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## The Long War, the Federal Courts, and the Necessity/Legality Paradox

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# BOOK REVIEW

## THE LONG WAR, THE FEDERAL COURTS, AND THE NECESSITY/LEGALITY PARADOX

LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR  
By Benjamin Wittes. PENGUIN PRESS. 2008. 306 pp. \$25.95.

*Reviewed by Stephen I. Vladeck \**

### I. INTRODUCTION

With an increasingly small number of exceptions, commentators from all points along of the political spectrum have found common cause in identifying a central critique of the counterterrorism policies of the Bush Administration: their unilateralism.<sup>1</sup> Whether one ascribes fault to the executive branch for not reaching out to Congress; to Congress for not asserting itself and for thereby shirking its constitutional prerogative; or to both, the argument that “things would be different” if the political branches had acted in concert—and if the President had not claimed such an unprecedented degree of inherent constitutional authority—

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\* Associate Professor, American University, Washington College of Law. An earlier version of this review was presented at the PrawfsFest junior faculty colloquium hosted by the University of Miami School of Law in December 2008, where it benefited from the comments of Charlton Copeland, Tommy Crocker, Ben Depoorter, Dave Fagundes, Jessie Hill, Chad Oldfather, Howard Wasserman, Lesley Wexler, Verity Winship, and especially Dan Markel. Thanks also to Nutan Patel and Maureen Roach for superlative research assistance, and to Adeen Postar for her tireless assistance in tracking down sources. In the interests of full disclosure, I should note that I have played a recurring role on the legal team for Salim Hamdan in the *Hamdan* litigation, and also co-authored an amicus brief on behalf of a group of law professors (and in support of the petitioners) in *Boumediene*. Needless to say, the views expressed herein are mine alone.

1. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 205 (2007).

has taken on an unassailable (if not tautological) quality.<sup>2</sup> Even proponents of broad executive power have recognized the irony of the Bush Administration's aggressive approach, i.e., "that the president has now ended up with lesser powers than he would have had if [the administration] had made less extravagant, monarchical claims."<sup>3</sup>

Given this trend, Ben Wittes's *Law and the Long War* might best be understood as the most sophisticated addition to this burgeoning literature to date.<sup>4</sup> Wittes, an editorial writer for the *Washington Post* during much of the period he discusses,<sup>5</sup> seizes on the argument that there would be far less legal uncertainty today had the Bush Administration sought—and had Congress provided—framework legislation governing issues ranging from the detention of "enemy combatants" to surveillance and even interrogation.<sup>6</sup> As Wittes notes in the opening pages of his volume, "The absence of the national legislature from some of the most significant policy discussions of our time has brought about deleterious consequences at a number of levels,"<sup>7</sup> including constitutional theory, sound policy, and, perhaps most significantly, programmatic legality.<sup>8</sup>

Wittes's book is not just a critique, though; it is also a call to action—a roadmap for where to go from here. And as Curtis Bradley has noted, "Unlike many commentators, he seems ge-

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2. One particularly telling example comes from Jack Goldsmith, the former Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel from October 2003 to June 2004. *See id.*

3. BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 355 (2008) (quoting Bruce Fein, Associate Deputy Attorney General during the Reagan Administration).

4. BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008).

5. Indeed, although they cannot be attributed directly to Wittes, a common theme of the *Post's* editorials during his tenure was the absence of meaningful congressional involvement in counterterrorism policy. *See, e.g.*, Editorial, *Congress Awakens*, WASH. POST, June 18, 2005, at A18; Editorial, *A New Approach*, WASH. POST, Nov. 30, 2003, at B6 ("One of the great problems with the legal response to 9/11 has been Congress's unwillingness to do its job and write law. . . . By inaction, it has left the resolution of such issues to a dialogue between the executive branch and the courts, one based on laws and precedents that simply are inadequate for an untraditional conflict against a shadowy, non-state enemy."); *see also* Editorial, *The Moussaoui Law*, WASH. POST, Aug. 4, 2003, at A14 ("Congress has sat on the sidelines far too long as important decisions were made concerning the legal response to 9/11.").

6. *See* WITTES, *supra* note 4, at 182, 188, 255.

7. *Id.* at 10.

8. *See id.* at 10–11.

nuinely interested in moving past partisan politics and finding workable solutions.”<sup>9</sup> To that end, there is much to commend in his discussion of *how* Congress might go about both conferring upon and limiting the authority the President claims on a host of controversial topics,<sup>10</sup> and we would all do well to take his proposals seriously. Thus, although much of what follows is particularly critical of one chapter of Wittes’s analysis, it should go without saying that his is an incredibly thoughtful and incisive book. Indeed, it is entirely *because* I hope its ideas will be widely disseminated that I thought it necessary to register a dissent to a small—albeit significant—part of Wittes’s discussion.

