In what they have termed “democratic constitutionalism,” Robert Post and Reva Siegel have sought to take the insights of Learned Hand and “popular constitutionalism” seriously, but without rejecting the role of courts.<sup>106</sup> They acknowledge that courts play a central role in enforcing constitutional protections against majoritarian pressures. But they also insist that the “authority of the Constitution depends on its democratic legitimacy, upon the Constitution’s

---

<sup>104</sup> See supra note \_\_.

<sup>105</sup> Cite Larry Kramer, *The People Themselves*, supra note \_\_

<sup>106</sup> See, e.g., Robert Post and Reva Siegel, *Roe Rage*, supra note \_\_.

ability to inspire Americans to recognize it as *their* Constitution.”<sup>107</sup> As such, they see a role for both courts and the people, and argue that popular reactions to constitutional decisions, sometimes worryingly described by other scholars as “backlash,” should be viewed positively as expressing “the desire of a free people to influence the content of the Constitution.”<sup>108</sup> As they put it, “backlash can promote constitutional solidarity and invigorate the democratic legitimacy of constitutional interpretation.”<sup>109</sup> Thus, Post and Siegel seek to avoid the contradiction of “popular constitutionalism” by focusing instead on the *interaction between* popular political movements and judicial decisions about constitutional meaning.

Both “popular” and “democratic” constitutionalism recognize the central paradox of constitutional and human rights in a democracy: namely, that those rights are designed to check the force of popular opinion and ordinary politics, but, as Learned Hand noted, they are effective only to the extent that the people are committed to them. How does constitutional law check politics if it is ultimately dependent upon political commitment? A focus on the particular institutional role played by civil society organizations committed to constitutional rights helps to provide an answer. Because such civil society organizations define themselves precisely by their institutional dedication to rights, operate through appeals to rights, and lack the formal authority to “enforce” rights themselves, they necessarily bridge the gap between politics and law, by building, supporting, and reinforcing a culture of resilience with respect to constitutional and human rights. They then draw upon that culture and their own institutional commitments to resist oppression when the forces of ordinary politics are all aligned otherwise.

---

<sup>107</sup> *Id.* at [2].

<sup>108</sup> *Id.* at [4]

<sup>109</sup> *Id.*

Civil society, in other words, performs an essential function in mediating the law and the politics of rights, and in furthering Hand’s requirement that “liberty lies in the hearts of people.” Like a constitution itself, a civil society organization committed to constitutional or human rights instantiates a collective decision to defend certain fundamental values. Unlike a constitution, however, civil society is not simply a piece of paper, but a living embodiment of those values. And when, as in times of crisis, the executive, the legislature, the courts, and the general population are most inclined to favor broad executive power over fidelity to fundamental principle, civil society organizations play their most critical role, and are often at their best. Because those organizations are defined by their commitment to constitutional and human rights values, they are less likely to lose sight of those values.<sup>110</sup>

Indeed, civil society organizations often thrive precisely when it appears that all other forces in society are directed toward undermining constitutional and human rights. Thus, the ACLU, the Center for Constitutional Rights, and the Council on American-Islamic Relations all grew substantially in the wake of 9/11, as people saw those institutions as critically important checks on government abuse and flocked to join and support them like never before.<sup>111</sup> Those and other organizations then used their newfound resources to stand up for rights and causes that otherwise had few advocates. And despite their lack of any governmental or similarly formalized power, they played an important role in prompting the United States to bring its counter-terrorism policies and practices more in line with the constitutional and human rights limits that the Bush administration initially sought to avoid altogether.

---

<sup>110</sup> This is of course not always the case, as the complicated history of the ACLU’s relationship to the Communist Party during the McCarthy era attests. Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (2d ed. 1999).

<sup>111</sup> CITE stats on growth of these orgs after 9/11

Nor is the role of civil society organizations in formulating, shaping, and helping to enforce constitutional meaning limited to times of crisis. Virtually every advance in the development of constitutional rights has been prompted and accompanied by the robust participation of civil society organizations. Civil society groups committed to eliminating racial injustice, including the NAACP and its Legal Defense Fund, and a host of other civil rights groups, were critically important to the eventual invalidation of official segregation and racial discrimination. Women's rights groups, including the ACLU under the guiding hand of Ruth Bader Ginsburg, played a central role in establishing that distinctions based on sex are presumptively suspect under the Equal Protection Clause, and that the right to terminate a pregnancy is a central aspect of equality. And civil society groups dedicated to gay rights played an important part in the Supreme Court's invalidation of homosexual sodomy laws in *Lawrence v. Texas* and in the ongoing movement to recognize the right of same-sex couples to marry. Attempting to understand these developments as a matter of pure doctrine, or as a function of politics, misses the distinctive role that civil society organizations have played in formulating, developing, and enforcing constitutional rights claims.

