

**LEGAL AFFAIRS:  
DREYFUS, GUANTÁNAMO, AND THE FOUNDATION OF THE  
RULE OF LAW**

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The Dreyfus affair reminds us that the rule of law and basic human rights are not self-executing. In a democracy, individual rights and the rule of law are designed to check popular power and protect the individual from the majority.<sup>1</sup> Yet paradoxically, they cannot do so without substantial popular support. Alfred Dreyfus received two trials—or at least the trappings thereof—and was twice wrongly convicted.<sup>2</sup> The rule of law was initially unable to stand between an innocent man and the powerful men who sought to frame him. But the issue of Dreyfus’s guilt or innocence was not concluded with his verdicts. Thanks to the work of many supporters inside and outside of France, including, most famously, Émile Zola, Dreyfus was ultimately exonerated and his accusers were revealed for the criminals that they were. Justice ultimately triumphed—but only because of the substantial political pressure brought to bear on his behalf.<sup>3</sup>

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<sup>1</sup> *Boumediene v. Bush*, 553 U.S. 723, 745 (2008).

<sup>2</sup> See generally LOUIS BEGLEY, *WHY THE DREYFUS AFFAIR MATTERS* (2009); GEORGE R. WHYTE, *THE DREYFUS AFFAIR: A CHRONOLOGICAL HISTORY* (2008); Adam Gopnik, *Trial of the Century: Revisiting the Dreyfus Affair*, THE NEW YORKER (Sept. 28, 2009), [http://www.newyorker.com/arts/critics/books/2009/09/28/090928crbo\\_books\\_gopnik](http://www.newyorker.com/arts/critics/books/2009/09/28/090928crbo_books_gopnik).

<sup>3</sup> See Gopnik, *supra* note 2 (“Stirred into movement by Mathieu, the entire liberal establishment, frightened and feeble at first, began to enlist in the cause; the great left-wing politician Jean Jaurès joined, then the publisher and future Prime Minister Georges Clemenceau, then the novelist Émile Zola—none of them Jewish, but with a certain self-interest in seeing the right done down, and, above all, with a passion for republicanism and a sense that it could not survive this parody of justice.”).

A similar story can be told about Guantánamo and the United States' "war on terror" in the wake of the terrorist attacks of September 11, 2001. Here, too, the powerful initially subverted the rules to achieve their desired ends,<sup>4</sup> and the victims were a minority with little or no "voice" in the domestic political system.<sup>5</sup> But once again, substantial pressure by citizens and foreigners in defense of the rule of law forced the government to back down and retreat, if not necessarily to admit its errors or crimes.<sup>6</sup>

As Professor Gary Shaw has eloquently demonstrated in his essay in this volume, the Supreme Court imposed significant and historic constraints on the executive branch's attempts to subject "enemy combatants" to "military justice."<sup>7</sup> Over strenuous executive objections, the Court ruled that detainees at Guantánamo had a right to seek judicial review of the legality of their detentions as alleged "enemy combatants"—even after Congress sided with the president to repeal all statutory avenues of habeas corpus review.<sup>8</sup> The Court ruled further, again over the administration's national-security based objections, that United States citizens detained as "enemy combatants" were entitled, as a matter of due process, to notice of the case against them and a meaningful opportunity to defend themselves before an objective arbiter.<sup>9</sup> And the Court rejected the administration's position that alleged fighters for al Qaeda were not entitled to the protections of the Geneva Conventions, a holding whose significance extended far beyond the Court's decision to invalidate the President's unilaterally created military commissions.<sup>10</sup> Because it extended Geneva Convention protections to the detainees, for example, the decision implied that inflicting cruel or inhumane treatment on detainees was a war crime.<sup>11</sup>

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<sup>4</sup> DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 85 (2003).

<sup>5</sup> *Id.* at 21-23, 26-27.

<sup>6</sup> David Cole, *After September 11: What We Still Don't Know*, THE N.Y. REV. OF BOOKS (Sept. 29, 2011), <http://www.nybooks.com/articles/archives/2011/sep/29/after-september-11-what-we-still-dont-know>.

<sup>7</sup> Gary Shaw, *Due Process in American Military Tribunals After September 11, 2001*, 29 TOURO L. REV. 29 (2012).

<sup>8</sup> *See, e.g., Boumediene*, 553 U.S. at 732, 771 (holding that detainees at Guantánamo had constitutional right to habeas corpus); *Rasul v. Bush*, 542 U.S. 466, 481, 484 (2004) (holding that detainees at Guantánamo had statutory right to habeas corpus).