In particular, the discussion with which I disagree has to do with the courts. For, as dismayed as Wittes is with the performance of both the legislative and executive branches, he also saves a significant amount of criticism for the role of the judiciary—and the Supreme Court in particular—in the legal challenges arising out of the Bush Administration’s counterterrorism policies. Wittes devotes an entire chapter of his book to what he describes as “The Necessity and Impossibility of Judicial Review”<sup>11</sup>—the idea that the courts do have a role to play, but a role far different from that which, in his view, they are on the verge of playing:

Taken on their own, the Court’s pronouncements to date have been something less than dramatic. At the same time, they contain doctrinal seeds of a far more aggressive judicial posture—one that several of the justices clearly regard as desirable. The Court, in other words, has loaded and cocked its gun, positioning itself for a veritable sea change in the relationship between the federal branches in wartime. Yet it has skillfully done so without closing off any policy options for either the executive branch or the legislature in the short term. It has not actually pulled the trigger.<sup>12</sup>

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9. Curtis A. Bradley, *Terror and the Law: The Limits of Judicial Reasoning in the Post-9/11 World*, FOREIGN AFF., July/Aug. 2008, at 132 (reviewing WITTES, *supra* note 4).

10. For example, Wittes proposes a framework detention statute modeled on civil commitment laws for “the dangerously mentally ill,” a framework interrogation statute modeled on placing accountability for specific interrogation methods in the sole hands of the President, and a series of amendments to the Foreign Intelligence Surveillance Act—our current framework statute for non-criminal surveillance—centered on aggressive data mining. See WITTES, *supra* note 4, at 181–82, 213–14, 247–55. To be clear, I take issue with several aspects of each of these proposals. But I also think that, at least in these areas, our disagreements are more in implementation than in principle.

11. See *id.* at 103–30.

12. *Id.* at 104. Although his book was released one week after it was handed down,

Put another way, Wittes's central critique of the courts is that they have at once done too much and not enough. Notwithstanding the relatively soft steps that the courts have taken to date, he suggests that the judiciary has carved out a far more aggressive role for itself in reviewing decisions traditionally committed to the executive branch during wartime and that we risk either "paralyzing our response to terrorism or corrupting the judiciary" by putting the courts in a position where they are bound to enforce legal limits on military authority in all—or even most—cases.<sup>13</sup>

Although he does not expressly draw the analogy, Wittes's argument powerfully echoes Justice Jackson's dissent in *Korematsu v. United States*, which warned of the dangers of conflating military necessity with legality: "A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image."<sup>14</sup> Jackson's dissent is more famous for the "loaded weapon" metaphor,<sup>15</sup> but it is more important for this idea—that courts should not even *review* military decisions during wartime justified solely on grounds of necessity, lest they approve them for the wrong reasons.<sup>16</sup> Indeed, Jackson expressly refused to state an opinion on whether the military lacked the power to exclude and detain Korematsu—he believed only that it wasn't for the courts to say.<sup>17</sup> And there is

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Wittes was writing shortly *before* the Supreme Court's June 2008 decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The Court in *Boumediene* concluded that the Constitution's Suspension Clause *does* apply to the Guantánamo detainees and, thereby, invalidated section 7 of the Military Commissions Act of 2006—which precluded access to habeas corpus without, in the majority's view, providing an adequate alternative remedy. *Id.* at 2262, 2274. I discuss *Boumediene's* implications for Wittes's analysis in more detail below. See *infra* Part II.C. Wittes was also writing before the divided Fourth Circuit's decision in *Al-Marri v. Pucciarelli*, upholding the detention of a non-citizen as an enemy combatant within the territorial United States, 534 F.3d 213, 216 (4th Cir. 2008). The Supreme Court granted certiorari in December 2008, see *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (2008), although the case had not yet been scheduled for argument when this review went to print.

13. WITTES, *supra* note 4, at 122.

14. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

15. See *id.* ("[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution . . . the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.").

16. See *id.* at 245–46.

17. See, e.g., *id.* at 248 ("The military reasonableness of these orders can only be de-

much in common between his reasoning and Wittes's fears of the potential implications of aggressive judicial review of military decisionmaking.<sup>18</sup>

Thus, although I enthusiastically agree with Wittes's critique of Congress and the executive branch, it is with respect to the courts where we part company. In the review that follows, I suggest that Wittes's criticisms of the courts suffer from two flaws. First, as a descriptive matter, he unconvincingly dismisses (even while noting) a competing narrative of the role of the courts in the war on terrorism—as a model of judicial restraint, characterized by narrow holdings and implicit guidance to the political branches on how to avoid more serious confrontations.<sup>19</sup> It is only when the political branches have rejected that guidance (and when the legal confrontations have become unavoidable) that the Court has asserted itself further—what we might think of as an “incrementalist” model of judicial review, pursuant to which the Court reaches difficult constitutional questions only when all other possible interpretive remedies have been exhausted.<sup>20</sup> That the courts in general (and the Supreme Court, in particular) have otherwise not reached out to decide unnecessary questions and have rested their holdings on statutory grounds wherever possible is hardly evidence of undue judicial interference, or of the courts sitting on the edge of the precipice with which Wittes is so concerned.<sup>21</sup> Wittes's narrative may therefore not only be entirely speculative, but based on a future reality that is rather unlikely.

