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**U.S. JUDICIAL INDEPENDENCE: VICTIM IN THE “WAR ON TERROR”**

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

This paper catalogs the principal cases first by the nature of the government action challenged and then by the special doctrines invoked. What I attempt to show is that the judiciary has virtually relinquished its valuable role in the U.S. system of judicial review. In the face of governmental claims of crisis and national security needs, the courts have refused to examine, or have examined with undue deference, the actions of

1 Much of this article is based on work done by Erik Luna, Washington & Lee [need full title] for the second edition of our “Understanding the Law of Terrorism.” I hope I have not plagiarized Erik’s work, and I emphasize that the thesis and critiques herein are entirely my own. I do not want to attribute criticism of the federal judiciary to Erik without his permission.

government officials. Oddly enough, the mostly Republican Supreme Court has shown more stiff resistance than most of the lower courts but still has ducked some significant issues.

How do these cases offend principles of judicial independence? The Mt. Scopus Standards demand that “in the exercise of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.” Further, that judges “should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law.” The Montreal Declaration of 1983 emphasizes in several ways the importance of the Rule of Law and due process.3

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

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

**A. The Actions Challenged**

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

1. **Guantanamo.**

   In *Boumediene v. Bush,*4 the Supreme Court allowed the U.S. to detain alleged “terrorists” under unstated standards to be developed by the lower courts with “deference” to Executive determinations. The intimidation exerted on the Court was reflected in Justice Scalia’s injudicious comment that the Court’s decision would “surely cause more Americans to be killed.”

2. **Detention and Torture**

   Khalid El-Masri5 claimed that he was detained in CIA “black sites” and tortured – case dismissed under the doctrine of “state secrets privilege.” (SSP)

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3. 1.03 Judges and courts shall be free in the performance of their duties to ensure that the Rule of Law is observed, and shall not admit influence from any government or any other authority external to their statutes and the interests of international justice.

4. 1.05 Judges shall enjoy freedom of thought and, in the exercise of their duties, shall avoid being influenced by any considerations other than those of international justice.

5. 1.08 Judges shall promote the principle of the due process of law as being an integral part of the independence of justice.

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5 El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).
Maher Arar⁶ is a Canadian citizen who was detained at Kennedy Airport by U.S. authorities, shipped off to Syria for imprisonment and mistreatment, and finally released to Canadian authorities – case dismissed under “special factors” exception to tort actions for violations of law by federal officials – awarded $1 million by Canadian authorities.

Jose Padilla⁷ was arrested deplaning at O’Hare Airport, imprisoned in the U.S. for ___ years without a hearing and allegedly mistreated in prison – case dismissed on grounds of “good faith” immunity.

Binyam Mohamed⁸ was subjected to “enhanced interrogation techniques” at several CIA “black sites” before being repatriated to England, which awarded him £ 1 million in damages – U.S. suit dismissed under SSP.

3. Unlawful Detentions

Abdullah Al-Kidd⁹ arrested as a material witness, held in various jails for two weeks, and then confined to house arrest for 15 months – suit dismissed on grounds of “qualified immunity” and apparent validity of material witness warrant.

Ali Al-Marri was originally charged with perjury, then detained as an enemy combatant, for a total detention of four years before the Fourth Circuit finally held that he must be released or tried.¹⁰

Javad Iqbal¹¹ was detained on visa violations in New York following 9/11 and claimed he was subjected to mistreatment on the basis of ethnic profiling – suit dismissed on grounds that he could not prove Attorney General authorization of illegal practices and court’s unwillingness to divert attention of officials away from national security.

Osama Awadallah¹² was taken into custody in Los Angeles after his name and phone number were found on a gum wrapper in the car of one of the 9/11 hijackers – charged with perjury before grand jury and held as material witness – Second Circuit reversed district court ruling on abuse of the material witness statute

4. Unlawful Surveillance

⁷ Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012).
⁸ Mohamed v. Jeppesen Dataplan, 614 F.3d 1070 (9th Cir. en banc 2010)
⁹ Al-Kidd v. Ashcroft, 580 F.3d 949, 951-52 (9th Cir. 2009).
¹⁰ Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).
Amnesty International\textsuperscript{13} is one of numerous organizations that brought suit believing that its communications, especially with foreign clients or correspondents had been monitored by the National Security Agency – suit dismissed because the secrecy of the NSA spying program made it impossible to prove that any particular person or group had been monitored. The validity of the entire Foreign Surveillance Act (FISA) rests on the “special needs” exception to the Fourth Amendment, a conclusion that was rejected by one district court although accepted by others.

5. Targeted Killing

Anwar Al-Awlaki (or Aulaqi)\textsuperscript{14} was reported by press accounts as having been placed on a “kill list” by President Obama – suit by his father dismissed on grounds that Anwar himself could come forward and seek access to U.S. courts – not only Anwar but his son were then killed in separate drone strikes.

6. Asset Forfeiture

Both Al Haramain Islamic Foundation\textsuperscript{15} and KindHearts for Charitable Humanitarian Development\textsuperscript{16} have been found by the Department of Treasury to be fronts for raising money for Hamas, and their assets have been blocked – despite findings of due process violations by the lower courts, the blocking of assets has been upheld on the basis that their support for terrorist activities is public knowledge.

B. Avoiding Accountability

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

1. Deference
2. State Secrets Privilege (SSP)
3. Qualified Immunity
4. “Special Factors” Exception
5. “Special Need” Exception
6. Standing

\textsuperscript{13} Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013).

\textsuperscript{14} Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010)

\textsuperscript{15} Al Haramain Islamic Foundation v. U.S. Dept. Of Treasury

1. Deference

The word “deference” appears frequently in describing the judicial attitude toward an executive or legislative decision. As a general matter, there is nothing wrong with the idea of deference. It makes sense that a reviewing court accepts the findings of another entity if there is any “rational basis” for those findings. An extreme example would be a court’s acceptance of the legislature’s decision on the level of taxation for a particular activity – in that situation, we would go so far as to say that the decision is “committed to the authority of a coordinate branch” and conclude that it is a “political question” unfit for judicial review at all. Within the realm of judicial review but still entitled to a significant level of deference would be Congressional findings that a particular activity has a “substantial effect” on interstate commerce. Because the Supreme Court was able to find some evidentiary support for the proposition that a farmer’s use of home-grown wheat for commercial purposes affected interstate demand for wheat, the Court upheld federal regulation of home-grown wheat. That form of deference is merely an expression of the degree to which a court is going to look behind legislative findings of fact.

Other examples of deference occur in the realm of executive dealings in foreign affairs. The extreme is the unfettered ability of the President to recognize one entity as the legitimate government of another country. At a lesser level but still showing deference to executive judgment are the many occasions in which the Treasury Department decides that a country is engaged in practices that violate restrictions in federal statutes and should be subject to embargo requirements. A court will say that it is poorly equipped to second-guess the findings that lie behind that decision because the facts are complex and buried in multiple international transactions.

These are examples of thoroughly understandable and justifiable judicial deference to executive or legislative determinations. Many of the statements of deference that have been made in the realm of combating terrorism similarly are understandable and justifiable, but the degree of deference over time has reached a somewhat disturbing level.

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

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

a. “Enemy Combatant” and Guantanamo Detentions

Yaser Hamdi was one of two U.S. citizens to appear before the Supreme Court in 2004.\(^{17}\) He was picked up in Afghanistan on the same day and location as John Walker Lindh. While Lindh was taken directly to the Eastern District of Virginia (landing at Andrews AFB), Hamdi was first taken to Guantanamo, but when it was discovered that he was an American citizen, he was transported to Naval Brigs first at Norfolk, Virginia, and then at Charleston, South Carolina. He was initially held incommunicado and a habeas corpus petition was filed on his behalf by his father. Although his case does not deal with Guantanamo, the

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subsequent cases dealing with that unfortunate locale are more easily understood with an initial look at this extra-judicial detention of a citizen by the military.

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

To this, the Supreme Court responded:

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

The more serious claim for deference came out of the language of “war” that the Government had adopted to cover all instances of detention for alleged collaborators with hostile groups.

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

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

Conceding that “Both of these positions highlight legitimate concerns,” the O’Connor plurality then proceeded to balance the competing interests. In doing so, it concluded that Hamdi was not entitled to the full procedural protections of a criminal proceeding because of “the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle.” The plurality went along with the Government’s assertions that “burdens” on military officials could be “properly taken into account” – those burdens consisting of distraction to commanders in the field and the

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18 542 U.S. at

19 Id. at

20 Id. at
prospect that “discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war.”

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

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

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.21

An observer might consider this holding a victory for due process and judicial review, but wait. There were two Justices who believed that the legislature had not authorized nonjudicial executive detention of a citizen on U.S. soil.22 And in what has to be one of the oddest pairings in Supreme Court history, Justices Scalia and Stevens dissented sharply on the basis of British history known to the Founders as “due process” meant that a citizen accused of criminal conduct was entitled to the full procedural panoplies of a criminal trial.23 So there were actually four votes for immediate remanding of Hamdi to the civil authorities for trial along with the four votes of the plurality for habeas corpus review.

So why the diluted form of due process endorsed by the plurality rather than the rigorous version of due process endorsed by the other four? The answer lies in the procedures of the Court: if left to a 4-4 vote, the Court would have to affirm the lower court by a divided vote. That would have left the Fourth Circuit’s total deferential approach in place and left Hamdi with no remedy whatsoever. Therefore, Justice Souter joined by Justice Ginsburg reluctantly voted with the plurality to “remand on terms closest to those I would impose.”24

The companion case to Hamdi that deal with Guantanamo detainees was Rasul v. Bush.25 This time, Justice Stevens was able to command a majority of the Court (minus Justice Scalia) to the view that the Gitmo detainees were entitled to proceed in federal court under habeas corpus. The crux of the matter was that Gitmo was essentially U.S. territory and prisoners on our soil are entitled to some form of due process. The most significant case to be distinguished was a World War II case, Johnson v. Eisentrager,26 in which German soldiers were denied access to habeas corpus following their trial and imprisonment in Germany.

21 Id. at 533.
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23
24 Id. at 552.
Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.27

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

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

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

The third executive detention case in the 2004 set was a habeas corpus petition brought on behalf of Jose Padilla, a U.S. citizen arrested at O’Hare airport for allegedly plotting to place a “dirty bomb” somewhere in the U.S.28 After Hamdi, it would seem that Padilla’s case would be a slam dunk because he was not anywhere near a “battlefield,” unless one believed the politicians who talked as if the whole world were a battlefield.29 In a masterpiece of ducking, however, the Court decided that his habeas petition had been brought in the wrong court because it was filed by his New York counsel in New York two days after he had been transferred to the Navy Brig in South Carolina. There, Padilla would languish for almost four years in isolation before he was finally brought to trial on criminal charges — more on that abuse of the system later.