A focus on the catalytic and reinforcing role of civil society organizations committed to constitutional and human rights may help to avoid the contradiction in "popular constitutionalism" while acknowledging the force of Learned Hand's insight. If we think not of "popular constitutionalism," but "civil society constitutionalism," we may better understand how constitutional and human rights values are effectuated and protected in a democracy. Civil society organizations are at once committed to constitutional law and engaged in politics to advance that law. They bridge the gap between ordinary politics and formal constitutional law,

and help to reinforce the culture that is so essential to preserving the Constitution as a living embodiment of our society's deepest commitments.

In understanding the role of civil society in the enforcement and reinforcement of constitutional rights, it is important to distinguish it from ordinary politics. To that end, *The Executive Unbound*, by Eric Posner and Adrian Vermeule, offers a useful foil. Posner and Vermeule argue that in the modern era, Congress, the courts, and the law itself cannot effectively constrain the executive, especially in emergencies, but that this need not be of concern because the executive is adequately limited by political checks.<sup>112</sup> At first glance the past decade seems to vindicate Posner and Vermeule's views, as political forces were more effective at checking the president than were Congress or the judiciary. But Posner and Vermeule's valorization of politics over law overstates the power of politics, understates the force of law, and misses the complicated and essential interplay between the two. Posner and Vermeule may be right that the law alone is not enough, but they fail to see that politics alone is also wanting. In the end, the enforcement of constitutional rights turns on a complex relationship of law, politics, and culture. When they do, as they arguably did to an important extent in the wake of September 11, they can mount a significant defense of basic human rights against executive overreaching.

To Posner and Vermeule, the separation of powers is, for all practical purposes, defunct. In their view, the modern executive cannot possibly be constrained by the legislative and judicial branches, or even by law itself. Like many commentators before them, they attribute this development largely to the growth of the administrative state and to the near-constant state of emergency in which modern American government now seems to operate.<sup>113</sup> As a practical

---

<sup>112</sup> Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010).

<sup>113</sup> See, e.g., Arthur Schlesinger, Jr., *The Imperial Presidency* (1972); Garry Wills, *Bomb Power* (2010).

matter, the vast and complex matters subject to federal regulation require Congress to cede control to the executive, through broad delegations of authority to administrative agencies. The executive vastly outnumbers the other branches; about 98 percent of the federal government's nearly two million employees work in the executive branch. In emergencies, the executive's characteristics of speed, flexibility, unified command, and secrecy are especially valued, so Congress tends to delegate even more broadly, and courts in turn typically defer to executive action.<sup>114</sup> Under these conditions, Posner and Vermeule maintain, it is simply not feasible for the other two branches to keep effective tabs on what the executive is up to.

But where other commentators view these developments as profound challenges to our constitutional order, Posner and Vermeule insist that they are of little concern because political constraints on the executive render the rule of law unnecessary. That view, however, both underestimates the constraining force of law and overestimates the extent of political limits on executive overreaching. Dismissing the role of law, Posner and Vermeule sweepingly claim that law is so indeterminate and manipulable as to constitute only a "façade of legality."<sup>115</sup> But in assessing law's effect, they look almost exclusively to formal indicia – statutes and court decisions. That approach disregards the possibility that law has a disciplining function long before cases get to court, and even when no case is ever filed, a reality to which anyone who has worked in the executive branch will attest.<sup>116</sup> Executive officials generally cannot know in advance whether their actions will attract court review, or whether such review will be strict or

---

<sup>114</sup> Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (1948).

<sup>115</sup> CITE.

<sup>116</sup> See Jack Goldsmith, *The Terror Presidency*, (arguing that the executive's national security function is excessively governed by law).

deferential; that uncertainty itself has a deterrent effect on the choices they make. There are plenty of reasons why executive lawyers generally take legal limits seriously. They take an oath and are acculturated to do so. They know that claims of illegality can undermine their programmatic objectives. And they cannot predict when a legal claim will be advanced against them, in court, Congress, or the court of public opinion. Similarly, in focusing on statutes and their enforcement by courts, Posner and Vermeule disregard the considerable checking function that Congress's legal oversight role plays through means short of formal statutes, such as by holding hearings, launching investigations, or requesting information about doubtful executive practices, or restricting federal expenditures.