If anything, my own view is that the Supreme Court has been *too* passive, missing opportunities to identify limits on the government's authority in a number of cases of equal—or even greater—significance than the Guantánamo litigation. As I note in more detail below, there have been any number of terrorism-related cases over the past seven years where the Court *declined* to review lower court decisions endorsing the government's position,<sup>22</sup> denials that are curiously omitted from Wittes's review.

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terminated by military superiors.”); *id.* (“I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task.”).

18. See WITTES, *supra* note 4, at 103.

19. *Id.* at 112.

20. See, e.g., Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1573–80 (2000).

21. See *id.* at 109.

22. Examples (in no particular order) include the el-Masri state-secrets case, see El-

But whatever the merits of the argument that the courts have not been aggressive *enough*, it strikes me as entirely backwards to cast judicial restraint as symptomatic of creeping judicial aggressiveness.<sup>23</sup>

Second, and perhaps more importantly, with regard to Wittes's deeper concern about the role the courts are potentially set to play going forward,<sup>24</sup> my own view is that Wittes's critique is misplaced for the same reason that Justice Jackson was wrong in *Korematsu*—not in his criticism of the majority's *result*, but in his suggestion that courts should not be in the business of reviewing military actions held out to be justified by "necessity" *at all*.<sup>25</sup> Jackson's central thesis was that we must not conflate military necessity with legality,<sup>26</sup> but whereas he thus argued for the courts to sidestep deciding such cases altogether,<sup>27</sup> my own (perhaps controversial) view is that the need to police such a line provides all the more reason for the courts to step in—to reinforce that a distinction *does* exist between the two, and that even the most necessary of actions might nonetheless be unlawful.

If anything, having courts carefully demarcate the line between legality and necessity may force the relevant actors to have particularly strong justifications for crossing that line—a result I am not convinced we should discourage. If a particular action is suffi-

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Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007); the second round of the Jose Padilla detention litigation, *see* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006); the NSA wiretapping controversy, *see* ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008); the scope of federal government's power to detain "material witnesses," *see* United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003), *cert. denied*, 543 U.S. 1056 (2005); the sharp circuit split over the Justice Department's authority to close "special interest" deportation hearings to the public, *compare* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003), *with* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002); and a number of others.

23. Surprisingly, most of the reviews of Wittes's book to date have either neglected his critique of the courts or have generally not found fault with it. *See, e.g.*, Michael J. Glennon, *Trying Terror: Two Books on How Our Legal System Is Adjusting to Terrorism*, WASH. POST, Sept. 14, 2008, at BW4; Eric Posner, "Law and the Long War," N.Y. POST, July 27, 2008, available at <http://www.nypost.com/seven/07272008/postopinion/postopbooks/law-and-the-long-war-121770.htm>; Gabriel Schoenfeld, *The Home-Front Battle Heats Up*, WALL ST. J., June 27, 2008, at A11. The one exception is Bradley, who alludes to the "incrementalist" view I detail below. *See* Bradley, *supra* note 9, at 136.

24. *See* WITTES, *supra* note 4, at 104.

25. *Compare* WITTES, *supra* note 4, at 120–21, *with* *Korematsu v. United States*, 323 U.S. 214, 247–48 (1944) (Jackson, J., dissenting).

26. *See* *Korematsu*, 323 U.S. at 244–45.

27. *See id.* at 245–48.

ciently necessary to preserve the union, it should not matter whether or not it is legal.<sup>28</sup> But to suggest that courts have no business reviewing conduct carried out under the rubric of military necessity is to give such necessity prominence (if not permanence) over the rule of law. Like Wittes, Justice Jackson thought this a necessary sacrifice to preserve the role of the courts in the long-term.<sup>29</sup> I disagree.

To unpack these points, I begin in Part II with a thorough recounting of Wittes's critique of the courts, taking seriously both his narrative of the role the courts have played and his prescription for the dangerous role he sees the courts as being on the verge of playing. Part I is thus heavy on quotations and light on analysis; my goal is simply to frame the discussion that follows as objectively as possible.