The next act in the drama of Gitmo occurred two years later in 2006 when the Court determined that the military commissions established to try war crime allegations at Guantanamo were improperly constituted under both domestic and international law.30 The case that reached the Court involved a charge of “conspiracy” against one of Osama bin Laden’s former drivers, when it was clear that the concept of “conspiracy” was not part of the “law of war.”

Hamdan’s odyssey through both military and civilian judicial systems is noteworthy for many reasons, including the fact that he is leaving freely in Yemen than to point out that the executive plea for deviation from the procedural requirements of the Uniform Code of Military Justice was unpersuasive.

Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that

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27 Id. at 476.


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document authorizes a response to the felt need.\textsuperscript{31}

The Government argued that military necessity mandated the need for a military commission with unusual authority such as the use of hearsay evidence and inadequate independence of counsel. The UCMJ provided Congressional authority for military commissions so long as the commission procedures were “the same as those applied to courts-martial unless such uniformity proves impractical.” The Government urged several aspects of deference to executive determination that the military commissions could dispense with procedural safeguards.

Finally, the President's determination that "the danger to the safety of the United States and the nature of international terrorism" renders it impracticable "to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," is, in the Government's view, explanation enough for any deviation from court-martial procedures.\textsuperscript{32}

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

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

The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present.\textsuperscript{33}

These comments are probably the high-water mark of judicial resistance to demands for deference in relationship to terrorism. After this decision, Congress adopted the Military Commission Act of 2006 (MCA), in which it not only defined a complete catalog of offenses against the “law of nations,” but also attempted to validate some of the procedural objections to the commissions. The list of offenses included both “conspiracy” and “material support” of terrorism and terrorist organizations. Hamdan was then tried and acquitted of the conspiracy charge but found guilty of material support. He was sentenced to 66 months in prison but had already served 61. By the time a deal was negotiated for repatriation to his native Saudi Arabia, his sentence had only one month to run, which he served back home and is now free. The final twist in this bizarre scenario is that the D.C. Circuit ultimately reversed his conviction for material support on the ground that it was not a crime under either domestic or international law at the time when he was active with al Qaeda.\textsuperscript{34}

\textsuperscript{31}Id. at 591.

\textsuperscript{32}Id. at 622.

\textsuperscript{33}Id. at 623-24.

\textsuperscript{34}Hamdan v. United States, 696 F.3d 1238, 402 U.S. App. D.C. 471 (D.C. Cir. 2012)
The third step in the Supreme Court’s handling of Guantanamo cases is *Boumediene v. Bush*, which provides a measure of judicial review over the Gitmo detainees but also provides the low water mark for judicial independence in the form of Justice Scalia’s most injudicious dissent. Justice Kennedy, not surprisingly after his concurring opinion in *Hamdan*, wrote the majority for the Court in reviewing the validity of the MCA of 2006.

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

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

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

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

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

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

Justice Scalia provided the low-water mark for judicial independence at the Supreme Court when he engaged in a highly inflammatory and disrespectful tirade against the majority:

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

The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.

In the short term . . . the decision is devastating. At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. Some have been captured or killed. But others have succeeded in carrying on their atrocities against innocent civilians. These, mind you, were detainees whom the military had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection.

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

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

Hamlily v. Obama. The Obama administration staked out its position on executive detention in a brief filed in March 2009 in this case. It based the detention authority squarely on the AUMF without mentioning inherent Article II powers, and it has continued to take that position since. It took the position that detention authority extended to members and substantial supporters of Al Qaeda, the Taliban, and associated forces, differing from the Bush administration only by adding the qualifier of “substantial” support for one who cannot be considered a “member” of an “associated force.” The subsequent cases have attempted to discern what would constitute “substantial support” in the case of someone who was not directly involved with al-Qaeda or the Taliban, but (apart from the Uighurs) there has not been anyone brought before the courts who had no connection with operations in Afghanistan.

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

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37 590 F. 3d 866 (D.C. Cir. 2010).
The standard can be satisfied by either of two independent components. “While we think the facts of this case show Al-Bihani was both part of and substantially supported enemy forces, we realize the picture may be less clear in other cases where facts may indicate only support, only membership, or neither. We have no occasion here to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard. We merely recognize that both prongs are valid criteria that are independently sufficient to satisfy the standard.”

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

The district court granted habeas relief to the other five on the ground that there was no reliable evidence that they had intended to travel to Afghanistan to fight against the U.S. The district court, however, denied Bensayah’s petition for habeas corpus, holding that the Government had adduced sufficient evidence to show it was more likely than not that he had “supported” al Qaeda. The evidence for this conclusion consisted primarily of a classified document plus corroboration from a classified source. On appeal, the Government disclaimed reliance on the source and abandoned the argument that he had provided “support” for al Qaeda. Instead, it argued that he was “part of” al Qaeda. The court of appeals panel started with this observation:

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

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

**Conclusion – preliminary.** The D.C. Circuit has decided that the government is entitled to introduce hearsay testimony and that testimony is even entitled to a presumption of regularity, not exactly a presumption of truthfulness of the statement but that the statement was made. The burden of proof to show detainability remains on the government and the hearsay evidence is introduced only for whatever probative value it may have, while the detainee is entitled to introduce evidence to rebut the Government’s position.

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

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38 610 F.3d 718 (D.C. Cir. 2010).
The odyssey of U.S. involvement with Guantanamo detention is long, complicated, and likely to continue for some time. The purpose of this exercise has been merely to address the degree of deference given by the judiciary to the executive and legislative branches. It is a mixed story. Although the courts have talked in deferential terms and allowed unusual procedures (such as use of hearsay evidence), there has been no carte blanche acquiescence to all detentions at Guantanamo or to the standards and procedures adopted by Congress. That, unfortunately, is not true with many of the cases to which we will turn next.

b. Looking Away from Domestic Executive Detentions

1. Aliens as a Special Class

Immediately after 9/11, resident aliens became a primary focus of counter-terrorism efforts. The majority of the detainees in the PENTTBOM investigation were aliens who were placed in the custody of immigration officials. Signed into law on October 26, 2001, the USA PATRIOT Act contained a provision authorizing the Attorney General to “take into custody” any alien he has reasonable grounds to believe is involved in terrorist activity and to hold the alien for up to six months in renewable increments, with no process or evidentiary hearing and subject only to judicial review by a habeas corpus petition. Apparently, however, the Justice Department did not use this power because it had sufficient authority under existing law to hold aliens considered for deportation without bond.

In 2002, the Justice Department announced the “National Security Entry-Exit Registration System” (NSEERS). Among other things, NSEERS instituted a “special call-in registration” program that required alien males from designated countries (all Muslim majority states except for North Korea) to report to immigration offices to be fingerprinted, photographed, and interviewed. Those who did not report were threatened with arrest. According to one source, the program registered more than 83,000 aliens, nearly 14,000 of whom were placed in deportation proceedings. In a series of cases, the program was challenged by aliens whose registration led to deportation proceedings – and in each case, the arguments were rejected.


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

40 Id. § 1226a(b).


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

In Rajah v. Mukasey, for instance, the Second Circuit found no equal protection violation:

The terrorist attacks on September 11, 2001 were facilitated by the lax enforcement of immigration laws. The Program was designed to monitor more closely aliens from certain countries selected on the basis of national security criteria. The individuals subject to special registration under the Program were neither citizens nor even lawful permanent residents. They were asked to provide information regarding their immigration status and other matters relevant to national security. They were not held in custody for appreciable lengths of time. Those whose immigration status was not valid were subject to generally applicable legal proceedings to enforce pre-existing immigration laws. In sum, the Program was a plainly rational attempt to enhance national security.\footnote{Although the special registration program was suspended in December 2003, the NSEERS program continued until 2011.}

With mounting complaints about post-9/11 investigations, the Department of Justice’s Office of Inspector General undertook a review of the detentions and the conditions of confinement of terrorism suspects. Released in June 2003, the report noted that agents investigating leads would arrest all individuals who were out of immigration status and treat them as being “of interest” in the 9/11 investigation, regardless of whether they were connected with the lead. Moreover, leads resulting in arrests were often very general in nature, “such as a landlord reporting suspicious behavior by an Arab tenant.”\footnote{OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 16 (Sept. 2003) [hereinafter OIG REPORT].}

2. A “Plausible” Claim of Policy

In December 2003, a supplemental report found evidence of verbal and physical abuse of 9/11 detainees at the Metropolitan Detention Center (MDC) in New York City.\footnote{See OFFICE OF THE INSPECTOR GENERAL, SUPPLEMENTAL REPORT OF SEPTEMBER 11 DETAINES’ ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (Dec. 2003).} Although it did not find that detainees had been brutally beaten, “some officers slammed detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished, them by keeping them restrained for long periods of time.”\footnote{Id. at 46.} A number of lawsuits were filed by MDC detainees, including one by Javad Iqbal, a Pakistani Muslim who was arrested on criminal charges and detained in restrictive conditions as a person of “high interest” in the 9/11 investigation. After pleading guilty, serving a term of imprisonment, and being deported to Pakistan, Iqbal filed a Bivens\footnote{See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (implying a right of action against federal officials).} action against federal officials ranging from low-level correctional officers to the highest levels of federal law enforcement.

In Ashcroft v. Iqbal,\footnote{556 U.S. 662 (2009).} the Supreme Court concluded that the complaint against Attorney General John Ashcroft and FBI Director Robert Mueller failed to plead sufficient facts to state a claim for relief. The Court rejected out of hand the allegations that Ashcroft and Mueller countenanced harsh treatment of detainees

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based on their religion, race, and national origin, holding that “[t]hese bare assertions amount to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim.”\(^49\) It also found that Iqbal had failed to make a plausible showing that Ashcroft and Mueller purposefully adopted a policy of invidious discrimination in classifying 9/11 detainees as being “high interest.”

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim-Osama bin Laden-and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.\(^50\)

To allow this suit to go forward, the Court concluded, would divert the attention of those officials charged with responding to “a national and international security emergency unprecedented in the history of the American republic.”\(^51\) After Iqbal, the Second Circuit partially reversed the dismissal of another suit by MDC detainees, allowing them the opportunity to meet the Supreme Court’s pleading standard with regard to claims related to the conditions of confinement.\(^52\)

3. Material Witness Warrants

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

In the post 9/11 atmosphere, material witness warrants were used to secure a number of people who were thought to be plotters but as to whom there was not probable cause for arrest. Their alleged plotting was said to be the basis for thinking they would have material evidence for a grand jury, but this sounded like a subterfuge to many observers, who claimed the warrants were being used in lieu of preventive custody, a practice clearly prohibited by due process.

For example, alleged “dirty bomber” Jose Padilla was arrested under a material witness warrant and held for a month before he was transferred to military custody as an enemy combatant.\(^53\) In 2004, Brandon Mayfield was arrested and held for two weeks as a material witness based on incorrect evidence connecting

\(^49\) Id. at __.

\(^50\) Id. at __ (quoting Iqbal v. Hasty, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring)).

\(^51\) Id. at __.