<sup>9</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

<sup>10</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 567, 628 (2006).

<sup>11</sup> *Id.* at 560, 563 ("The military commission at issue lacks the power to proceed because

Those decisions, however, are only a part of the story. In this essay, I will reflect more broadly on the course of events that the terrorist attacks of September 11, 2001 (“9/11”), triggered in the United States, and attempt to draw some contemporary lessons, inspired by the Dreyfus affair, from what we might someday call the Guantánamo affair. Many accounts have focused on the response of the Bush administration to the terrorist attacks of 9/11.<sup>12</sup> I want to shift the focus, however, and examine the response of ordinary citizens, within and outside the United States, to the American “war on terror.” As with the Dreyfus affair, it is that response that ultimately helped to determine the course of history.

As it is now well known, the Bush administration initially responded to the threat of terrorist attacks by, for all practical purposes, jettisoning the rule of law as an inconvenient obstacle to Americans’ security.<sup>13</sup> The administration adopted a “preventive paradigm,” in which harshly coercive measures, from detention to torture, to war itself, were employed preemptively, ostensibly to prevent terrorist attacks before they occurred.<sup>14</sup> It frequently sought to justify its measures, both legally and politically, by stressing that they applied only to “them,” which in this case meant foreign nationals—specifically Arab and Muslim foreign nationals—and not “us,” United States citizens.<sup>15</sup>

At the Guantánamo Bay naval base, the administration sought to hold detainees beyond the law, subjected them to cruel and inhuman treatment, and in some instances, torture, and denied them

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its structure and procedures violate . . . the four Geneva Conventions[,] . . . [but] the Executive nevertheless must comply with the prevailing rule of law in undertaking[s] to try [detainees] and subject [them] to criminal punishment.”). At the time, the war crimes statute defined war crimes to include any “breach of common Article 3” of the Geneva Conventions, which, in turn, prohibited all “cruel or inhuman treatment” of detainees. 18 U.S.C. § 2441 (2006). Congress subsequently amended the statute to limit war crimes to certain “grave breaches,” not including cruel and inhuman treatment. 18 U.S.C. § 2441 (2012).

<sup>12</sup> See, e.g., JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008); JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 26 (2007) [hereinafter COLE & LOBEL, *LESS SAFE*] (describing the Bush administrations treatment of detainees).

<sup>13</sup> See generally COLE & LOBEL, *LESS SAFE*, *supra* note 12.

<sup>14</sup> *Id.* at 34 (“As President Bush put it, ‘If we wait for threats to fully materialize, we will have waited too long.’”).

<sup>15</sup> COLE, *supra* note 4, at 40.

access to court.<sup>16</sup> Ultimately, 779 men were held there; however, as of today approximately 600 have been released.<sup>17</sup> Guantánamo was reserved for foreign nationals, and the government argued that it could treat human beings in this way because they were foreign nationals outside the United States' borders.<sup>18</sup>

Within the United States, the administration similarly embarked on a widespread detention initiative.<sup>19</sup> In the first two years after 9/11 over 5000 foreign nationals were detained in preventive detention measures, the vast majority in connection with immigration charges, often for highly technical violations.<sup>20</sup> Virtually all of those detained were from Arab or Muslim countries.<sup>21</sup> Many, rounded up in the first few months after the attacks, were presumed to be “of interest” to the 9/11 investigation on little or no evidence beyond their national origin, and detained until the FBI “cleared” them of any such connection.<sup>22</sup> Not one of these men stands convicted of a terrorist offense.<sup>23</sup> The FBI sought out another 8000 foreign nationals for “voluntary” interviews, selected solely because they were young men from Arab or Muslim countries.<sup>24</sup> Once again, none turned out to be terrorists.<sup>25</sup> The government required more than 80,000 foreign nationals from Arab and Muslim countries residing here to “register” with immigration authorities, and be fingerprinted, photographed, and interviewed.<sup>26</sup> Again, none was convicted of a terrorist offense.<sup>27</sup> These measures were possible, both legally and politically, because those detained were foreign nationals not entitled to constitutional rights.<sup>28</sup>

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<sup>16</sup> See generally MAYER, *supra* note 12.

<sup>17</sup> *Guantánamo by the Numbers*, HUM. RTS. FIRST, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Gitmo-Numbers.pdf> (last updated Oct. 3, 2012).

<sup>18</sup> COLE, *supra* note 4, at 85.

<sup>19</sup> *Id.* at 22.

<sup>20</sup> *Id.* at 25-26.

<sup>21</sup> *Id.* at 25.