In Part III, I offer an alternative narrative of the courts after September 11. Part III begins with the cases on which Wittes focuses and suggests how the decisions are actually models of sound judicial restraint, with the courts finding the narrowest grounds available for their decisions. Part III then recounts many of the terrorism-related cases that Wittes omits from his discussion, where the Supreme Court left intact lower court decisions embracing the government's position. As Part III explains, even if Wittes's narrative of decisions like *Hamdi*,<sup>30</sup> *Rasul*,<sup>31</sup> and *Hamdan*<sup>32</sup> is convincing, his focus on cases the Court has *heard* is skewed (and necessarily underinclusive),<sup>33</sup> underselling the judicial restraint often inherent in the Court's denial of review. Wittes's speculative critique of the role he fears the courts are set to play may well be undermined by the idea that the courts will

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28. Indeed, as I note below, this is one reading—albeit not Wittes's—of what President Lincoln meant in his July 4, 1861 message to Congress, where he responded to Chief Justice Taney's decision in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), with his famous rhetorical question: “[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?” Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

29. See *Korematsu*, 343 U.S. at 246 (Jackson, J., dissenting).

30. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

31. *Rasul v. Bush*, 542 U.S. 466 (2004).

32. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

33. Wittes also leaves out the Court's first decision in the *Padilla* litigation, where the Court ducked the merits of Padilla's challenge to his detention as an “enemy combatant,” holding instead that he filed in the wrong court. See *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).



stay out of the way whenever possible. Indeed, and perhaps even more tellingly, in all of the cases where the Court denied review, it thereby left intact lower court decisions favoring the *government's* position—including in *Padilla II*, where there was at least some suggestion that the government deliberately tried to *avoid* Supreme Court review of a favorable Fourth Circuit decision.<sup>34</sup>

Finally, in Part IV, I turn to the deeper theme of Wittes's critique—that the aggressive role for the courts seemingly contemplated in the decisions thus far is actually *dangerous*. After revisiting the analogous argument made by Justice Jackson in *Korematsu*, I suggest that, like Jackson before him, Wittes would sacrifice too much in the short term for an entirely speculative payoff in the long term. The courts may fail to draw the *proper* distinction between what is necessary and what is legal—as the Supreme Court spectacularly failed to do in *Korematsu*<sup>35</sup>—but the critical point of Part IV is that this potential shortcoming is not a reason for the Court not to try.

## II. THE WITTES NARRATIVE

The framework for Wittes's descriptive summary is his suggestion that the Supreme Court's decisions to date have operated on three layers:

On the surface, the rhetorical and most politically immediate level, the decisions represented a harsh rebuke of the administration and an attempt to rein it in. Go down a layer to the practical substantive importance of the decisions, however, and that rebuke looks like something of a feint—less than initially meets the eye. But still a level below that, at the layer of the tectonic plates of the relationship between the branches, the decisions paradoxically portend far *more* than meets the eye. All of these layers are real; all operate at once. And to understand what judicial review in the war on terror has been so far, its simultaneous triviality and momentousness, one needs to understand all three.<sup>36</sup>

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34. See *Padilla v. Hanft*, 432 F.3d 582, 585 (4th Cir. 2005) (noting that the government's conduct had "given rise to at least an appearance that the purpose of these actions may be to avoid consideration of our decision by the Supreme Court").

35. See *infra* note 152 (discussing the *coram nobis* proceedings that led to the invalidation of the convictions in *Korematsu* and *Hirabayashi*).

36. WITTES, *supra* note 4, at 104–05.

Thus, before moving onto his broader critique of the role the courts are set to play going forward, I begin by recapping his view of what the courts have done so far.

### A. *The Layers of Judicial Review and the Gathering Storm*

Wittes's layers of judicial review are fairly easy to map onto the three Supreme Court decisions he discusses. Beginning from the top (the "harsh rebuke" layer): In *Rasul*, the government had argued that the federal courts had no authority to entertain habeas petitions filed by the Guantánamo detainees, a position on which it had prevailed in both the D.C. district court<sup>37</sup> and the D.C. Circuit.<sup>38</sup> Nevertheless, a 6-3 majority of the Court disagreed.<sup>39</sup> Relying on the precedents providing that the federal habeas statute countenanced jurisdiction so long as the district court's process could reach the detainee's *custodian*,<sup>40</sup> the Court held—over a spirited dissent from Justice Scalia<sup>41</sup>—that the detainees' habeas petitions *could* proceed in the lower courts.<sup>42</sup>

Although the Court's decision the same day in *Hamdi* is a bit more complicated, it was similarly cast as a "stinging rebuke"

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37. See *Rasul v. Bush*, 215 F. Supp. 2d 55, 72–73 (D.D.C. 2002).

38. See *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003). After the D.C. Circuit's decision in *Al Odah*, the Ninth Circuit reached the opposite conclusion in *Gherebi v. Bush*, 352 F.3d 1278, 1304–05 (9th Cir. 2003).