\(^53\) See § 10.04 infra.
him to the Madrid train bombings. Subsequent to his release, Mayfield received an apology from the FBI and a $2 million settlement from the U.S. government.\textsuperscript{54}

Not surprisingly, the use of material witness warrants suspected to be subterfuge for preventive custody was challenged in several terrorism-related cases. In \textit{United States v. Awadallah},\textsuperscript{55} Osama Awadallah was taken into custody in Los Angeles after his name and phone number were found on a gum wrapper in the car of one of the 9/11 hijackers. Awadallah was detained on a material witness warrant and flown to New York, where he testified twice before a grand jury over the course of several weeks. He admitted knowing one of the hijackers but initially denied knowing the other hijacker. Charged with perjury, Awadallah moved to suppress his grand jury statement and dismiss the indictment for abuse of the material witness statute. The district judge agreed: “[S]ince 1789, no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation.”\textsuperscript{56} The Second Circuit reversed, holding that obtaining grand jury testimony would be an appropriate use of the material witness statute:

The district court noted (and we agree) that it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established. However, the district court made no finding (and we see no evidence to suggest) that the government arrested Awadallah for any purpose other than to secure information material to a grand jury investigation. Moreover, that grand jury was investigating the September 11 terrorist attacks. The particular governmental interests at stake therefore were the indictment and successful prosecution of terrorists whose attack, if committed by a sovereign, would have been tantamount to war, and the discovery of the conspirators’ means, contacts, and operations in order to forestall future attacks.\textsuperscript{57}

Another case eventually made it to the Supreme Court. In 2005, Abdullah Al-Kidd, an African-American Muslim, brought a suit against Attorney General John Ashcroft and others, claiming that he had been illegally arrested and confined under the federal material witness statute. As summarized by the appellate court,

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

\textsuperscript{54} See § 6.04 infra.


\textsuperscript{56} Id. at 82.

from his job as an employee of a government contractor because he was denied a security clearance due to his arrest, and had separated from his wife. He has been unable to obtain steady employment since his arrest.\textsuperscript{58}

According to Al-Kidd, his mistreatment was the result of a program devised by Ashcroft and other government officials, as evidenced by a number of Department of Justice statements publicly extolling the utility of the procedure.\textsuperscript{59}

In \textit{Ashcroft v. Al-Kidd},\textsuperscript{60} a unanimous Supreme Court held that the former Attorney General enjoyed qualified immunity given the lack of clearly established law. Justice Scalia’s majority opinion went further by holding that “an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive.”\textsuperscript{61} Four concurring Justices questioned whether the material witness warrant was necessary to secure al-Kidd’s testimony and, more generally, whether the material witness statute comports with the Fourth Amendment’s Warrant Clause.\textsuperscript{62} Concurring Justices Breyer, Ginsburg, and Sotomayor also objected to the majority’s apparent disposition of the merits of al-Kidd’s claim:

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

Casting further doubt on the assumption that the warrant was validly obtained, the Magistrate Judge was not told that al-Kidd’s parents, wife, and children were all citizens and residents of the United States. In addition, the affidavit misrepresented that al-Kidd was about to take a one-way flight to Saudi Arabia, with a first-class ticket costing approximately $5,000; in fact, al-Kidd had a round-trip, coach-class ticket that cost $1,700. Given these omissions and misrepresentations, there is strong cause to question the Court’s opening assumption – a valid material-witness warrant – and equally strong reason to conclude that a merits determination was neither necessary nor proper.\textsuperscript{63}

\textsuperscript{58}Al-Kidd v. Ashcroft, 580 F.3d 949, 951-52 (9th Cir. 2009).

\textsuperscript{59}Al-Kidd v. Ashcroft, 598 F.3d 1129, 1131 (9th Cir. 2009) (Smith, J., concurring in the denial of rehearing en banc).

\textsuperscript{60}131 S. Ct. 2074 (2011).

\textsuperscript{61}Id. at 2085.

\textsuperscript{62}Id. at 2085-86 (Kennedy, J., concurring, joined by Ginsburg, Breyer, and Sotomayor, JJ.).

\textsuperscript{63}Id. at 2087-88 (Ginsburg, J., concurring, joined by Breyer and Sotomayor, JJ.). Justice Ginsburg’s concurrence also balked at the majority opinion’s statement that al-Kidd’s arrest was “based on individualized suspicion.”

The word “suspicion,” however, ordinarily indicates that the person suspected has engaged in wrongdoing. Material witness status does not “involv[e] suspicion, or lack of suspicion,” of the individual so identified. This Court’s decisions, until today, have
2. Domestic “Enemy Combatants”
   a. The Odyssey of Jose Padilla

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

   Padilla was arrested arriving at O’Hare Airport after flying from Pakistan, where he allegedly had trained in bombing techniques. He was held initially as a material witness in New York, then two days before his court-appointed counsel could file for habeas corpus in New York, he was transferred to a Naval Brig in South Carolina as an enemy combatant. The Government’s public statements asserted that he was planning to detonate a “dirty bomb,” which would spread radiative material across a major city.

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

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

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

   On this version of the facts, the court held that his carrying of arms in Afghanistan made him an “enemy combatant” appropriate for detention under the AUMF. The Fourth Circuit held that Padilla was an "enemy belligerent" who "associated with the military arm of the enemy, and with its aid, guidance, and direction uniformly used the term “individualized suspicion” to mean “individualized suspicion of wrongdoing.” The Court’s suggestion that the term “individualized suspicion” is more commonly associated with “know[ing] something about [a] crime” or “throwing ... a surprise birthday party” than with criminal suspects, is hardly credible. The import of the term in legal argot is not genuinely debatable. When the evening news reports that a murder “suspect” is on the loose, the viewer is meant to be on the lookout for the perpetrator, not the witness. Ashcroft understood the term as lawyers commonly do: He spoke of detaining material witnesses as a means to “tak[e] suspected terrorists off the street.”

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

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entered this country bent on committing hostile acts on American soil." But these "facts" were based on a stipulation by the petitioner's counsel for purposes of a summary judgment motion – they were never subjected to a neutral fact-finder's review, and the claim that he entered the country to explode a "dirty bomb" was dropped in favor of a variety of modified contentions in different venues.

The petition for certiorari was presented to the Supreme Court on October 25, 2005. Just before its response to the petition was due at the Supreme Court, the Government filed a motion to transfer him to civilian custody in Florida to stand trial on various charges. That motion was referred by the Fourth Circuit to the Supreme Court, which granted it on January 4, 2006. The Court asserted that it would "consider the pending petition for certiorari in due course," which it did with a very unusual set of opinions in April 2006. The petition was denied over three dissents with a concurring opinion by four Justices. Justice Kennedy for the four concurring Justices, wrote:

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

That Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against addressing those claims when the course of legal proceedings has made them, at least for now, hypothetical. This is especially true given that Padilla's current custody is part of the relief he sought, and that its lawfulness is uncontested.69

Ironically, it could just as easily be argued that the "separation of powers, including consideration of the role and function of the courts," weighed heavily against allowing the Government to play fast and loose with the system by transferring him once again to a different jurisdiction for a different purpose, thus avoiding judicial review of his four-year-long detention. Justice Ginsburg was quite restrained in her dissent from the denial of certiorari, addressing merely the issue of whether the petition was moot.70

To recap, all this came after his application was kicked from New York to South Carolina, granted by the district court, denied by the Fourth Circuit, by which time he had been held in solitary confinement with no judicial review for nearly four years. How can this be considered to be in compliance with our own due process clause, let alone with any number of international human rights provisions? It also illustrates the contempt with which the Administration tended to treat the judiciary – deciding not to give the Supreme Court a chance at an obvious violation of law.

Following these shenanigans, Padilla eventually was tried and convicted on charges conspiring to commit murder outside the United States and conspiring to provide material support to terrorism.71 He was sentenced

67 546 U.S. at 1084.


69 Id. at 1064.

70 Id. at 1064-65.

71 The charges were actually a touch more complicated than that, and raise some substantial issues of the propriety of conspiracy law, but that's a subject for another day. See United States v. Hassoun, 2007 U.S. Dist. LEXIS 85720 (S.D. Fla. 2007).
to 17 years in prison and then brought a civil action for damages against John Yoo, among others in California while his mother brought a similar action in Virginia. Both actions sought damages for wrongful confinement as well as mistreatment while in custody. These will be considered in the section below on “Damage Actions Against Government Officials,” but suffice to say at this point the courts have ducked those actions as well.

b. The Iliad of Ali Al-Marri

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

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

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

Since that time (that is, for five years) the military has held al-Marri as an enemy combatant, without charge and without any indication when this confinement will end. For the first sixteen months of his military confinement, the Government did not permit al-Marri any communication with the outside world, including his attorneys, his wife, and his children. He alleges that he was denied basic necessities, interrogated through measures creating extreme sensory deprivation, and threatened with violence. A pending civil action challenges the "inhuman, degrading," and "abusive" conditions of his confinement.

72 Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012).
73 Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012).
74 Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008).
75 Id. at 217.
76 Id. at 220.
The original panel of the Fourth Circuit, led by Judge Motz over one dissent, held that he must be released or tried.\textsuperscript{77} Judge Motz pointed out that the Government does not assert that al-Marri: (1) is a citizen, or affiliate of the armed forces, of any nation at war with the United States; (2) was seized on or near a battlefield on which the armed forces of the United States or its allies were engaged in combat; (3) was ever in Afghanistan during the armed conflict between the United States and the Taliban there; or (4) directly participated in any hostilities against United States or allied armed forces.\textsuperscript{78}

Judge Motz was at pains to point out that the Government’s allegations would justify trying al-Marri for very serious offenses, but there was nothing to justify extrajudicial executive detention of someone who had never directly participated in hostilities against the U.S.

When the Fourth Circuit reheard this case \textit{en banc}, the result was a highly fractured set of opinions. A majority led by Judge Wilkinson believed that the AUMF authorized his detention as an enemy combatant on the basis of his alleged affiliation with the Taliban or alQaeda. The “low water mark” for judicial independence in this drama may be represented by these comments by Judge Wilkinson:

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

I say this not as an exhortation to panic or fear, but rather as a call for prudence. The advance and democratization of technology proceeds apace, and our legal system must show some recognition of these changing circumstances. In other words, law must reflect the actual nature of modern warfare. By placing so much emphasis on quaint and outmoded notions of enemy states and demarcated foreign battlefields, the plurality (the opinion authored by Judge Motz) and concurrence (the opinion authored by Judge Traxler) misperceive the nature of our present danger, and, in doing so, miss the opportunity presented by al-Marri's case to develop a framework for dealing with new dangers in our future.\textsuperscript{79}

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

The middle ground for the \textit{en banc} court was struck by Judge Traxler, who agreed that the AUMF provided authority for detention of a domestic “enemy combatant” but read \textit{Hamdi} as requiring that al-Marri be given an opportunity to rebut the claims against him. This resulted in a divided court’s issuing an order

\textsuperscript{77} Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).