<sup>22</sup> U.S. Dep't of Justice, Office of the Inspector Gen., *The Sept. 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the Sept. 11 Attacks* 1, 5, 37, 77 (2003) [hereinafter *The Sept. 11 Detainees*].

<sup>23</sup> COLE, *supra* note 4, at 25.

<sup>24</sup> COLE & LOBEL, LESS SAFE, *supra* note 12, at 107; see also *The Sept. 11 Detainees*, *supra* note 22, at 4.

<sup>25</sup> COLE & LOBEL, LESS SAFE, *supra* note 12, at 107.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> COLE, *supra* note 4; see also Neal K. Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1379 (2007).

By unilateral executive order, the Bush administration also created military commissions in which defendants could be tried, convicted, and sentenced to death by a system entirely under the authority of the President without any judicial review.<sup>29</sup> The rules did not bar the admission of coerced confessions.<sup>30</sup> And again, the rules applied only to foreign nationals.<sup>31</sup>

The administration authorized the abduction and “disappearance” of terrorism suspects into secret Central Intelligence Agency (“CIA”) prisons, known as “black sites,” where they were subjected to what the administration called “enhanced interrogation techniques,” but are more properly characterized as “cruel, inhumane, and degrading,” and in some instances, torture.<sup>32</sup> The President authorized CIA interrogators to douse suspects with water, force them into painful stress positions and small dark boxes for hours at a time, hit them, slam them into walls, and “waterboard” them.<sup>33</sup> These tactics were initially justified by secret legal memoranda that somehow managed to find that none of these tactics amounted to torture, and that the related prohibition on cruel, inhuman, degrading treatment, contained in an international human rights treaty did not protect foreign nationals held by United States officials outside our borders.<sup>34</sup> When Congress overruled that strained interpretation, and correctly insisted that the prohibition applied to all human beings held by the CIA, regardless of the detainee’s nationality, the Bush administration opined, in secret, that none of the tactics were even cruel, inhuman, or degrading in anyway.<sup>35</sup>

The administration authorized the “rendition” of suspects to

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<sup>29</sup> Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

<sup>30</sup> John Perazzo, *Why Civilian Trials for Terrorists Are a Bad Idea*, FRONT PAGE MAG (Feb. 6, 2007), <http://www.archive.frontpagemag.com/readArticle.aspx?ARTID=336>.

<sup>31</sup> See Katyal, *supra* note 28, at 1366 (exempting American citizens from the order).

<sup>32</sup> MAYER, *supra* note 12, at 125, 143, 148.

<sup>33</sup> See *id.* at 165, 167-71 (describing the various punishment tactics employed on the detainees).

<sup>34</sup> DAVID COLE, *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* 19-35 (New Press 2009) [hereinafter COLE, *THE TORTURE MEMOS*] (summarizing the arguments presented in the memos to authorize the CIA’s interrogation tactics).

<sup>35</sup> See Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May be Used in the Interrogation of High Value al Qaeda Detainees* (May 30, 2005), reprinted in COLE, *THE TORTURE MEMOS*, *supra* note 34, at 225-26 (concluding that the CIA’s interrogation tactics were not cruel, inhuman, or degrading, and therefore met the obligations of Article 16).

security services in foreign countries that the State Department had long condemned for systematic use of torture—such as Syria, Egypt, and Morocco.<sup>36</sup> When Maher Arar, a Canadian, sued United States officials for delivering him to Syria to be tortured, the government argued that Arar’s treatment, including United States officials’ decision to fly him to Syria, and his subsequent torture by the Syrians at the behest of the United States, violated no constitutional rights because he was a foreign national who was not residing in the United States.<sup>37</sup>

These early post-9/11 measures echo the federal government’s reaction to a series of terrorist bombings eighty years earlier. The summer of 1919 saw the interception of mail bombs addressed to such figures as Supreme Court Justice Oliver Wendell Holmes Jr., and financiers J.P. Morgan and John D. Rockefeller; violent riots in several cities on May Day; and, on June 2, the explosions of eight bombs in eight different cities within the same hour, killing two men, and ripping the front off of the Georgetown home of Attorney General A. Mitchell Palmer.<sup>38</sup> The United States responded by rounding up more than 1000 foreign nationals in coordinated raids across the country.<sup>39</sup> Most were picked up on technical immigration violations or charges of association with various communist groups.<sup>40</sup> No one was convicted in the bombings. As Louis F. Post, a government official at the time, later wrote, the “force of the delirium [caused by the bombings] turned in the direction of a deportations crusade with the spontaneity of water flowing along the course of least resistance.”<sup>41</sup>