At the same time, Posner and Vermeule have an unrealistically romantic view of the constraining force of politics. The "politics" they identify consists solely of the fact that presidents must worry about election returns, and must cultivate credibility and trust among the electorate. There are several reasons to doubt that these political realities are sufficient to guard against executive overreaching.

First, and most fundamentally, while the democratic process is well designed to protect the majority's rights and interests, it is generally terrible at protecting the rights of minorities, and even worse at protecting the rights of foreign nationals, who have no say in the political process. In times of crisis, the executive nearly always selectively sacrifices the rights of foreign nationals, often defending its actions by claiming that "they" don't deserve the same rights that "we" do.<sup>117</sup> To say the law is superfluous because we have elections is to relegate foreign nationals, and minorities generally, to largely unchecked abuse.

---

<sup>117</sup> See David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (2005); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (198\_).

Second, the ability of the political process to police the executive is hampered by secrecy. Much of what the executive does, especially in times of crisis, is secret, and even when some aspects of executive action are public, its justifications often rest on grounds that are assertedly secret. Courts and Congress have at least some ability to pierce that veil and to insist on accountability. Absent legal rights, such as those created by the Freedom of Information Act, the public has virtually no ability to do so.

Third, the political process is a blunt-edged sword. Presidential elections occur only once every four years, and necessarily encompass a broad range of issues. Elections are therefore unlikely to be effective at addressing specific abuses of power. Voters' concerns about abstract institutional issues such as executive power may clash with their interests on the substantive merits of particular issues, such as whether to use military force in support of Libyan rebels. There is no guarantee that citizens will separate these issues in their minds, and no reason to believe that if they do so, they will favor abstract institutional concerns over specific policy preferences at the ballot box.

Fourth, the political process is notoriously focused on the short term, while issues of constitutional rights and separation of powers generally serve long-term values. It was precisely because ordinary politics tend to be short-sighted that the framers adopted a constitutional democracy. The Constitution identifies those values that society understands as important to preserve for the long term, but knows it will be tempted to sacrifice in the short term. If ordinary politics were sufficient to protect such concerns, we would not need a constitution in the first place.

Thus, there is little reason to believe that political checks will be *sufficient* to restrain presidential abuse. However, as detailed above, political checks may well be *necessary*, and

under certain conditions, can be effective. It was civil society, more than the courts or Congress, that compelled President Bush to retreat from his assaults on fundamental principles of law and human rights in the wake of the terrorist attacks of September 11. And it may well have been civil society that impelled the Supreme Court to depart from its customary deference to the executive in the military detention and trial cases.

In a review of post-9/11 legal scholarship, Joseph Margulies and Hope Metcalf criticize most of that scholarship for focusing too exclusively on the role of courts in protecting and preserving rights.<sup>118</sup> In their view, whether rights are actualized turns less on formal judicial decisions than on which narrative prevails -- whether the American populace is convinced that respect for rights (often, the rights of others) is an obstacle to national security or an important component of American values and a source of our strength.<sup>119</sup> Court decisions and political elections play a part in the competing narratives, but a victory in either arena may reinforce one set of views or, conversely, spark a backlash.<sup>120</sup> Margulies' and Metcalf's emphasis on the need to consider the *interrelation* of law, culture, and politics is persuasive, and is borne out by the first decade after September 11.

As I have shown above, while political forces played a significant role in checking President Bush, what was significant was the particular *substantive* content of that politics; it was not just any political pressure, but pressure to maintain fidelity to constitutional and human rights. Politics standing alone is as likely to fuel as to deter executive abuse; consider the lynch

---

<sup>118</sup> Margulies and Metcalf, *supra* note \_\_ at 437, 450.

<sup>119</sup> See Margulies and Metcalf, *Terrorizing Academia*, *supra* note \_\_ at 456-70 (criticizing legalistic and court-centric understanding of rights, and advocating more attention to the political and symbolic uses of rights).

<sup>120</sup> *Id.* at 461 ("a loss can produce a sense of threat and mobilize people to act, while success invariably encourages complacency and quiescence").

mob in the United States or the Nazi Party in Germany. What we need if we are to check abuses of executive power is a culture that champions constitutional and human rights. And civil society is integral to building and sustaining that culture, and to invoking it in times of crisis.