\textsuperscript{78} Id at 166.

\textsuperscript{79} Id. at 293.
The Supreme Court granted certiorari.\(^{80}\) Showing contempt for the judicial process, the Government then applied to the Court to transfer the prisoner to civilian authorities for trial on the original charges, to which the Supreme Court acquiesced.\(^{81}\) Al-Marri pleaded guilty to providing material support under § 2339(B) and was sentenced to 100 months in prison – the sentence initially would have been 180 months under the statute but the judge granted credit of 71 months for the time spent in custody and another 9 months "to reflect the very severe conditions of part of his confinement at the Naval Brig."\(^{82}\)


The three most commonly deployed doctrines to prevent recovery by those who have been wrongfully mistreated (allegedly in some cases, certainly in others) have been the state secrets privilege (SSP), qualified immunity, the special factors exception to federal damage actions. These three doctrines are somewhat intertwined and will be treated in a single section devoted to damage actions.

Damage actions against federal officials begin under the *Bivens* doctrine,\(^{83}\) under which federal courts will imply private rights of action from some constitutional provisions, such as Due Process for physical abuse or the Fourth Amendment for invasions of privacy.

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established” at the time of the challenged conduct.\(^{84}\)

I mentioned above the case of Abdullah al-Kidd who was detained on a material witness warrant and then brought suit against former Attorney General Ashcroft, alleging a post-9/11 policy of using the material-witness statute to detain individuals with suspected ties to terrorist organizations. His complaint alleged that agents detained suspects as material witnesses in other cases as a pretext because they had insufficient evidence to charge them with a crime. Al-Kidd, a native U.S. citizen was arrested in 2003 as he checked in for a flight to Saudi Arabia and then held under a material witness warrant issued by a federal magistrate in an unrelated case. He was in custody for 16 days and on supervised release until the other trial concluded over a year later.

The Ninth Circuit held that Ashcroft “should have known” that a pretextual use of a warrant was a violation of the Fourth Amendment.\(^{85}\) For the Supreme Court, Justice Scalia responded in his subtle fashion:

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\(^{82}\) al-Marri v. Davis, 714 F.3d 1183, 1186 (10th Cir. 2013).


\(^{84}\) Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011).

\(^{85}\) al-Kidd v. Ashcroft, 580 F.3d 949, 969 (9th Cir. 2009):

“The there is a valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier.” [Illinois v. Lidster, 540 U.S. 419, 428 (2004)] (Stevens, J., concurring in part, dissenting in part). That is precisely the distinction at
We have repeatedly told the lower courts – and the Ninth Circuit in particular – not to define clearly established rights at a high level of generality. . . . The Fourth Amendment was a response to the English Crown's use of general warrants, which often allowed royal officials to search and seize whatever and whomever they pleased while investigating crimes or affronts to the Crown. According to the Court of Appeals, Ashcroft should have seen that a pretextual warrant similarly ‘gut[s] the substantive protections of the Fourth Amendment[t] and allows the State to arrest upon the executive's mere suspicion.’ Ashcroft must be forgiven for missing the parallel, which escapes us as well. 86

In a similar case, Javaid Iqbal unsuccessfully sued Attorney General Ashcroft and FBI Director Mueller for policies that resulted in his being mistreated while in custody awaiting trial. 87 He alleged that he was placed in a special administrative unit and “subjected . . . to harsh conditions of confinement on account of his race, religion, or national origin.” The Supreme Court’s opinion by Justice Kennedy noted that Iqbal’s allegations of mistreatment certainly stated violations of constitutional rights by unknown guards. But nothing in his pleadings tended to validate his speculation that Ashcroft or Mueller had authorized or prompted that treatment. Thus, applying the Court’s recently adopted pleading standards requiring plaintiffs to state a “plausible” theory of the facts, 88 Iqbal failed to survive a motion to dismiss on the basis of qualified immunity.

The “state secrets” doctrine has two aspects. One aspect shields specific pieces of evidence when the privilege is claimed. 89 The more extreme application occurs when the mere existence of the litigation would be a threat to national security, resulting in a total exception to the Bivens doctrine and dismissal of the plaintiff’s case. 90 The state secrets privilege (SSP) protects a wide array of governmental action in matters that touch upon national security, and everything rides on the Government’s ability to persuade a judge of that without even producing any material for in camera inspection.

It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers. 91

Khaled El-Masri brought a damage action against George Tenet, three corporate defendants, ten unnamed employees of the Central Intelligence Agency (the "CIA"), and ten unnamed employees of the defendant

work here, and the reason we hold that Ashcroft's policy as alleged was unconstitutional.

86 131 S. Ct. at 2084.

87 Ashcroft v. Iqbal, 556 U.S. 662 (2009). He eventually pleaded guilty to charges of identity fraud, served his sentence, and was deported to his native Pakistan.


91 345 U.S. at 10.
corporations. He alleged that he was originally detained by Macedonian authorities, handed over to CIA operatives who transported him to Afghanistan, and finally released somewhere in Albania. Along the way, he claimed to have been “beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility.”

The Fourth Circuit held that the claim inexorably involved privileged state secrets and that the lawsuit could not proceed at all. For the plaintiff even to make a prima facie showing of his treatment, he would have to introduce evidence about CIA operations. “Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations. . . . With respect to the defendant corporations and their unnamed employees, El-Masri would have to demonstrate the existence and details of CIA espionage contracts, an endeavor practically indistinguishable from that categorically barred by Totten and Tenet v. Doe.” Then if the plaintiff carried the prima facie burden, the defendants would not be able to present a cogent defense without disclosure of sources and methods.

The District Court in El-Masri concluded its opinion dismissing the complaint with these comments:

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

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

In a case that generated significant controversy in the United Kingdom, Binyam Mohamed was joined by four other detainees who alleged they were tortured in various secret locations. They sued the operator of the aircraft (a Gulfstream V) which was used by the C.I.A. in “black site” and extraordinary rendition operations. The Ninth Circuit echoed the sentiments of the district judge in el-Masri with this comment:

This case requires us to address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency,
accountability and national security. Although as judges we strive to honor all of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them. On those rare occasions, we are bound to follow the Supreme Court’s admonition that “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.” *United States v. Reynolds.* After much deliberation, we reluctantly conclude this is such a case, and the plaintiffs’ action must be dismissed.

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

A Canadian citizen, Maher Arar, also brought suit in the U.S. unsuccessfully and subsequently received a significant settlement from his home government. Arar was detained while in transit through JFK airport on the basis of information from Canadian authorities. His detention for 12 days in New York, rendition to Syria, and 10 months of abuse in a Syrian prison were documented by a Canadian special commission. His claims in Canada were settled by a $10.5 million payment and apology from the Canadian Government.

In his suit against various U.S. officials, the Second Circuit held that he could not state a claim under the Torture Victims Protection Act because that statute deals only with actions taken under color of foreign law and there was no allegation that the U.S. officers were acting pursuant to Syrian law. With regard to his detention for 12 days in New York, he might be able to state a due process claim but his complaint did not “specify any culpable action taken by any single defendant.”

Judge Calabresi, joined by several colleagues, dissented with this comment:

I respectfully dissent. . . . [B]ecause I believe that when the history of this distinguished court is written, today’s majority decision will be viewed with dismay, I add a few words of my own, ”. . . more in sorrow than in anger.” Hamlet, act I, sc. 2.

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

The plaintiffs, as well as *amici* [retired military officers], contest the notion that a *Bivens* remedy would impose judicial oversight over military decision-making and chill military effectiveness on the battlefield, arguing instead that “providing an effective remedy for the violation of Plaintiffs’ constitutional rights would be wholly consonant with longstanding military laws and regulations and would not entangle the Court in any inappropriate inquiry.” The Court cautions against the myopic approach advocated by the plaintiffs and amici, which essentially frames the issue as whether torture is universally prohibited and thereby warrants a judicially-created remedy under the circumstances.

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

There is no getting around the fact that authorizing monetary damages remedies against military officials engaged in an active war would invite enemies to use our own federal courts to obstruct the Armed Forces' ability to act decisively and without hesitation in defense of our liberty and national interests, a prospect the Supreme Court found intolerable in *Eisentrager*.

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

a. their claims under the Alien Tort Act should have been brought under the Federal Tort Claims Act, which has a specialized procedure that must be followed when federal officers are sued for acts done in the scope of employment,

b. their constitutional claims were unavailing because non-resident aliens outside the U.S. have no constitutional rights and because the claims would be barred by the good faith immunity of the defendants,

c. their religious freedom claims were not cognizable under the Religious Freedom Restoration Act because the statute has no application to aliens located outside sovereign United States territory at the time their alleged RFRA claim arose.

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

Yoo argued that “special factors” counseled against implication of a *Bivens* claim. The court assessed the national security implications of Yoo’s arguments by noting that Padilla was not alleged to have taken up arms against the U.S. or otherwise shown to have been “engaged in armed conflict” with the U.S. so the notion of making him a prisoner under the law of war was not a reason for denying him relief. Indeed, unlike the allegations made by Iqbal against AG Ashcroft, “the Court finds Padilla has alleged sufficient facts to satisfy the requirement that Yoo set in motion a series of events that resulted in the deprivation of Padilla’s constitutional rights.” And with regard to Yoo’s claim for qualified immunity,

The Court finds that Padilla alleges a violation of his constitutional rights which were clearly established at the time of the conduct. Further, based on the fact that the allegations involve conduct that would be unconstitutional if directed at any detainee, a reasonable federal officer could have

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99 Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008), reaff’d, 563 F.3d 527 (D.C. Cir. 2009).

believed the conduct was lawful. Therefore, Yoo is not entitled to qualified immunity.\textsuperscript{101}

On appeal, the Ninth Circuit reversed, holding that Yoo’s derelictions were not so clearly established at the time as to have stripped him of qualified immunity.\textsuperscript{102} The Ninth Circuit stated the applicable standard to be whether “at the time he acted the law was . . . ‘sufficiently clear that every reasonable official would have understood that what he [was] doing violate[d]’ the plaintiffs' rights.” Meanwhile, the Fourth Circuit held that Padilla, as represented by his mother in a separate action, could not bring a \textit{Bivens} claim against anyone for his allegedly wrongful detention and mistreatment.\textsuperscript{103} The court reasoned, similarly to its opinion in \textit{el-Masri}, that any exploration into the circumstances of his treatment would embroil the courts in second-guessing the actions of the executive and legislature at a time of national crisis. Those “special circumstances” thus occasioned hesitation in implying a \textit{Bivens} remedy.