As in 1919, the focus of the government’s post-9/11 response on foreign nationals, and particularly Arab and Muslim foreign nationals, made its measures easier to “sell” to, and less likely to engender objection from the American public. When, as is often the case, a democracy responds to a crisis by targeting those who are a minority, or worse yet, unrepresented, the political process is unlikely to weigh the costs and benefits fairly. To the majority, it seems that they can have their security and their liberty too, as the government’s

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<sup>36</sup> MAYER, *supra* note 12, at 109-10, 113; *see also* Arar v. Ashcroft, 414 F. Supp. 2d 250, 256 (E.D.N.Y. 2006).

<sup>37</sup> *See* Arar, 414 F. Supp. 2d at 275.

<sup>38</sup> COLE, *supra* note 4, at 117-18.

<sup>39</sup> *Id.* at 118-19.

<sup>40</sup> *See generally* LOUIS F. POST, THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY: A PERSONAL NARRATIVE OF AN HISTORIC OFFICIAL EXPERIENCE 38 (1923).

<sup>41</sup> *Id.* at 307.

initiatives threaten not their rights, but the rights of others. For that reason, democracies are likely to overreact in times of crisis.

Given the focus of so many of the post-9/11 measures on foreign nationals, one might well expect that they would engender little popular opposition. Neither Congress nor a majority of the American public could be expected to object as the measures did not, for the most part, implicate the rights of citizens. What is perhaps most surprising, then, is the fact that on virtually all of these fronts, President Bush was nonetheless forced to retreat. When the secret August 1, 2002, Justice Department memo authorizing torture was leaked to the *Washington Post* and published on the *Post* website, the administration swiftly retracted the memo; it could not defend in public what it had rubber-stamped in secret.<sup>42</sup> Similarly, when the *New York Times* disclosed the existence of a secret National Security Agency program that had conducted sweeping warrantless electronic surveillance, in defiance of a criminal prohibition in the Foreign Intelligence Surveillance Act, the administration ultimately suspended the unilateral executive program and replaced it with one subject to judicial oversight and approval.<sup>43</sup>

When European nations objected to the “extraordinary rendition” program,<sup>44</sup> reported renditions of torture grew more infrequent. When, during Senate hearings on the nomination of Alberto Gonzales to be Attorney General, the administration disclosed for the first time that it had secretly interpreted the international treaty prohibition on cruel, inhuman, and degrading treatment not to apply to foreign nationals, held by the CIA outside of our borders, Congress resoundingly rejected that interpretation by enacting an amendment sponsored by Senator John McCain making clear that the prohibition applied to all persons held by the United States, irrespective of location or na-

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<sup>42</sup> See Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST (June 8, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>; COLE, *THE TORTURE MEMOS*, *supra* note 34, at 225-26 (discussing the Bush administration’s release of a replacement memo on interrogation tactics in December 2004). (see rule 16.6(f))

<sup>43</sup> See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all> (describing the warrantless monitoring of both international telephone calls and emails).

<sup>44</sup> See EU Parliament, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, at 6, 11 (Jan. 30, 2007), available at [http://www.europarl.europa.eu/comparl/tempcom/tdip/final\\_report\\_en.pdf](http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf) (reporting on “extraordinary arrests and renditions”).

tionality.<sup>45</sup>

And as noted above, and explicated in more detail by Gary Shaw, the Supreme Court ruled against the administration on four separate occasions with respect to the administration's asserted power to detain and try "enemy combatants," insisting that the courts, the Constitution, and the laws of war have an important role to play in checking executive power.

President Obama's 2008 presidential campaign featured sharp criticism of many of the above initiatives, and Obama introduced further reforms when he assumed office.<sup>46</sup> After his election, he closed the CIA's secret prisons, forbade "enhanced interrogation techniques," promised to close the prison at Guantánamo Bay within one year, and released several previously secret Office of Legal Counsel ("OLC") memos authorizing "enhanced interrogation techniques" long after the initial memo had been disclosed and formally rescinded.<sup>47</sup> In May 2009, President Obama gave a major speech on national security in which he insisted on the importance of fighting terrorism within the constraints of the rule of law and our Constitution.<sup>48</sup> He abandoned his predecessor's claim that as Commander-in-Chief, the President cannot be checked by the other branches in terms of how he "engages the enemy."<sup>49</sup> When a panel of the District of Co-

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<sup>45</sup> See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001, 119 Stat. 2739 (2005) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

<sup>46</sup> See *Obama Names Intel Picks, Vows No Torture*, ASSOCIATED PRESS, [http://www.msnbc.msn.com/id/28574408/ns/politics-white\\_house/#.UDMBmULv1UQ](http://www.msnbc.msn.com/id/28574408/ns/politics-white_house/#.UDMBmULv1UQ) (last updated Jan. 9, 2009) (statement of President Obama) ("We will abide by the Geneva Conventions. We will uphold our highest ideals.").