Unlike the politics Posner and Vermeule imagine, this type of politics cannot be segregated neatly from the law. On the contrary, it will often coalesce around a distinctly legal challenge, objecting to departures from distinctly legal norms, heard in a court case, as with Guantanamo. Congress's actions make clear that had Guantanamo been left to the political process, there would have been few if any advances. The litigation generated and concentrated political pressure on claims for a restoration of the values of legality, and, as discussed above, that pressure then played a critical role in the litigation's outcome, which in turn affected the political pressure for reform.

There is, to be sure, something paradoxical about this assessment. The separation of powers and human rights are designed to discipline and constrain politics, out of a concern that pure majoritarian politics, focused on the short term, is likely to discount these long-term values. Yet without a critical mass of active support for these legal principles, they are unlikely to be effective checks on abuse, for many of the reasons Posner and Vermeule identify. The critical mass, however, need not be a majority to be effective. Civil society organizations in the wake of 9/11 helped achieve results that almost certainly would have been impossible through a strictly majoritarian political process. The answer, then, is not to abandon the rule of law for politics, as Posner and Vermeule would, but to develop and nurture a political culture that values constitutional and human rights.

Civil society organizations devoted to such values, such as Human Rights Watch, the Center for Constitutional Rights, and the American Civil Liberties Union, play a central role in

facilitating, informing, and generating that politics. Indeed, they have no alternative. Unlike governmental institutions, civil society groups have no formal authority to impose the limits of law themselves. Their recourse to the law is necessarily indirect: they can file lawsuits seeking judicial enforcement, lobby Congress for statutory reform or other legislative responses, or seek to influence the executive branch. But while they advance legal claims, they simultaneously pursue these goals through political avenues – by appealing to the public for support, educating the public, exposing abuses, and engaging in public advocacy around rule-of-law values.

Unlike ordinary politics, which tends to focus on the preferences of the moment, civil society organizations dedicated to constitutional and human rights are committed by definition to a set of long-term principles. These organizations are therefore uniquely situated to bring such long-term interests to bear on the public debate. Much like a constitution itself, civil society groups are institutionally designed to emphasize and reinforce our long-term interests. When the ordinary political process is consumed by the heat of a crisis, organizations like the ACLU, Human Rights First, and the Center for Constitutional Rights, dedicated to preserving constitutional and human rights, can generally be counted on to stand up for these rights and to resist ordinary political pressures.

While Congress and the courts were at best compromised and at worst complicit in the abuses of the post-9/11 period, civil society performed estimably. The Center for Constitutional Rights brought the first lawsuit seeking habeas review at Guantanamo, and went on to coordinate a nationwide network of volunteer attorneys who represented Guantanamo habeas petitioners. The ACLU filed important lawsuits challenging secrecy and government excesses, and succeeded, through the Freedom of Information Act, in disclosing many details about the government's illegal interrogation program. Both the ACLU and CCR filed lawsuits and

engaged in public advocacy on behalf of torture and rendition victims, and challenging the NSA's warrantless wiretapping program. Human Rights Watch and Human Rights First wrote important reports on detention, torture, and Guantanamo, and Human Rights First organized former military generals and admirals to speak out in defense of humanitarian law and human rights. These efforts are but a small subset of the broader activities of civil society, at home and abroad, that helped to bring to public attention the Bush administration's most questionable initiatives, and to portray the initiatives as contrary to constitutional and human rights.

At their best, civil society organizations help forge a culture of resilience about rights. Their interventions bridge the gap between politics and law: their appeal to law informs their particular politics, and that politics reinforces the law's appeal, in a mutually reinforcing relation. Post and Siegel, Posner and Vermeule, and Margulies and Metcalf all recognize the importance of politics and/or culture as a checking force in the modern world. But none focuses on the particular role that civil society organizations committed to constitutional and human rights play in that checking mechanism. It is not that the "rule of politics" has replaced the "rule of law," or that the Constitution needs to be taken from the courts and given to the people, but that a culture of resilience about rights is a critical supplement to constitutional law itself. Our survival as a constitutional democracy true to our principles turns not only on a written Constitution and the separation of powers, but on a vibrant civil society dedicated to reinforcing and defending constitutional values.