Finally, there is one institutional plaintiff with a near-victory in a compensation case but no compensation, the Al-Haramain Foundation.\textsuperscript{104} In protracted litigation regarding the warrantless and FISA-less surveillance program carried out by the NSA, the plaintiff foundation first had to show standing to sue. It was able to persuade the Ninth Circuit that it had probably been the target of unauthorized wiretaps because otherwise there would have been no evidence on which the Government could have based its petitions to have the organization declared an FTO. After passing that hurdle, the plaintiff was then met with the state secrets privilege (SSP), to which the trial court answered that FISA pre-empted SSP by providing a civil remedy for unauthorized wiretaps. Allowing the Government repeated opportunities to come forward with evidence that surveillance of the foundation had in fact been authorized by the FISA Court, the district court finally entered summary judgment for the plaintiff and assessed damages and attorney fees. On appeal, the Ninth Circuit reversed the grant of summary judgment on the ground of sovereign immunity.\textsuperscript{105}

4. “Special Needs” Exception – Foreign Intelligence Surveillance Act

The Foreign Intelligence Surveillance Act (FISA)\textsuperscript{106} was enacted in 1978 “to provide legislative authorization and regulation for all electronic surveillance conducted within the United States for foreign intelligence purposes.”\textsuperscript{107} Its background and subsequent history are far too complex for treatment in this short discussion. The major point is that the whole premise for a secret special court is something called the “special needs” doctrine. That doctrine creates an exception to the Fourth Amendment, which would otherwise require a judicial warrant before any electronic surveillance (wiretap, e-mail intercepts, and the like) affecting U.S. persons. The Fourth Amendment protects the privacy of “the people,” which could easily exclude foreign governments and similar entities but might include foreign citizens while within the U.S.

\textsuperscript{101} Id. at 1038.

\textsuperscript{102}Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012).

\textsuperscript{103}Lebron v. Rumsfeld, 2012 U.S. App LEXIS * (4th Cir. 1/23/12).


\textsuperscript{105}Al-Haramain Islamic Foundation Inc. v. Obama, 690 F.3d 1089 (9th Cir 2012).


Therefore, the “special needs” of intelligence work would seem to apply, if at all, only to scrutinizing suspected agents of foreign powers, which is how the statute at first was constructed.

The most significant difference between a FISA court order and an ordinary warrant is that a warrant requires a showing of probable cause to believe that the target of the surveillance has committed or is about to commit a crime, while the FISA order originally could be based on probable cause to believe that the target was an “agent of a foreign power,” which included foreign political organizations. Since 9/11, FISA was amended to allow surveillance of any person believed to be outside the United States (whose conversations, of course, could include U.S. citizens at home). And now the revelations of 2013 show what many people believed, that the NSA was in fact gathering electronic data on millions of American citizens without any statutory authorization. The premise of FISA was that a court-order scheme for foreign intelligence electronic surveillance could be devised consistent with the Fourth Amendment’s requirement of reasonableness.

FISA created a special court of designated federal judges – the Foreign Intelligence Surveillance Court (FISC) – that can issue orders authorizing electronic surveillance to gather foreign intelligence. A subsequent amendment extended that authority to issuing court orders to conduct physical searches for foreign intelligence purposes.

Over the years, FISA has been subject to numerous challenges, almost all of them brought by criminal defendants, but only one has enjoyed even a brief success. In a 1984 case involving attempts by members of the Provisional Irish Republican Army to buy explosives and missiles from an FBI informant, the Second Circuit held that the FISA procedures were a “constitutionally adequate balancing of the individual's Fourth Amendment rights against the nation's need to obtain foreign intelligence information.”

With this balancing in mind, several courts struggled with whether “foreign intelligence” had to be the “primary purpose” of the surveillance. The First Circuit stated that “the investigation of criminal activity cannot be the primary purpose of the surveillance.” The Ninth Circuit refused to distinguish between “purpose or primary purpose . . . . We refuse to draw too fine a distinction between criminal and intelligence

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

Id. at 14-15.


Mayfield v. United States, 504 F. Supp. 2d 1023 (D. Or. 2007), rev’d on standing grounds, 599 F.3d 964, 966 (9th Cir. 2010).

United States v. Duggan, 743 F.2d 59, 73 (2d Cir. 1984).

Johnson, 952 F.2d at 572.
investigations.\textsuperscript{113}

These discussions about the “purpose” requirement prompted the FISA Court of Review, prior to 9/11, to approve the practice of the Department of Justice in erecting a “wall” between criminal investigations and intelligence investigations. The idea was that the looser procedures of FISA should not be used for ordinary criminal proceedings. This “wall” affected efforts to search the computer of Zacarias Moussaoui, the purported “20th hijacker” who had been detained prior to 9/11. The 9/11 Commission Report described how CIA and FBI agents each had pieces of the plot puzzle but no means of assembling the pieces together\textsuperscript{114} and argued that failure to share information among agencies resulted in missed opportunities to interdict the plot before its culmination.\textsuperscript{115}

The attacks of 9/11 prompted much hand-wringing over perceived failures of the “intelligence community.” But there is no way of knowing how many hundreds or thousands of other leads similar to those of 9/11 could be followed to dead ends. Just because there was one needle in the haystack doesn’t mean there are many more. Nevertheless, the USA PATRIOT Act – “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act”\textsuperscript{116} – was enacted six weeks after 9/11. It has served in some minds as a lightning rod for debate, but could also be seen as a smokescreen for many government policies which have nothing to do with the legislation itself (e.g., military detentions, harsh interrogation, and extraordinary rendition). For our purposes here, the principal impact of PATRIOT was to modify FISA to require that gathering foreign intelligence information is “a significant purpose” (rather than “the purpose”) of surveillance.\textsuperscript{117}

In August 2002, the ACLU and EPIC filed a the Freedom of Information Act (FOIA) request for a variety of documents related to the government’s use of the PATRIOT Act.\textsuperscript{118} The request included records containing aggregate statistics on how frequently the DOJ exercised some of its new search and surveillance powers. The DOJ refused to disclose the aggregate statistical data, invoking FOIA’s national security exemption for information “kept secret in the interest of national defense or foreign policy” pursuant to an executive order.\textsuperscript{119} The plaintiffs responded that the FOIA national security exemption was eliminated with the shift of FISA’s focus from intelligence gathering to law enforcement and therefore beyond the relevant executive order’s protection of intelligence information.

In its opinion, the district court acknowledged that “the public has a significant and entirely legitimate desire for this information,” supported by the “plaintiffs’ compelling argument that the disclosure of this information will help promote democratic values and government accountability.”\textsuperscript{120} Nonetheless, the court

\begin{itemize}
\item \textsuperscript{113}Sarkissian, 841 F.2d at 965.
\item \textsuperscript{114}See 9/11 COMMISSION REPORT at 266-77.
\item \textsuperscript{115}Id. at 353.
\item \textsuperscript{117}See id. at § 218 (codified at 50 U.S.C. §§ 1805(a)(6)(B), 1823(a)(6)(B)).
\item \textsuperscript{119}5 U.S.C. § 552(b)(1).
\item \textsuperscript{120}Id. at 31.
\end{itemize}
concluded that the national security exemption applied, deferring to the government’s concerns about the damage that might result from disclosing the statistics at issue.

Indeed, records that indicate how DOJ has apportioned its counterespionage resources, that reveal the relative frequency with which particular surveillance tools have been deployed, and that show how often U.S. persons have been targeted may undoubtedly prove useful to those who are the actual or potential target of such surveillance, and may thereby undermine the efficiency and effectiveness of such surveillance. 121

Following the amendment of FISA to require that foreign intelligence be only a significant purpose, rather than the primary purpose, of the surveillance, 122 the Attorney General issued a memorandum in March 2002 allowing full exchange of information between law enforcement and intelligence units, and to permit criminal prosecutors to consult with and advise intelligence officials regarding FISA surveillance and searches. These changes were permissible because the PATRIOT Act “allows FISA to be used primarily for a law enforcement purpose, as long as a significant foreign intelligence purpose remains.” 123 So interpreted, the Act essentially tore down the wall between foreign intelligence and criminal investigation.

In a unanimous opinion, the FISA Court balked at the idea that criminal investigation could be the primary purpose of surveillance under FISA and rejected the new procedures. In the opinion of the FISC, the extensive acquisition of information concerning U.S. persons through secretive surveillances and searches authorized under FISA, coupled with broad powers of retention and information sharing with criminal prosecutors, weigh heavily on one side of the scale which we must balance to ensure that the proposed minimization procedures are “consistent” with the need of the United States to obtain, produce, and disseminate foreign intelligence information. ... The [new] procedures appear to be designed to amend the law and substitute the FISA for Title III electronic surveillances and [ordinary search warrants]. This may be because the government is unable to meet the substantive requirements of these law enforcement tools, or because their administrative burdens are too onerous. In either case, the FISA’s definition of minimization procedures has not changed, and these procedures cannot be used by the government to amend [FISA] in ways Congress has not. 124

In the first-ever appeal from the FISC, the Court of Review (FISCR) in its In re Sealed Case decision reversed the lower court’s retention of the wall of separation. FISCR described the wall as a “false dichotomy” between intelligence gathering and criminal investigation. 125 In its view, foreign intelligence information includes evidence of espionage, sabotage, terrorism, and other crimes; likewise, a U.S. person who is an agent of a foreign power is necessarily involved in criminal conduct. “Indeed, it is virtually impossible to read the 1978 FISA to exclude from its purpose the prosecution of foreign intelligence

121 Id.


124 In re All Matters, 218 F.Supp.2d at 622-23.

crimes.”

The FISCR noted that the Supreme Court in *Keith* had approached the issue of surveillance by balancing of governmental and individual privacy interests, suggesting that the line be drawn between ordinary crimes and foreign intelligence. Thus, the “special needs” doctrine provided an appropriate benchmark.

The distinction between ordinary criminal prosecutions and extraordinary situations underlies the Supreme Court’s approval of entirely warrantless and even suspicionless searches that are designed to serve the government’s “special needs, beyond the normal need for law enforcement.” ...

FISA’s general programmatic purpose, to protect the nation against terrorists and espionage threats directed by foreign powers, has from its outset been distinguishable from “ordinary crime control.” After the events of September 11, 2001, though, it is hard to imagine greater emergencies facing Americans than those experienced on that date. ...

Even without taking into account the President’s inherent constitutional authority to conduct warrantless foreign intelligence surveillance, we think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore, believe firmly, applying the balancing test drawn from *Keith*, that FISA as amended is constitutional because the surveillances it authorizes are reasonable.

Several years later, a district court judge in Oregon disagreed with the FISCR and declared the amended FISA scheme to be an unconstitutional violation of the Fourth Amendment. The facts of the case were quite compelling: Following the Madrid subway bombing of March 11, 2004, Spanish authorities submitted to the FBI a fingerprint from a plastic bag found in the subway. The fingerprint was identified as belonging to Brandon Mayfield, an Oregon lawyer, former U.S. Army officer, and practicing Muslim. As a result of the fingerprint identification, the FBI applied for and received a FISA order to wiretap Mayfield’s phones, to place listening devices in his home, and to conduct sneak-and-peak searches of his home and office. Mayfield was then arrested and detained for more than two weeks. Finally, he was released after Spanish authorities notified the FBI that they had matched the fingerprint to an Algerian in their custody. In 2006, Mayfield received an official apology and a $2 million settlement, which still allowed him to pursue his constitutional challenge to FISA.