<sup>47</sup> *Id.*; Exec. Order No. 13492, 74 Fed. Reg. 4897, 4897-98 (Jan. 22, 2009); Press Release, President of the United States, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), [available at http://www.whitehouse.gov/the\\_press\\_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/](http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/); see also Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantánamo*, N.Y. TIMES (Jan. 21, 2009), [http://www.nytimes.com/2009/01/22/us/politics/22gitmo.html?\\_r=1](http://www.nytimes.com/2009/01/22/us/politics/22gitmo.html?_r=1).

<sup>48</sup> Press Release, President Barack Obama, Remarks by the President on National Security (May 21, 2009), [available at http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09](http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09).

<sup>49</sup> *Id.*; see also Ross Douthat, *All the President's Privileges*, N.Y. TIMES (June 23, 2012), [http://www.nytimes.com/2012/06/24/opinion/sunday/douthat-all-the-presidents-privileges.html?\\_r=1](http://www.nytimes.com/2012/06/24/opinion/sunday/douthat-all-the-presidents-privileges.html?_r=1) (explaining that the Obama administration has rejected former President Bush's "expansive view of executive authority"). Compare U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 32 n.15 (2006), [available at http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf](http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf) (set-



lumbia Circuit ruled that his detention authority at Guantánamo was not bound by the laws of war,<sup>50</sup> he took the extraordinary step of arguing that the court had granted him too much power, submitting a brief to the full court that insisted that in fact his powers are constrained by the laws of war.<sup>51</sup> The full court then vacated that aspect of the panel's decision.<sup>52</sup>

President Obama's record on respecting human rights and the rule of law remains far from perfect. He has relied on overbroad claims of secrecy, both to resist lawsuits on behalf of torture victims seeking redress,<sup>53</sup> and to keep from public view the contours of his "targeted killing" policy, pursuant to which he has authorized the killing even of an American citizen, without trial and far from any battlefield, without trial.<sup>54</sup> He has successfully resisted judicial review of detentions at Bagram Air Force Base in Afghanistan.<sup>55</sup> President Obama has continued his predecessor's sweeping interpretation of a law criminalizing "material support" to designated "foreign terrorist organizations," contending that it prohibits even advocacy of human rights and peace, including the filing of an amicus brief in the Supreme Court, if the advocacy is done on behalf of an organization that the government has labeled terrorist.<sup>56</sup> He has resisted all efforts to pursue accountability for the wrongs done by federal officials in the "war on terror," opposing even the formation of a nonpartisan blue-ribbon commission to report on what went wrong.<sup>57</sup> We now

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ting forth Bush administration's view of executive power), with David Cole, *Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief, and Executive Power in the War on Terror*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 17, 18 (2006) (discussing President Bush's claim that other branches cannot check the Commander-in-Chief's methods of "engaging the enemy").

<sup>50</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 871-72 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

<sup>51</sup> Brief for Appellees at 21, *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (No. 09-5051), 2009 WL 2957826.

<sup>52</sup> *Al-Bihani v. Obama*, 619 F.3d 1, 52-53 (D.C. Cir. 2010).

<sup>53</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1092-93 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>54</sup> See David Cole, *Killing Our Citizens Without Trial*, THE N.Y. REV. OF BOOKS (Nov. 24, 2011), <http://www.nybooks.com/articles/archives/2011/nov/24/killing-our-citizens-without-trial/>; David Cole, *Killing Our Citizens in Secret*, THE N.Y. REV. OF BOOKS, Oct. 9, 2011, <http://www.nybooks.com/blogs/nyrblog/2011/oct/09/killing-citizens-secret/>.

<sup>55</sup> *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

<sup>56</sup> Brief for Respondents Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (No. 08-1498, 09-89), 2009 WL 4951303 at 25-26, 33, 39.

<sup>57</sup> See C.I.A. *Interrogations*, N.Y. TIMES (July 1, 2011), [http://topics.nytimes.com/top/reference/timestopics/organizations/c/central\\_intelligence\\_age](http://topics.nytimes.com/top/reference/timestopics/organizations/c/central_intelligence_age)

know, for example, that President Bush and Vice-President Cheney personally authorized waterboarding, which Obama correctly acknowledges is torture, yet there has been no official effort to hold them accountable for such conduct.