39. See *Rasul v. Bush*, 542 U.S. 466 (2004).

40. See *id.* at 478–79. Justice Kennedy, who concurred in the judgment, did not agree with the majority's methodology, and instead focused his analysis on why the cases before the Court were distinguishable from *Johnson v. Eisentrager*, 339 U.S. 763 (1950), including a detailed focus on the unique legal status of Guantánamo. See *Rasul*, 542 U.S. at 487–88 (Kennedy, J., concurring).

41. See *id.* at 488–506 (Scalia, J., dissenting).

42. *Id.* at 485 (majority opinion). In a maneuver that went (and remains) largely unnoticed, the Court subsequently sent a clear message, notwithstanding the Ninth Circuit's decision in *Gherebi*, see *supra* note 38, that all Guantánamo habeas petitions were to proceed in the D.C. district court—and nowhere else. See *Bush v. Gherebi*, 542 U.S. 952 (2004) (mem.). In its order "GVRing" (granting, vacating, and remanding) *Gherebi* two days after it decided all three of the terrorism cases on its docket, the Court did not reference its decision in *Rasul*; instead, it invoked its decision in *Padilla*, in which it had held that *Padilla* had filed his habeas petition in the wrong district court. See *id.* (citing *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)). On remand, the Ninth Circuit got the message, ordering that the petitions pending before it be transferred to Washington. See *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004). Although the order is not reported, the same result happened to *Hamdan's* initial habeas petition, which had been filed in the U.S. District Court for the Western District of Washington. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 570 (2006).

to the Bush Administration when it was decided.<sup>43</sup> Indeed, all but one of the Justices rejected the sweepingly deferential Fourth Circuit opinion, which had concluded that the government, by simply offering an affidavit, had provided Hamdi—a U.S. citizen—with all the process to which he was due in challenging his designation as an “enemy combatant.”<sup>44</sup> As Wittes notes, *Hamdi* thus rejected a proposition for which “[t]he administration fought tooth and nail,” i.e., “that an American citizen held domestically as an enemy combatant has no right to counsel and no right to respond to the factual assertions that justify his detention.”<sup>45</sup> And it did so emphatically. As Justice O’Connor wrote:

[T]he position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.<sup>46</sup>

Finally, in *Hamdan*,<sup>47</sup> the Court struck down military tribunals established by President Bush pursuant to a November 2001 Military Order.<sup>48</sup> Specifically, the Court held that the tribunals exceeded the limits that Congress had created for such proceedings—limits that the Court’s World War II-era decision in *Ex parte Quirin*<sup>49</sup> had recognized.<sup>50</sup> Although the Court also concluded that Congress had been insufficiently clear in its attempt

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43. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion); see also Editorial, *Reaffirming the Rule of Law*, N.Y. TIMES, June 29, 2004, at A26.

44. See *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003); see also *Hamdi v. Rumsfeld*, 337 F.3d 335, 341–45 (4th Cir. 2003) (Wilkinson, J., concurring in the denial of rehearing en banc).

45. WITTES, *supra* note 4, at 105.

46. *Hamdi*, 542 U.S. at 535–36 (citation omitted).

47. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

48. See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (2006).

49. 317 U.S. 1, 9 (1942).

50. See, e.g., *Hamdan*, 548 U.S. at 591–93 & n.23.

to take away the Court's jurisdiction to decide the case,<sup>51</sup> the gravamen of the decision was that the military commissions at Guantánamo could not go forward in their then-present form.<sup>52</sup> As importantly, the Court in *Hamdan* was unequivocal in holding that Common Article 3 of the Geneva Conventions—and its humane treatment and fair trial norms—applied to the conflict with Al-Qaeda.<sup>53</sup> Like *Hamdi* and *Rasul* before it, *Hamdan*, as Wittes notes, thus “left the administration scrambling to alter its litigating positions, and . . . prompted changes in both law and administrative procedures.”<sup>54</sup>

The middle layer is where things start getting a bit foggier. In *Hamdi*, for example, the government actually prevailed on several key points, including the (until-then contested) issue of whether the military conflict in Afghanistan was actually a “war” for constitutional purposes,<sup>55</sup> and whether the Authorization for Use of Military Force (“AUMF”),<sup>56</sup> enacted one week after September 11, provided authority for the detention of U.S. citizens—at least those captured on the battlefield<sup>57</sup>—notwithstanding the Non-Detention Act and its mandate that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”<sup>58</sup>

On these points, Justice Breyer turned out to be the swing vote, as he joined Justice O'Connor's plurality opinion,<sup>59</sup> rather than the separate dissents penned by Justices Souter (who, along with Justice Ginsburg, thought that Congress had not authorized Hamdi's detention)<sup>60</sup> and Scalia (who, with Justice Stevens,

51. See *id.* at 572–84.

52. See *id.* at 611–12. This was also the central conclusion of Justice Kennedy, whose concurrence with most of Justice Stevens's majority opinion formed the crucial fifth vote. See *id.* at 636–55 (Kennedy, J., concurring in part).