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126 *In re Sealed Case*, 310 F.3d at 723.


128 *In re Sealed Case*, 310 F.3d at 745-46.


130 The incident stands as a watershed for fingerprint evidence, which was once considered infallible but is now recognized as fraught with the potential for error. *See*, e.g., *Strengthening Forensic Science in the United States: A Path Forward* (2009); Jennifer Mnookin, *The Achilles’ Heel of Fingerprints*, Wash. Post, May 29, 2004, at A27.

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

Now, for the first time in our Nation's history, the government can conduct surveillance to gather evidence for use in a criminal case without a traditional warrant, as long as it presents a non-reviewable assertion that it also has a significant interest in the targeted person for foreign intelligence purposes. Since the adoption of the Bill of Rights in 1791, the government has been prohibited from gathering evidence for use in a prosecution against an American citizen in a courtroom unless the government could prove the existence of probable cause that a crime has been committed. The hard won legislative compromise previously embodied in FISA reduced the probable cause requirement only for national security intelligence gathering. The Patriot Act effectively eliminates that compromise by allowing the Executive Branch to bypass the Fourth Amendment in gathering evidence for a criminal prosecution.\textsuperscript{132}

The district court found the FISCR’s application of the special needs doctrine to be “without merit.” After the PATRIOT Act amendments, a FISA order need not meet a special need beyond ordinary law enforcement. Instead, an order could serve the same objective as a search warrant, having “as its ‘programmatic purpose’ the generation of evidence for law enforcement purposes – which is forbidden without criminal probable cause and a warrant.”\textsuperscript{133}

The *Mayfield* court pointed out that criminal investigators can obtain a Title III order or a traditional search warrant for suspected criminal activity described by FISCR. “For over 200 years, this Nation has adhered to the rule of law – with unparalleled success,” the district court concluded. “A shift to a Nation based on extra-constitutional authority is prohibited, as well as ill-advised.”\textsuperscript{134} After the district court granted summary judgment to the plaintiff, however, the Ninth Circuit reversed on the ground that *Mayfield* lacked legal standing because he had settled the damages claim “and a declaratory judgment would not likely impact him or his family.”\textsuperscript{135} And although at least one judge said he “shares the very significant concerns that the ‘significant purpose’ standard violates the Fourth Amendment,”\textsuperscript{136} the *Mayfield* opinion has been termed an “outlier.”\textsuperscript{137} Every other federal court has upheld FISA as amended by the PATRIOT Act, often relying upon the reasoning of *In re Sealed Case*.\textsuperscript{138}

\begin{footnotesize}
\begin{enumerate}
\item[132] *Mayfield*, 504 F. Supp. 2d at 1036-37.
\item[133] *Id.* at 1042.
\item[134] *Mayfield*, 504 F. Supp. 2d at 1042.
\item[135] *Mayfield v. United States*, 599 F.3d 964, 966 (9th Cir. 2010).
\item[136] *United States v. Warsame*, 547 F. Supp. 2d 982, 996 (D. Minn. 2008). The *Warsame* court did not decide the issue, however, as it found that the primary purpose of the FISA surveillance at issue was to gather foreign intelligence.
\item[137] See, e.g., *United States v. Abu-Jihaad*, 630 F.3d 101, 120 (2d Cir. 2010) (collecting cases). For an argument that the FISCR misinterpreted the statutory framework, see John E. Branch III, *Statutory Misinterpretation: The Foreign Intelligence Court of Review’s Interpretation of the "Significant Purpose"
\end{enumerate}
\end{footnotesize}
Thus, with the exception of a lone judge in Oregon, courts have universally accepted the argument that FISA is not subject to the standards applicable to judicial search warrants. The common rubric is that foreign intelligence is different and gives rise to “special needs” of government surveillance. It is difficult, however, to see what is “special” about surveilling alleged plotters of violence. Perhaps “special needs” could apply in the case of foreign governments or political entities, who are not part of “the people” protected by the Fourth Amendment anyway. So the only persons who come within the concerns of FISA really are foreign citizens in the U.S. as to whom the government has probable cause to believe are acting as agents of a foreign power. Thus, the whole premise of FISA as a “special need” exception to the Fourth Amendment could be flawed even before the change to “a significant purpose,” and surely flawed as the Oregon court believed it to be when the relaxed standards have the “primary purpose” of law enforcement.

Once again, we have the apparent specter of the judiciary yielding to executive claims of special needs arising from the threat of violence, resulting in a failure of judicial review and loss of judicial independence. But then in 2013 came the “revelation” that the FISA Court had authorized unlimited recording of data communications by U.S. citizens within the U.S. – a revelation that was of little surprise to those who had been following the issue.

5. Carte Blanche for Electronic Snooping

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

For example, Attorney General Gonzales in a number of public statements during 2005-06 was always careful to say that “the program the President has disclosed” is legal, leaving open the inference that there was much more that had not been disclosed.

A word of caution here. This remains a highly classified program. . . . So my remarks today speak only to those activities confirmed publicly by the President, and not to other purported activities described in press reports. These press accounts are in almost every case, in one way or another, misinformed, confusing, or wrong. And unfortunately, they have caused concern over the potential breadth of what the President has actually authorized.139

Nowhere in the many public statements of the era, all of which are contained on the Department of Justice website is there any mention of the undisclosed activities of the NSA. So naturally we would get “press accounts [that were] misinformed, confusing, or wrong.” But we probably got some information that

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What do we know now in July 2013? Very little actually. We know that NSA and its affiliated agencies are capable of reading all of our e-mail and listening to our phone conversations. Do they do so? They would have us believe they are too busy to bother with us little people. But it is also clear that if the “metadata mining” reveals a pattern of curiosity, then it is a simple matter to reach into the grab-bag and pull out everything any particular individual has said for a long period of time.

DNI Clapper said that “The court only allows the data to be queried when there is a reasonable suspicion, based on specific facts, that the particular basis for the query is associated with a foreign terrorist organization.” This pretty clearly states that no warrant, and apparently not even a specific permission from the FISA Court, is required for reading my e-mails or listening to my phone conversations.

The problem, however, is that now the Court has approved “programmatic” surveillance. According to press accounts, the court has interpreted the word “relevant” to mean basically all electronic communications, which can be monitored for suspicious patterns. And under the “reasonable suspicion” standard, there is no judicial review when someone decides to look into the content of those communications.

The justification for this level of engagement with communication begins with a Supreme Court ruling in 1979 that we do not have a “reasonable expectation of privacy” in the phone numbers we dial because they go through a service provider – thus a “pen register” (the recording of numbers dialed) is not a “search.”

OK, questionable but understandable. The second step is that the Court in 1968 had ruled that a “stop and frisk” may be justified by a “reasonable suspicion” of unlawful behavior. It is important to realize that the stop-and-frisk ruling started from the premise that the Fourth Amendment applied and that the frisk was a search. The only reason that no warrant was required was because it occurred on the street when there was no time to go to a judge in the face of what appeared to be an immediate threat. “The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”

Combining these holdings for some observers gives rise to the idea that government can collect all phone numbers and e-mail addresses from everyone in the U.S. because those go through third-party providers. Well, that does seem to be what the Supreme Court said, although they were talking in that case about a specific investigation with its own “reasonable suspicion.” Now what about reading your e-mail because your pattern seems suspicious? That’s where the analysis breaks down unless there is an immediate threat of violence displayed in the pattern itself. I’m not enough of a computer geek to know whether that is plausible but it seems like a major stretch from what we know so far.

One of the more interesting aspects of the Snowden episode is that it has triggered the long-delayed advent of the Privacy and Civil Liberties Oversight Board established as an “independent agency” within the Executive Branch. The predecessor of this Board was the 1974 Privacy Protection Study Commission, which issued an elaborate report in 1977. The gist of the report was that the electronic age meant that the citizenry would rapidly lose control of their private data. The report pointed out that “government . . . has investigative and enforcement responsibilities which make the search and tracking capabilities that stem from applying

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142 Id. at 29.
computers and telecommunications to personal-data record keeping an attractive instrument . . . to which
government can have easy access.” This was certainly a prescient warning from 40 years ago.

The Electronic Privacy Information Center is devoted entirely to its namesake subject and files many
lawsuits to pursue privacy of digital information. I’m not so sure that privacy of information is really that
important, except to the extent that I need to be able to protect my bank accounts from being raided. What
makes the NSA dustup more disturbing is the feeling within government that it can act with impunity in the
name of “national security.”

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

Collection of all electronic communications in the U.S. apparently was done with the blessing of Article
III judges sitting on a special court through interpretation of the word “relevant.” The particular statute in
which this word occurs reads this way:

Each application under this section shall require the approval of the Attorney General, or a
designated attorney for the Government, and shall include--

(1) the identity of the Federal officer seeking to use the pen register or trap and trace device
covered by the application; and.

(2) a certification by the applicant that the information likely to be obtained is foreign
intelligence information not concerning a United States person or is relevant to an ongoing
investigation to protect against international terrorism or clandestine intelligence activities,
provided that such investigation of a United States person is not conducted solely upon the
basis of activities protected by the first amendment to the Constitution.  

That’s it. There’s no requirement that the judges make findings regarding relevance other than that the
“application satisfies the requirements of this section.” So we could say that the whole NSA spying scandal
is the fault of Congress, except that “relevant” certainly could be read to mean some specific showing of
relevance in a particular case rather than that all electronic communications in the entire country.

But wait a minute, what about the Fourth Amendment, and general invasion of privacy standards? Surely,
a blanket approval to record every electronic communication in the entire country cannot be justified by the
“special needs” of law enforcement or by “protection of the police officer and others nearby.” The only way
this degree of intrusion into the private lives of citizens can be rationalized (not justified) is by the threat of
panic when Government utters the magic word “terrorism.” This is purely and simply an abdication of
judicial independence.

6. Standing

143 Personal Privacy in an Information Society: Report of The Privacy Protection Study Commission,

144 50 U.S.C. § 1842(c).

145
The U.S. federal courts have a rather mystical, ethereal approach to their “special place” in separation of powers. Part of the mystique is a doctrine called “standing,” which I have described elsewhere as part of the Mythology of Justiciability. The heart of the doctrine is that a person who is not able to show an injury by another person has no claim of right against that other person. Duh. The mystery is why we need to waste barrels of ink and jurisprudential energy on a point that is basic to all of law – if you haven’t harmed me, I don’t have a claim against you.

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

a. Have I Been Bugged?

In December 2005, an article in the New York Times revealed the existence of what has now become known as the “Terrorist Surveillance Program” (TSP), under which “President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying.”