## **B. The Checking Function of Political Freedom**

If civil society, as much as or more than the separation of powers, was the principal checking force after September 11, then constitutional protections of civil society, in particular

the First Amendment, are at least as important as the formal separation of powers in countering the harms of government overreaction. In this sense, the post-September-11 decade can be read as a vindication of Vincent Blasi's classic vision of the First Amendment's "checking value."<sup>121</sup> Blasi argued that one of the central values of free speech is precisely its instrumental ability to hold official power in check by calling it to public account. But of course it is not the First Amendment itself that calls power to account. Civil society is and was the living embodiment of this "checking value."

The First Amendment is the lifeblood of civil society. For civil society organizations to flourish, they must have the freedom to criticize the government; to organize themselves as associations; to appeal to the citizenry for support, both financial and ideological; and to associate with other groups as a means of furthering their ends. Maintaining those freedoms is an important value in itself, but also has substantial instrumental benefits, inasmuch as a free civil society may act as a critical check on executive abuses of other rights.

In this light, three developments since September 11 should be of concern. First, while direct attacks on speech have not been a central feature of the "war on terror," free speech remains vulnerable, especially for some. By and large, we have not seen since 9/11 the sort of direct punishment of speech that characterized the government's response to anti-war activists during World War I or Communist sympathizers in the McCarthy era. However, the government's aggressive targeting of Muslim communities in the United States, including the use of pretextual immigration charges, informants, and undercover agents, has had a profound chilling effect on that community's freedom to engage in criticism of the government. While this targeting does not affect the ability of non-Muslim and non-Arab individuals and

---

<sup>121</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 Am. Bar Res. J. 521 (1977).

organizations to criticize government overreaching, the Arab and Muslim community, as the target of virtually all of the overreaching, is the most important source of information.

Immigrants are especially vulnerable, because the byzantine immigration code affords wide discretion for selective enforcement, and the Supreme Court has ruled that even selective enforcement based on otherwise protected associations is no bar to deportation proceedings.<sup>122</sup>

While investigating potential terrorists is indisputably important, the heavy-handed way in which the federal government has gone about it has undermined the freedom of members of these communities to speak out and be heard -- and that in turn increases the likelihood of executive overreaching.

Second, Congress and the president have criminalized speech and association when engaged in with or on behalf of foreign organizations that the government has designated as “terrorist” -- regardless of the otherwise peaceful and lawful character of the individual’s speech or association. Federal law broadly empowers the executive to designate foreign as well as domestic groups as terrorist, and then makes it a crime to provide such groups with any “material support,” or to engage in any “transaction” with them, including offering them any service.<sup>123</sup> Both “material support” and “service” are defined sufficiently broadly as to include pure speech, and neither requires any nexus between the content of the speech and any terrorist conduct. Thus, these laws make it a crime even to engage in speech advocating only human rights and the peaceful resolution of conflict, when done for or with designated groups. The government has yet to prosecute individuals merely for such speech. But in *Holder v. Humanitarian Law*

---

<sup>122</sup> Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999).

<sup>123</sup> 18 U.S.C. 2339B; IEEPA, E.O. 13224.

*Project*, the Obama administration insisted on its authority to do so, and the Supreme Court rejected a First Amendment challenge to the “material support” law as applied to such speech.<sup>124</sup>

For all practical purposes, these laws resurrect the principle of “guilt by association” that was so widely employed during the McCarthy era. The Supreme Court ultimately ruled that the Constitution precludes the imposition of guilt for association with a proscribed group absent proof that an individual associated with the group for the specific purpose of furthering its illegal ends.<sup>125</sup> The “material support” law does not criminalize membership or association as such, but it effectively does just that, because it makes it a crime to do anything that one would do as a member or associate of a group. Under current law, you have a constitutional right to be a member of a group the government has designated “terrorist,” but you have no right to pay dues, volunteer your services, or advocate even for peaceful, lawful reform on the group’s behalf. The “material support” laws have effectively rendered the right of association a meaningless formality. The fact that this restriction on political freedoms is selectively targeted only at groups officially disfavored by the government only makes the law more problematic from a First Amendment standpoint. The views of such groups, and their supporters, could well be particularly relevant from a checking standpoint, as they are most likely to be the targets of the government’s counterterrorism initiatives, and therefore the victims of its abuses. The “material support” law’s sweeping criminalization of virtually any speech or associational conduct in coordination with these groups is likely to have its most chilling effects on those groups and individuals from whom we most need to hear.