Still, many of the government's initial measures have been abandoned. The United States' effort to protect its citizens from terrorist attacks by al Qaeda and the Taliban is being carried out today in a much more law-abiding manner than in the first several years after 9/11.

To what should we attribute these changes? With the exception of the McCain Amendment, Congress failed to play a checking role. It passed the USA PATRIOT Act in the weeks after the attacks.<sup>58</sup> It repealed habeas corpus for Guantánamo detainees in response to the Supreme Court's 2004 decision that construed the habeas corpus statute to grant the detainees review.<sup>59</sup> It largely ratified the president's military commissions in 2006 by reversing the Court's decision in *Hamdan v. Rumsfeld*<sup>60</sup> that the military commissions were illegal.<sup>61</sup>

The Supreme Court played more of a constraining role than Congress did, and more than the Court itself had played in past crises. Even here, however, the Court's rebuffs were limited. Two of its four decisions, *Boumediene v. Bush*<sup>62</sup> and *Rasul v. Bush*,<sup>63</sup> addressed only the threshold issue of whether detainees at Guantánamo could be heard in court at all. Those decisions, while ensuring access to the courts, did not rule on what substantive rights the detainees may have. Additionally, the Court has declined to review the critical question of what a court can order when it concludes that a detainee

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ncy/cia\_interrogations/index.html (reporting President Obama's refusal to "re-examine the treatment of prisoners and the use of harsh interrogation tactics").

<sup>58</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>59</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("No court, justice, or judge shall have jurisdiction to hear . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined . . . to have been properly detained as an enemy combatant or is awaiting such determination."); see also *Hamdan*, 548 U.S. at 575-76.

<sup>60</sup> 548 U.S. 557 (2006); see also *Hamdan*, 548 U.S. at 576 (arguing that Congress has failed to "expressly reserve federal courts' jurisdiction").

<sup>61</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

<sup>62</sup> 553 U.S. 723 (2008).

<sup>63</sup> 542 U.S. 466 (2004).

is not lawfully held, but cannot be returned to his country of origin because of a credible fear of torture.<sup>64</sup>

A third decision, *Hamdi v. Rumsfeld*,<sup>65</sup> established that United States citizens held as “enemy combatants” have a due process right to notice of the case against them and a meaningful opportunity to respond.<sup>66</sup> However, the Court left unresolved the specific process due, and the Bush administration circumvented further elaboration on that issue by releasing Hamdi rather than giving him a fair hearing.<sup>67</sup> The fourth detainee decision, *Hamdan*, which concerned the legality of President Bush’s military commissions, rested solely on statutory grounds and, as noted above, was effectively reversed by the Military Commissions Act of 2006.<sup>68</sup>

Moreover, while district courts exercising habeas corpus jurisdiction initially ruled in favor of the detainees in the large majority of cases they heard, the United States Court of Appeals for the D.C. Circuit has consistently sided with the government on its appeals, and has eased the government’s burden to demonstrate that a detainee is lawfully held.<sup>69</sup> The Supreme Court has repeatedly denied petitions for certiorari from these D.C. Circuit decisions.<sup>70</sup>

Meanwhile, the Supreme Court’s other post-9/11 national security decisions have all been decided in the government’s favor.<sup>71</sup>

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<sup>64</sup> See *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) (holding that federal judge may not order release of such a detainee into the United States), *vacated and remanded*, 130 S. Ct. 458 (2009), *reinstated and modified* 605 F.3d 1046 (D.C. Cir. 2010).

<sup>65</sup> 542 U.S. 507 (2004).

<sup>66</sup> *Id.* at 533.

<sup>67</sup> See *id.* at 535-39; see also Eric Lichtblau, *U.S., Bowing to Court, to Free “Enemy Combatant,”* N.Y. TIMES (Sept. 23, 2004), <http://www.nytimes.com/2004/09/23/politics/23hamdi.html> (“The [Bush administration] decided that rather than give Mr. Hamdi a hearing, it would simply negotiate his release.”).

<sup>68</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); see also *Hamdan*, 548 U.S. 557.

<sup>69</sup> Stephen Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1466 (2011).