Apparently, the TSP was one of a collection of clandestine intelligence activities referred to as the “President’s Surveillance Program,” with the other parts of the program remaining classified. As events have unfolded, we have been exposed to reports of NSA projects called Carnivore and PRISM. In May 2013, Edward Snowden became famous by going public with reports of massive collection of phone and e-mail records of American citizens. As if anyone were really surprised by these disclosures, some politicians called him a traitor and the Government filed espionage charges against him.

In January 2007, the Attorney General announced that “a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an affiliated terrorist organization.” FISA was amended by Congress in 2007 and 2008 to provide “temporary” authorization for surveillance where one person in a communication was reasonably believed to be outside the U.S.

A number of lawsuits were filed challenging the NSA program. One suit was brought by the ACLU on


behalf of a group of individuals and groups who regularly conduct international telephone and internet communications for legitimate professional reasons (e.g., journalism and the practice of law). A district court in Michigan granted the plaintiffs’ request for an injunction, finding that the TSP violated FISA, the First and Fourth Amendments, and the separation of powers doctrine. On appeal, the Sixth Circuit found that the plaintiffs lacked standing to bring the action. They could not show that any particular conversation had been intercepted, nor could the plaintiffs claim that any personal interest had been harmed by their refraining from conversations that might be monitored. Judge Gilman dissented on the ground that the attorney plaintiffs had a clear duty to refrain from communicating with clients when those communications were likely to be intercepted, and thus they were able to show a cognizable harm from the threat of interception. Speaking to the merits, Judge Gilman argued that the TSP was illegal because “the clear wording of FISA and Title III that these statutes provide the ‘exclusive means’ for the government to engage in electronic surveillance within the United States for foreign intelligence.”

At the same time, the Al-Haramain Foundation and two of its lawyers filed a similar action against the government in Oregon district court. Al-Haramain is a Muslim charity that has been designated a “Specially Designated Global Terrorist” by the Treasury Department’s Office of Foreign Assets Control, which freezes the organization’s assets and makes it illegal for others to do business with it. At one point, the government inadvertently disclosed a “top secret” document, which proved that Al-Haramain had been subjected to warrantless surveillance and prompted a further claim for unlawful surveillance. The government sought to dismiss the case by invoking the state secrets privilege, which the district court rejected on the basis that the existence of the TSP was not a secret, and that “no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance as revealed in the Sealed Document.”


151ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007).

152Id. at 656-57:

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

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so long as no other information in the document was revealed.154

The Ninth Circuit granted the government’s request for interlocutory review of the state secrets issue,155 holding that the public disclosures about the TSP had already made the basic dimensions of the program known and thus the state secrets privilege did not foreclose the lawsuit entirely. Nevertheless, the top secret document was protected by the privilege, and the plaintiffs would not be allowed to introduce their memory of the document into evidence. Although it believed that the plaintiffs could not establish standing without the document, the Ninth Circuit sent the case back to the district court to determine whether FISA might preempt the state secrets privilege. On remand, the district court first held that FISA would, in fact, preempt the privilege, but a remedy would be available only on behalf of someone who was an “aggrieved person” under the statute.156

The plaintiffs were able to rely on public announcements by government officials and publicly available press reports to make out a prima facie case, based on non-classified information, that they were aggrieved persons as a result of wiretaps and e-mail intercepts without a court order.157 After extended recalcitrance by the Government, the district court ordered:158

Plaintiffs have made out a prima facie case and defendants have foregone multiple opportunities to show that a warrant existed, including specifically rejecting the method created by Congress for this very purpose. Defendants’ possession of the exclusive knowledge whether or not a FISA warrant was obtained, moreover, creates such grave equitable concerns that defendants must be deemed estopped from arguing that a warrant might have existed or, conversely, must be deemed to have admitted that no warrant existed. The court now determines [that for] purposes of this litigation, there was no such warrant for the electronic surveillance of any of plaintiffs.159

With no genuine issue of material fact, the district court granted summary judgment for the plaintiffs, and it later awarded them about $41,000 in damages and over $2.5 million in fees and expenses.160 The entire amount went to the attorney plaintiffs, as the “distribution of any funds to plaintiff Al-Haramain is impossible because Al-Haramain’s assets are blocked as a result of its designation as a SDGT


155 Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007).


159 Id. at 1197.

organization.”161 Indeed, the district court acknowledged that “the government had reason to believe that Al-Haramain supported acts of terrorism.”162 In the final episode of this long-running litigation, the Ninth Circuit ruled that the Government enjoyed sovereign immunity from a damage action by the organization.163

Another large number of lawsuits alleged that telecommunications companies violated their customers’ rights by cooperating and assisting the NSA in surveillance of their phones.164 The actions were consolidated as part of the multi-district litigation panel in northern California. While their cases were pending in district court, Congress enacted a statutory provision rendering an electronic communications service provider immune from suit if and when the Attorney General certified that the provider had helped the government in intelligence gathering, including assistance in executing the TSP.165 Based on this provision, the district court dismissed the pending suits against the telecommunications companies.166 On appeal, the Ninth Circuit affirmed, rejecting a series of constitutional arguments, including several related to the separation of powers doctrine and due process considerations.167

But in another opinion on the same day, the Ninth Circuit allowed a class action suit to proceed against the government for what the plaintiffs described as “a communications dragnet of ordinary American citizens.”168 According to the court, the plaintiffs had standing by alleging a concrete and particularized injury from the collaboration between the government and AT&T at a specific facility in San Francisco. And although the claims “strike[] at the heart of a major public controversy involving national security and surveillance,” the Ninth Circuit refused to characterize the legal issues as political questions, or to impose

161Id. at 14.

162Id. at 25.

163Al-Haramain Islamic Foundation Inc. v. Obama, 690 F.3d 1089 (9th Cir 2012).

164Among the litigants was Pulitzer Prize-winning author Studs Terkel. See Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006); cf. STUDS TERENCE, THE GOOD WAR: AN ORAL HISTORY OF WORLD WAR II (1984).

165See 50 U.S.C. §§ 1885a-1885c.


167See Hepting v. AT&T Corp., 671 F.3d at 894-904. See also In re NSA Telecom Litigation [McMurray v. Verizon Communications, Inc.], 669 F.3d 928 (9th Cir. 2011) (rejecting Fifth Amendment takings claim).

168See Jewel v. NSA, 673 F.3d 902, 905 (9th Cir. 2011). The plaintiffs claimed that,

[using [a] shadow network of surveillance devices, Defendants have acquired and continue to acquire the content of a significant portion of phone calls, emails, instant messages, text messages, web communications and other communications, both international and domestic, of practically every American who uses the phone system or the Internet, including Plaintiffs and class members, in an unprecedented suspicionless general search through the nation's communications network.

Id. at 906.
a heightened standing requirement for government surveillance involving national security interests.\textsuperscript{169} Where this case will go now after the Snowden revelations remains to be seen, but at least the Ninth Circuit has shown itself to be the exception in standing up against some of the Government abuses.

The FISA Amendments Act of 2008 (FAA) continued the authorization of intercepts involving parties outside the U.S. but stipulated that the government may not conduct electronic surveillance or intercept wire, oral, or electronic communications except pursuant to express statutory authorization (e.g., FISA).\textsuperscript{170} This statement of exclusive authority should have defused the Executive argument for unfettered discretion, but of course we now have public admissions of massive government gathering of electronic communications data.

The ACLU filed suit against the FAA on behalf of a group of attorneys, journalists, and legal, media, and human rights organizations, arguing that the provision “allows the executive branch sweeping and virtually unregulated authority to monitor the international communications . . . of law-abiding U.S. citizens and residents.”\textsuperscript{171} The district court granted summary judgment in favor of the government on the basis that the plaintiffs lacked standing to bring the suit.\textsuperscript{172} On appeal, a panel of the Second Circuit reversed and remanded,\textsuperscript{173} asserting that the plaintiffs had standing based on a reasonable fear that their sensitive international electronic communications were being monitored, requiring them to engage in costly and burdensome measures to protect the confidentiality of communications necessary for their work. In September 2011, the Second Circuit denied rehearing \textit{en banc} by an equally divided vote.\textsuperscript{174}

In February 2013, the Supreme Court reversed on standing grounds,\textsuperscript{175} agreeing with the Government that the plaintiffs had failed to show a realistic threat of imminent injury. Their speculations depended on assuming that the government would target their communications, that authorization under the statute would be judicially approved, and that government would succeed in acquiring their communications. Moreover, their choices to make expenditures to prevent interception of confidential communications based on hypothetical future harm was their own choice and not the direct result of identifiable government action.

Of course, now we know that the assumptions of the Supreme Court about judicial authorization of intercepts were misfounded because NSA has been monitoring anything and everything that it chose to do. This set of assumptions was particularly poignant in some of the dissents from the earlier Second Circuit denial of rehearing. One dissent pointed to the FISCR’s opinion in \textit{In re Directives} as offering “a glimpse into the actual world of foreign intelligence targeting,” which “appears quite different from the one hypothesized by plaintiffs.”


\textsuperscript{170} \textit{See} 50 U.S.C. § 1812.

\textsuperscript{171} Amnesty International USA v. McConnell, No. 08 CIV 6259, Complaint for Declaratory and Injunctive Relief, at ¶ 1 (July 10, 2008).

\textsuperscript{172} \textit{See} Amnesty International USA v. McConnell, 646 F.Supp.2d 633 (S.D.N.Y. 2009).

\textsuperscript{173} \textit{See} Amnesty International USA v. Clapper, 638 F.3d 118 (2d Cir. 2011).

\textsuperscript{174} \textit{See} Amnesty International USA v. Clapper, 667 F.3d 163 (2d Cir. 2011).

\textsuperscript{175} Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138 (2013).
[The FISCR] reviewed the actual procedures adopted by the executive to satisfy PAA requirements and found that they in fact afforded “protections above and beyond those specified” in the statute and adequately allayed any particularity or probable cause concerns. Such scrupulous oversight rebuts any general assumptions, unsupported by specific facts, that the executive will instinctively abuse its targeting discretion under the FAA.”\textsuperscript{176}

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

\textbf{b. Judicial Review of Killing U.S. Citizens}

The final case that I wish to highlight here is the “targeted killing” of Anwar Al-Aulaqi, a U.S. citizen who expatriated to Yemen and became a major jihadist figure on the internet. When it was leaked in the press that Anwar al-Awlaki had been placed on the U.S. government’s kill lists, his father Nasser al-Awlaki filed suit to assert his son’s rights to due process. His law suit also asserted that the U.S. targeted killing policy violated the Fourth and Fifth Amendments, as well as treaty and customary international law. While asking for an injunction to stop the government from killing his son, he also sought a declaration that the policy was illegal and disclosure of the criteria used to determine whether to target a U.S. citizen.\textsuperscript{177}

The district court in D.C. started with the observations that this “unique and extraordinary case” presented “[s]tark, and perplexing, questions” such as: “How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to the defendants, judicial scrutiny in prohibited when the United States decides to target a U.S. citizen overseas for death?”\textsuperscript{178} Yet the court dismissed the case, holding that Nasser al-Awlaki lacked standing to bring the constitutional claims on behalf of his son. The court also blindly asserted that there was nothing to prevent Anwar al-Awlaki from peacefully presenting himself at the U.S. Embassy in Yemen and announcing his wish to vindicate his constitutional rights in court, which, as a matter of domestic and international law, the U.S. government would have to respect without resorting to violence. Moreover, it was not clear that the father was serving his son’s “best interests,” understood as acting in accordance with Anwar al-Awlaki’s intentions or wishes. There was no evidence that Awlaki wanted to vindicate his rights in a U.S. court; to the contrary, his public statements show disdain for the American legal system, as well as a belief that Muslims are not bound by Western law and it was legitimate to violate U.S. law.