53. See *id.* at 629–31 (majority opinion); *id.* at 641–43 (Kennedy, J., concurring in part).

54. WITTES, *supra* note 4, at 105.

55. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–19 (2004) (plurality opinion).

56. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

57. See *Hamdi*, 542 U.S. at 519.

58. 18 U.S.C. § 4001(a) (2006); see also Stephen I. Vladeck, Policy Comment, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen “Enemy Combatants,”* 112 YALE L.J. 961, 961 (2003).

59. See *Hamdi*, 542 U.S. at 509.

60. See *id.* at 539, 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

thought that Congress could not, at least not without suspending habeas corpus).<sup>61</sup> And although the Court had otherwise soundly rejected the government's view of the content of Hamdi's due process rights,<sup>62</sup> the plurality still left a substantial amount of discretion to the government in fashioning a more appropriate process, providing only a few clues as to what would not be constitutionally adequate.<sup>63</sup>

More straightforwardly, *Rasul* and *Hamdan* were both effectively statutory interpretation decisions, and therefore left open the possibility that Congress might (as it subsequently would) attempt to override them, a point that both Justices Breyer and Kennedy drove home in their separate concurrences in *Hamdan*.<sup>64</sup> With the exception of a tantalizing footnote,<sup>65</sup> the *Rasul* majority never even mentioned constitutional concerns; and *Hamdan*'s lone constitutional holding was that the President could not contravene otherwise valid congressional limits on his authority.<sup>66</sup> Thus, "the administration's dramatic rhetorical setbacks in these cases amounted in practical terms merely to a few procedural hoops to jump through before doing as it wished."<sup>67</sup>

Finally, with what Wittes calls the "tectonic" layer,<sup>68</sup> we begin to see the true outlines of his critique of the role of the courts to date. In his words:

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61. See *id.* at 554, 573 (Scalia, J., dissenting).

62. See *id.* at 532–33 (plurality opinion).

63. See *id.* at 533–34.

64. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary."); *id.* at 636–37 (Kennedy, J., concurring in part) ("[This] is a case where Congress, in the proper exercise of its powers as an independent branch of government . . . has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches.").

65. See *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) ("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.'" (quoting 28 U.S.C. § 2241(c)(3) (2006)).

66. See *Hamdan*, 548 U.S. at 591–93 & n.23; see also Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 933, 960–63 (2007) (summarizing the significance of this holding).

67. WITTES, *supra* note 4, at 108.

68. *Id.* at 109.

The decisions seem to threaten a completely different judicial posture in the war on terrorism, one that is a kind of mirror image of the executive power model the administration has adopted. . . . Under this vision, which clearly attracts the Court's more liberal justices, the Court asserts the inherent authority to review executive military actions. It sets its own jurisdiction for such review without regard to the wishes of the two political branches or to the historical limits of judicial power. In the absence of clear substantive law to apply using that jurisdiction, the justices mold substantive rights for detainees out of international humanitarian-law principles the United States has either never embraced at all or never clearly implemented in its domestic statutes.<sup>69</sup>

Thus, Wittes seizes on language in both *Rasul* and *Hamdan* where the Justices at least seemed to hint that more was going on than simply statutory interpretation.<sup>70</sup> Similarly, he focuses particular emphasis on how the *Hamdan* Court construed the Detainee Treatment Act of 2005<sup>71</sup> as not withdrawing its jurisdiction,

making its own power a matter of statutory default and forcing Congress to write it out of the picture if it chose—even as it held out the possibility that such legislation might be futile and that the Court would then fall back on a more fundamental legal basis for intervention.<sup>72</sup>

In short, Wittes sees the Court as speaking softly, but preparing to wield an unprecedented stick. Especially because the Bush Administration chose not to read between the lines, Wittes concludes that a far more aggressive role for the courts was practically inevitable.<sup>73</sup>

### B. *The Danger of Confusing Necessity with Legality*

At this point, Wittes finally delves into the trickier subject of why such “aggressive” review by the courts would be inappropriate.<sup>74</sup> First, he suggests that the principle that would require judicial review of detention decisions is difficult to detach from one that would require judicial review of *any* lawsuit where “people abroad . . . might ascribe their misfortunes, real or im-

69. *Id.*

70. *See id.* at 109–11.

71. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739, 2739–44 (codified as amended at 10 U.S.C. § 801 note, 28 U.S.C. § 2241, and 42 U.S.C. § 2000dd and note (2006)).

72. WITTES, *supra* note 4, at 110–11.

73. *See id.* at 112–13.