<sup>70</sup> See, e.g., *Al-Bihani v. Obama*, 131 S. Ct. 1814 (2011) (denying certiorari); *Al-Madhwani v. Obama*, 132 S. Ct. 2739 (2012) (denying certiorari); *Uthman v. Obama*, 132 S. Ct. 2739 (2012) (denying certiorari); *Almerfed v. Obama*, 132 S. Ct. 2739 (2012) (denying certiorari); *Al Alwi v. Obama*, 132 S. Ct. 2739 (2012) (denying certiorari); *Latif v. Obama*, 132 S. Ct. 2741 (2012) (denying certiorari); *Al Kandari v. United States*, 132 S. Ct. 2741 (2012) (denying certiorari).

<sup>71</sup> See generally *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2731 (2010) (holding “that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments”).

The Court rejected two lawsuits seeking damages against Attorney General John Ashcroft for alleged unconstitutional detentions in the roundups that occurred in the wake of 9/11.<sup>72</sup> And the Court rejected a First Amendment challenge to the criminalization of pure speech advocating peace and human rights under the “material support” statute.<sup>73</sup>

The Court’s record on protecting human rights, in short, while better than in previous crises, is mixed. Moreover, most of the Bush administration’s curtailments of its aggressive initiatives enumerated above were not ordered by a court. No court ordered the abandonment of the first torture memo, an end to extraordinary rendition, the suspension of the NSA warrantless wiretapping program, the release of the secret torture memos, or the closure of the CIA’s black sites.<sup>74</sup> Approximately 600 men have been released from Guantánamo, but the vast majority was released without a court order, and none have been released under a non-appealable court order. While several district courts have ordered the release of Guantánamo detainees, every time the administration has appealed to the District of Columbia Circuit (“D.C. Circuit”), it has prevailed.<sup>75</sup> No court ordered the administration to abandon the Article II Commander-in-Chief theory of uncheckable executive power. Additionally, as noted above, when the D.C. Circuit ruled that international law did not play any role in constraining the president’s detention authority, President Obama in effect objected that the court had granted him too much unchecked authority, and insisted that his actions were bound by international law.

What, then, caused the United States, specifically the executive branch, to change course? In my view, they were much the same sorts of forces that worked to vindicate Alfred Dreyfus: not the formal separation of powers, but informal nongovernmental resistance in the name of upholding the rule of law. As in the Dreyfus affair, this resistance took the form of individuals, acting on their own and

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<sup>72</sup> *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (finding that “Ashcroft did not violate clearly established law”); *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009).

<sup>73</sup> *Humanitarian Law Project*, 130 S. Ct. at 2712.

<sup>74</sup> *See Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003) (holding that prisoners at the Guantánamo base had no rights that could be vindicated by a federal court).

<sup>75</sup> *See generally* Mark Denbeaux et al., *No Hearing Habeas: D.C. Circuit Restricts Meaningful Review* 2 (May 1, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2145554](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145554) (explaining that after the court’s decision in *Al Adahi*, the District Court for the District of Columbia has denied eleven out of twelve petitions for habeas corpus).

in association with others, speaking out, issuing critical reports, organizing protests, filing lawsuits, and generally challenging perceived abuses of power.<sup>76</sup> As in the Dreyfus affair, the media played a critical role, by disclosing secret rights abuses and writing countless editorials espousing the importance of adhering to the rule of law and the Constitution. Were it not for leaks reported in the media, we would not know about the torture at Abu Ghraib, the torture memo, the NSA warrantless wiretapping program, secret CIA prisons, and extraordinary renditions to torture.

In addition, international voices played a major role. Guantánamo, after all, held nationals from forty-two countries, and some of those countries objected strongly to the way their countrymen were treated there. A former United Kingdom Law Lord, Lord Steyn, dubbed Guantánamo a “legal black hole,” and 175 members of the Houses of Parliament filed an amicus brief on the Guantánamo detainees’ behalf in the Supreme Court.<sup>77</sup> Together, these informal forces are responsible, as much as the formal separation of powers, for reining in the United States’ “war on terror” in important ways.

What lessons, then, can we draw from the Dreyfus affair and the first post-9/11 decade? The first is that the rule of law and individual rights are all too vulnerable to fear and demagoguery in times of crisis. Designed to constrain short-sighted decision making by insisting on adherence to basic principles of fairness, constitutional rights often seem inconvenient obstacles in a crisis. For Dreyfus and many Arabs and Muslims after 9/11, the law was initially unable to offer much, if any, protection. But both affairs also suggest that the rule of law is more resilient than many cynics might think. Alfred Dreyfus was eventually exonerated. The rule of law recovered in significant measure from its hasty dismissal in the aftermath of the 9/11 terrorist attacks. However, in both instances, the tide turned only because individuals, associations, and nongovernmental organiza-

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<sup>76</sup> David Cole, *Where Liberty Lies: Civil Society and Individual Rights After 9/11*, 57 WAYNE L. REV. 1203, 1204 (2012).