Moreover, Nasser al-Awlaki’s claims might be barred by sovereign immunity, because a suit against the President, Secretary of Defense, and CIA Director was tantamount to a suit against the United States. In the portion of its opinion most strikingly presenting problems of judicial independence, the court refused to decide this question by exercising its “equitable discretion” to avoid interjecting itself into sensitive issues of foreign affairs and activities by the military and intelligence community. Serious separation-of-powers

\textsuperscript{176}Clapper, 667 F.3d at 186 (Raggi, J., dissenting).


\textsuperscript{178}Al-Aulaqi v. Obama, 727 F. Supp.2d 1, 8 (D.D.C 2010).
concerns would be raised by a judicial attempt to enjoin the President in the performance of his official duties. The same would be true of a court order granting declaratory and injunctive relief against the nation’s top military and intelligence advisors regarding the use of force abroad, where such action was (purportedly) authorized by the President himself.

Finally, in a similar vein, the court concluded that the case was a non-justiciable political question. This doctrine exempts from judicial review those matters that are committed by the U.S. Constitution to the political branches, including the precise issue in this case – the decision to employ military force. According to the court, resolution of the plaintiff’s claims would require it to decide:

(1) the precise nature and extent of Anwar Al-Aulaqi’s affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants’ targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether (assuming plaintiff’s proffered legal standard applies) Anwar Al-Aulaqi’s alleged terrorist activity renders him a concrete, specific, and imminent threat to life or physical safety; and (4) whether there are means short of lethal force that the United States could reasonably employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests. Such determinations, in turn, would require this Court . . . to understand and assess the capabilities of the alleged terrorist operative to carry out a threatened attack, what response would be sufficient to address that threat, possible diplomatic considerations that may bear on such responses, the vulnerability of potential targets that the alleged terrorist may strike, the availability of military and nonmilitary options, and the risks to military and nonmilitary personnel in attempting application of non-lethal force.

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

The U.S. then used aerial unmanned aircraft (drones) to execute not just Anwar but his son Abdulrahman and a colleague Samir Khan. In July 2012, the ACLU filed a new suit on behalf of the families of all three, arguing that their killings violated the Fourth Amendment’s ban on unreasonable seizures, Fifth Amendment’s right to due process, and the Bill of Attainder Clause. In addition, the ACLU filed a Freedom of Information Act (FOIA) request and subsequent legal action seeking records related to legal

179 The standard advocated in Anwar al-Aulaqi’s complaint would preclude targeted killings outside of armed conflict unless an individual “presents a concrete, specific, and imminent threat to life or physical safety, and there are means other than lethal force that could reasonably be employed to neutralize the threat.” Al-Aulaqi Complaint, supra, at 11.

180 Id. at 46.

181 Id. at 51.

authority and factual basis for the targeted killing of the three individuals.\textsuperscript{183} In a masterly display of the various doctrines considered in this article, the Department of Justice on December 14, 2012, filed a motion to dismiss\textsuperscript{184} the damage action on the grounds of lack of standing, political question, qualified immunity, failure to state a claim under due process, and executive freedom from the bill of attainder clause.\textsuperscript{185}

C. Judicial Independence and International Law

1. The Requirement of Judging Without Government Control

As stated at the outset, the Mt. Scopus Standards demand that “in the exercise of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.” Further, that judges “should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law.” The Montreal Declaration of 1983 emphasizes in several ways the importance of the Rule of Law and due process.\textsuperscript{186}

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

2. The Nuremberg Precedent

Finally, I feel compelled to ask – with all due reluctance – whether any judges of the U.S. have violated international criminal standards by ceding so much of their responsibilities to the Executive? It is hard to avoid the conclusion that crimes have been committed by the Executive Branch in the name of national security. Many observers have called for prosecution of leaders such as Dick Cheney, Donald Rumsfeld, and John Yoo. (They usually are accused by detractors of “war crimes” but many of the crimes such as torture and extrajudicial detentions occurred outside any recognizable context of war and would be cognizable


\textsuperscript{184}http://www.aclu.org/files/assets/tk_govt_motion_to_dismiss.pdf


\textsuperscript{186}1.03 Judges and courts shall be free in the performance of their duties to ensure that the Rule of Law is observed, and shall not admit influence from any government or any other authority external to their statutes and the interests of international justice.

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

1.08 Judges shall promote the principle of the due process of law as being an integral part of the independence of justice.
under ordinary domestic law.)

The question here is whether the judges who refused to grant relief against the wrongful actions of government officials could be charged with criminal behavior? The most salient precedent, of course, is the Justice Case\(^\text{187}\) from Military Tribunal #3 at Nuremberg. The United States convened a Military Tribunal for the purpose of prosecuting 16 judges who were charged with having been complicit in the crimes against humanity committed by the Nazi regime.\(^\text{188}\) Specifically, they were charged with participating in the “common design or conspiracy” of racial persecution. According to the indictment,

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

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

Evidence in the case was heard over a period of 11 months and resulted in a 10,000 page transcript with hundreds of written exhibits along with oral testimony. In essence, ten of the judges were found to have taken an active part in the Holocaust events, some by drafting legislation granting special powers to the regime, some by replacing judges who were not compliant, and some by issuing death sentences that were manifestly unwarranted by the evidence in the individual cases. The most interesting aspect of the case involved the role of Judge Schlegelberger, a very prominent member of the Judiciary who “was put in charge of the Reich Ministry of Justice as Administrative Secretary of State” but eventually resigned. He testified that he often found the demands of the Nazi Party to be “difficult,” but there was evidence that “Hitler was at least attempting to reward Schlegelberger for good and faithful service rendered, in the performance of some of which Schlegelberger committed both war crimes and crimes against humanity as charged in the indictment.”

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

In the sphere of criminal law the road to a creation of justice in harmony with the moral concepts of the New Reich has been opened up by a new wording of Section 2 of the Criminal Code, whereby a person is also (to) be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal law and the sound instincts of the people. This new definition became necessary because of the rigidity of the norm in force hitherto.

The Tribunal had this to say about his defense:

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\(^{188}\) See generally INGO MULLER, HITLER’S JUSTICE (1991). This trial served as the model for the fictitious version in the movie Judgment at Nuremberg. In particular, the movie explored the ethical dilemma of a judge who stayed in office and sentenced some people to death because he believed that his resignation would result in the appointment of an even more brutal adherent of the regime. That character was based on Judge Schlegelberger.
Schlegelberger presents an interesting defense, which is also claimed in some measure by most of the defendants. He asserts that the administration of justice was under persistent assault by Himmler and other advocates of the police state. This is true. He contends that if the functions of the administration of justice were usurped by the lawless forces under Hitler and Himmler, the last state of the nation would be worse than the first. He feared that if he were to resign, a worse man would take his place. As the event proved, there is much truth in this also. Under Thierack the police did usurp the functions of the administration of justice and murdered untold thousands of Jews and political prisoners. Upon analysis this plausible claim of the defense squares neither with the truth, logic, or the circumstances.

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

Schlegelberger resigned. The cruelties of the system which he had helped to develop were too much for him, but he resigned too late. The damage was done. If the judiciary could slay their thousands, why couldn't the police slay their tens of thousands? The consequences which Schlegelberger feared were realized. The police, aided by Thierack prevailed. Schlegelberger had failed. His hesitant injustices no longer satisfied the urgent demands of the hour. He retired under fire. In spite of all that he had done he still bore an unmerited reputation as the last of the German jurists and so Hitler gave him his blessing and 100,000 RM as a parting gift. We are under no misapprehension. Schlegelberger is a tragic character. He loved the life of intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mass of political pottage and for the vain hope of personal security. He is guilty [of war crimes and crimes against humanity].

This is a harsh judgment suited to harsh measures. In the U.S. of the past decade, despite the torture, the unjustified detentions, the unauthorized surveillance, the targeted killings, it would be difficult to find a judge who participated in the “prostitution of a judicial system for the accomplishment of criminal ends.” Some judges turned blind eyes to the wrongs displayed before them. Some, the worst example probably being Judge Wilkinson, paid undue deference to the Executive. And at least one, Justice Scalia, skirted the bounds of propriety when he said the judgment of his colleagues would “cause more Americans to be killed.”

I think we can safely conclude that the examples of deference and the tolerance for wrongdoing by American judges in the past decade do not amount to criminal behavior under the standards of either domestic or international law. There is no hint that any judge has sentenced a person to an unwarranted death.

189 ABA Code of Judicial Conduct, Canon 3(A)(3):

A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.
or imprisonment, nor has any judge been directly involved in the acquisition of excessive executive power. The most that can be said is that many judges have failed to stand firmly against encroachments on their traditional role of judicial review. I don’t see that as a violation of criminal standards.

D. Conclusion

The “head in the sand” attitude of the U.S. judiciary in the past decade is a rather dismal record that does not fit the high standard for judicial independence on which the American public has come to rely. Many authors have discussed these cases from the perspective of civil rights and liberties of the individual. What I have attempted to do here is sketch out how the undue deference to the Executive in “time of crisis” has undermined the independent role of the judiciary.

Many authors, including critics of the Bush Administration who are now prominent figures in the Obama Administration carrying out the same policies, have looked at these issues from the perspective of the civil rights and liberties of the citizenry. I have chosen to consider the government actions from the perspective of doctrines by which the judiciary has managed to turn a blind eye to the abuses of both Administrations. Torture, executive detentions, illegal surveillance, and now killing of U.S. citizens, have all escaped judicial review under a variety of excuses.

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

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

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


executive.\textsuperscript{193}

To repeat, there is nothing “new” in the killing of innocents for religious or political vengeance. This violence has always been with us and will unfortunately continue despite our best efforts to curb it. Pleas for executive carte blanche power are exactly what the history of the writ of habeas corpus were developed to avoid,\textsuperscript{194} and what many statements in various declarations of human rights are all about. The way of unreviewed executive discretion is the way of tyranny.


\textsuperscript{194} The infamous British Star Chamber was abandoned in 1641. It was a mixture of “judges” and “privy councillors” which heard cases in secret and dealt mostly with political crimes. Although it started as a seemingly necessary way to deal with accusations against powerful persons, it became a major source of oppression by the monarchy.