74. *See id.* at 112–16.

aged, to American governmental behavior alleged to defy legal norms. Why is this area so different that jurisdiction unthinkable in those instances is constitutionally required here?"<sup>75</sup>

Second, he also criticizes aggressive judicial review as being based on "an unrealistic assessment of judicial competence and capacity to evaluate military actions."<sup>76</sup> Judges in that position, he suspects, will either "defer absolutely to the military's judgment" or "will try to apply criminal justice evidentiary standards to combat operations."<sup>77</sup> Neither prospect, he suggests, is particularly appealing.<sup>78</sup>

Finally, he gets to the "deeper problem"—that "we don't mean quite the same thing by 'law' here [in the context of international conflict] as we do in civilian contexts. The principles are fuzzier—tinged with caveats that amount to 'except when we really have to' or 'it's different when our guys do it.'"<sup>79</sup> Expressly invoking President Lincoln's controversial suspension of habeas corpus at the outset of the Civil War (and his decision to ignore Chief Justice Taney's rejection of that conduct in *Ex parte Merryman*<sup>80</sup>), Wittes suggests that "law can never fully regulate international conflict the way it regulates more civilized projects[,] and . . . the process of applying law to warfare changes law as much as it changes warfare."<sup>81</sup> Ultimately, then, Wittes's central problem with aggressive judicial review is this lacuna:

Necessity breeds exceptions, situations in which principled rules don't apply because they can't apply—unless, that is, the principle in question is the ugly one that the ends justify the means. Judges are exactly the wrong people to ask permission to break the rules, either because they will refuse (as Taney did) in situations in which the president cannot honor the refusal or because they will acquiesce to

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75. *Id.* at 116.

76. *Id.* at 117.

77. *Id.*

78. *Id.*

79. *Id.* at 117–18.

80. *Ex parte Merryman*, 17 F. Cas. 144, 146 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9,487).

81. WITES, *supra* note 4, at 120. For a more in-depth analysis of the complicated layers involved in *Merryman*, see Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 397–408 (2007). Useful discussions of *Merryman* abound. For a short list, see *id.* at 392 n.3.

steps that the judiciary ought not permit and certainly ought not cloak in the respectability of law.<sup>82</sup>

Of course, Wittes notes, such a possibility has not yet arisen in the war on terrorism.<sup>83</sup> But for those, like Wittes, who believe that “[t]here is an honorable place for judicial silence,” the judicial review that the Supreme Court appears to be contemplating in its rhetoric in *Rasul*, *Hamdi*, and *Hamdan* “risks obliterating its capacity for [such] silence.”<sup>84</sup>

Curiously, though, after marching through arguments for why the courts should leave themselves room to stay out of particular cases, Wittes then turns to arguments for why aggressive judicial review is appropriate—if not abundantly necessary—to review the detentions at Guantánamo.<sup>85</sup> Although he traces the need for review more to the defects in the established process than to the rights of the detainees, Wittes seems to agree that habeas corpus is an appropriate vehicle for reviewing the legality of detention simpliciter, at least once Congress has taken far more concrete steps to define both the substantive limits of the government’s detention authority and the procedures appertaining to detention decisions.<sup>86</sup> While courts should not make front-end policy on those points, Wittes suggests, they are the proper forum for back-end review.<sup>87</sup>

Given his rather substantial caveat, one wonders which cases Wittes is actually worried about having the courts review. He never says so expressly, but there is one particularly telling clue shortly after his invocation of Lincoln and Taney, where he asks the reader to “[c]onsider now the interrogations of Khalid Sheikh Mohammed and certain other high-value detainees.”<sup>88</sup> Reading between the lines, a cynic might view Wittes’s critique of the courts as reflecting a specific concern that the judiciary might pass upon the legality of the interrogation methods deployed at Guantánamo and elsewhere, and that nothing good would come from such review whether the government’s conduct was legal, necessary, both, or neither.

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82. WITTES, *supra* note 4, at 120–21.

83. *See id.* at 122.

84. *Id.*

85. *See id.* at 124–28.

86. *See id.* at 128–29.

87. *See id.* at 129.

88. *Id.* at 121.



### C. *Subsequent Developments: Boumediene and Kiyemba*

Finally, before turning to my own views, it is worth emphasizing that Wittes was (as I surely am) writing before several more recent developments, including in his case the Supreme Court's June 2008 decision in *Boumediene v. Bush*,<sup>89</sup> and the subsequent lower court decisions in the Guantánamo detention cases, especially those involving the Uighurs.<sup>90</sup>

Wittes expected *Boumediene*—indeed, he even predicted both the result<sup>91</sup> and the morass that the Court's decision would leave in its wake.<sup>92</sup> What he probably did not expect was that, so closely on the heels of *Boumediene*, the D.C. Circuit would decide, in the context of a Combatant Status Review Tribunal ("CSRT") appeal under the Detainee Treatment Act,<sup>93</sup> that a detainee fell outside the government's detention authority;<sup>94</sup> thus, the government either had to transfer or release that detainee.<sup>95</sup> Nor, I suspect, did he think a district court would then so quickly order the release into the United States of that detainee (and sixteen of his brethren) in the context of a habeas petition (although that decision was reversed on appeal).<sup>96</sup> For that matter, I suspect it may also have come as a surprise to Wittes that one of the more conservative members of the D.C. federal bench would take the lead in the post-*Boumediene* habeas litigation, ordering the release of a

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89. 128 S. Ct. 2229 (2008).