<sup>77</sup> Lord Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, Twenty-Seventh F.A. Mann Lecture, STATEWATCH NEWS ONLINE (Nov. 25, 2003), <http://www.statewatch.org/news/2003/nov/guantanamo.pdf>; see also Brief of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Petitioners at 1, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-343, 03-334), 2004 WL 96766 (“Each of the *amici curiae* is a serving member of one of the two Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland: the House of Commons and the House of Lords.”).

tions mobilized behind the cause of justice for the vulnerable. When it comes to the reality of rights protections, much depends on the mobilization of the polity.

But as the other “affair” under examination in this conference—the lynching of American Jewish businessman Leo Frank—chillingly demonstrates, popular mobilization can go either way.<sup>78</sup> When, in 1915, Georgia’s governor commuted Frank’s death sentence for murder to life without imprisonment, based on substantial concerns with the fairness of the trial and the accuracy of the verdict, a mob gathered, abducted Frank from his cell, and lynched him.<sup>79</sup> Popular mobilization does not always take the side of human rights, and it can easily overwhelm legal bulwarks through brute force and terror.

Precisely because they help to establish and reinforce a culture of respect for equality and the rule of law, the assessments and reassessments of the “Dreyfus affair” that continue to this day in France are critically important for sustaining contemporary commitments to the rule of law. The fact that the case has become an “affair,” a narrative widely known, exhaustively studied, and frequently invoked is crucial, for the history of the “affair” reminds us of what can go wrong when we depart from principles of fairness and justice. Whether the story of the United States’ response to 9/11 will similarly become an “affair” from which the United States and others draw lessons about resisting the temptation to sacrifice our fundamental commitments on the backs of the most vulnerable, remains to be seen. As was the case with Dreyfus for many years, the particular lessons to be drawn from the post-9/11 era are a matter of deep contestation. President Bush, Vice-President Cheney, and their supporters have sought to portray their actions as tough, but necessary and reasonable, decisions to recalibrate security and liberty.<sup>80</sup>

Others, myself included, have insisted that the principal les-

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<sup>78</sup> See *Frank v. State*, 80 S.E. 1016, 1034 (Ga. 1914) (affirming the conviction and death sentence of defendant Leo Frank).

<sup>79</sup> See Curator, *The Judicial Conclusion of the Leo Frank Case (1913 to 1915) and it’s [sic] Aftermath (1982 to 1986)*, THE 1913 LEO FRANK CASE AND TRIAL RES. LIBR. (Apr. 26, 2012), <http://www.leofrank.org/conclusion/> (explaining how a lynch mob took justice into their own hands after Leo Frank’s death sentence was commuted to life imprisonment).

<sup>80</sup> See, e.g., David E. Sanger & Eric Schmitt, *Cheney’s Power No Longer Goes Unquestioned*, N.Y. TIMES (Sept. 10, 2006), <http://www.nytimes.com/2006/09/10/washington/10cheney.html?pagewanted=all> (statement of Mr. Cheney: “I have the freedom and the luxury, as does the president, of doing what we think is right for the country.”).

son of the first post-9/11 decade is that sacrifices in the rule of law are all too easy to make, generally unnecessary, and come at a great cost to the legitimacy and long-term success of a democracy's struggle against terrorism. The fact that Guantánamo has become one of the world's leading symbols for "lawlessness" suggests that the latter narrative has taken hold, at least in the rest of the world. The struggle over its meaning within the United States, however, continues.<sup>81</sup> At stake is nothing less than the nature of our constitutional culture. Whether, after the next attack, we repeat our mistakes or respond in a more resilient and rights-respecting manner depends ultimately on the lessons we learn as a nation from our recent past. Those who are committed to the protection of civil liberties and the rule of law must continue to work to ensure that the "Guantánamo affair" takes on the character of the "Dreyfus affair" in popular consciousness. At the end of the day, the strength of our legal protections turns on our culture's engaged commitment to the values of the Constitution, the rule of law, and human rights.

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<sup>81</sup> See *CNN Poll: Americans Split on Closing Guantanamo Bay Prison*, CNN POL. (Jan. 21, 2009), <http://politicalticker.blogs.cnn.com/2009/01/21/cnn-poll-americans-split-on-closing-Guantanamo-bay-prison> (showing the split among Americans over whether the Guantánamo Bay prison should be closed down).