---

<sup>124</sup> Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

<sup>125</sup> See, e.g., United States v. Robel, \_\_\_ U.S. \_\_\_ (19\_\_); Scales v. United States, \_\_\_ U.S. \_\_\_ (19\_\_).

Third, and more generally, the doctrinal approach the Supreme Court employed in *Holder v. Humanitarian Law Project*, the Court's first post-9/11 case pitting free speech and association against national security claims, appears to dilute substantially constitutional protection for precisely the speech that is most important to checking government abuse. The Court in *Humanitarian Law Project* acknowledged that, as applied to plaintiffs' speech advocating human rights and peace, the "material support" ban was a content-based prohibition triggering the First Amendment's heightened scrutiny. Exceedingly few laws survive such scrutiny, which ordinarily requires the government to establish that prohibiting the specific speech at issue was necessary to further a compelling state interest. The government must generally substantiate its assertions with evidence. Yet in *Humanitarian Law Project*, the Court made up justifications for the statute that the government itself had never even advanced, and then upheld the statute on that basis without any evidence to substantiate its speculations. Thus, it reasoned that teaching a group how to advocate for human rights might permit it to engage in harassing filing of claims; that advising a group on paths toward peace might allow the group to use peace negotiations as a cover to re-arm itself; and that even if none of these immediate negative results arose, assisting the group in lawful activities might burnish its legitimacy, which it could then use to raise support for more terrorist activities. The Court demanded no evidence that advocacy of peace and human rights had ever had such effects, or that criminalizing such speech was indeed necessary or narrowly tailored to fight terrorism. Instead, the Court stressed that in the area of national security and foreign relations, it had to defer to the political branches. If this "deferential strict scrutiny" is to be the standard for judging future restrictions on speech defended in the name of national security or foreign relations, the First Amendment is unlikely to be much of a bulwark against censorship.

The central checking role that First Amendment freedoms played in the restoration of the rule of law after September 11 should reinforce the importance of prohibiting “guilt by association,” whether it appears in the form of “material support” or a direct prohibition on membership. It should make us more sensitive to the chilling effects of overly aggressive targeting of the Muslim community. And it should lead the courts to adopt a more truly skeptical stance toward government restrictions on speech justified in the name of national security. At the same time, the fact that much of civil society in the United States did feel free to criticize the government’s overreaching in the wake of September 11 indicates that the culture of political freedom here is still very strong. As the above discussion shows, however, there are signs that neither the political branches nor the judiciary have given sufficient emphasis to the importance of maintaining political freedom as a checking force in times of crisis.

### **Conclusion**

Learned Hand’s assertion that as long as “liberty lies in the hearts of men and women . . . it needs no constitution, no law, no court to save it,” simultaneously captures an essential truth and overstates its case. It is true that without a political culture that values constitutional rights, formal legal protections are likely to be largely unavailing. But it is not quite true that when such a culture exists, “it needs no constitution, no law, no court to save it.” The Constitution and the courts play a critical role in inculcating, reinforcing, and implementing the political culture of the rule of law. They remind us of the values we hold in highest esteem. Court cases can serve as focal points for debating the application of these enduring constitutional values to current

situations. And courts can and often do enforce constitutional rights where the political branches would not.

Left out of Judge Hand's equation altogether, however, and largely ignored by constitutional theorists before and since, is the role of civil society. Like government officials, the people at large will often fall short of constitutional ideals; that is why, after all, we have a constitution in the first place. But, as the decade since 9/11 suggests, civil society organizations dedicated to defending constitutional rights can play a critical role in checking abuse, reinforcing and developing constitutional meaning, and ensuring that "liberty lies in the hearts of people." Where the legislature and the judiciary were often compromised after 9/11, civil society organizations were not; indeed, many experienced unprecedented growth. Through active invocation of fundamental rights, they helped to inculcate and reinforce a culture of legality, and provided a critically important voice for rule-of-law values. Absent that voice, it is far from clear that legality would have been restored to the extent that it was, or that the Supreme Court's opinions in the military detention and trial cases would have been as strong as they were. Liberty must lie in the hearts of the people, but civil society can play an especially important part in keeping it alive there. In the end, Hand is correct that the responsibility lies with us, but an important mechanism for fulfilling that responsibility is political association, or civil society, in defense of constitutional rights. The past decade suggests that a political culture attuned to the values of constitutional and human rights, fostered by a robust civil society, can effectively check official abuse, even of the most powerful government in the world.