90. See, e.g., *Kiyemba v. Obama*, No. 08-5424, 2009 WL 383618, at \*8 (D.C. Cir. Feb. 18, 2009) (reversing a district court decision that had ordered the release of seventeen Uighur detainees into the United States); *Parhat v. Gates*, 532 F.3d 834, 835 (D.C. Cir. 2008) (overturning a Combatant Status Review Tribunal decision that the petitioner, an ethnic Uighur, was an enemy combatant).

91. See WITTES, *supra* note 4, at 111, 256–58.

92. See *id.* at 127–28.

93. That is, a suit Congress had *provided* for, rather than one that the Court held was constitutionally compelled.

94. Subsequently, the D.C. Circuit concluded that *Boumediene*, in recognizing the availability of habeas corpus jurisdiction in the district courts, had effectively vitiated its jurisdiction to review CSRTs. See *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Jan. 9, 2009). But see *Boumediene*, 128 S. Ct. at 2275 (2008) (emphasizing that “both the DTA and the CSRT process remain intact”).

95. See *Parhat*, 532 F.3d at 836.

96. See *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 34 (D.D.C. 2008), *rev'd sub nom.* *Kiyemba v. Obama*, No. 08-5424, 2009 WL 383618, at \*1 (D.C. Cir. Feb. 18, 2009).

number of detainees—including the lead plaintiff in *Boumediene*.<sup>97</sup>

Although these developments were still unfolding as of this writing, they may validate parts of his descriptive summary of the pre-2008 Supreme Court decisions.<sup>98</sup> On one reading, they suggest that the courts were in fact ready to play the more aggressive role Wittes saw them waiting to play in *Rasul*, *Hamdi*, and *Hamdan*. But perhaps they were just the courts taking the last in a series of incremental steps: *Rasul* provided that the federal courts had jurisdiction;<sup>99</sup> *Boumediene* provided that Congress could not take that jurisdiction away;<sup>100</sup> *Parhat* provided that the Uighurs were not properly classified as “enemy combatants”;<sup>101</sup> and the district court’s decision in *In re Guantanamo Bay Detainee Litigation* suggested that the appropriate remedy, if the government could not legally transfer the detainees to any other country, was release.<sup>102</sup> Is this “aggressive” judicial review, or creeping incrementalism? To that question, I now turn.

### III. A COMPETING NARRATIVE OF THE SUPREME COURT AFTER 9/11

In this Part, I suggest another view of the Court’s terrorism jurisprudence—that the Court has taken a remarkably modest and incremental approach to its decision making in significant terrorism cases. I begin with the cases the Court *has* decided, before moving on to a point Wittes neglects: the significant terrorism cases in which the Court *denied* review.

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97. See, e.g., *el Gharani v. Bush*, No. 05-429, 2009 WL 88056 (D.D.C. Jan. 14, 2009); *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008). Judge Leon had previously held that there is “no viable legal theory” on which some of the same detainees could prevail in a habeas petition. See *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005), *rev’d* by *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), and *abrogated* by *Hamden v. Gates*, 565 F. Supp. 2d 130 (D.D.C. 2008).

98. WITTES, *supra* note 4, at 110–13.

99. *Rasul v. Bush*, 542 U.S. 466, 480–81 (2004).

100. *Boumediene*, 128 S. Ct. at 2262.

101. *Parhat v. Gates*, 532 F.3d 834, 835–36 (D.C. Cir. 2008).

102. 581 F. Supp. 2d 33, 42–43 (D.D.C. 2008), *rev’d sub nom.* *Kiyemba v. Obama*, No. 08-5424, 2009 WL 383618 (D.C. Cir. Feb. 18, 2009).

### A. *The Supreme Court's Incremental Decision Making*

One way to view the multiple layers Wittes identifies in the Supreme Court's war-on-terrorism decisions is as a conversation between the Court and the political branches in several acts. Act I included the trio of 2004 decisions.<sup>103</sup> There, the Court sent a very subtle message to the political branches, noting that (1) habeas corpus jurisdiction—and thus judicial review—*would* extend to Guantánamo; and (2) the process afforded Hamdi was *not* (and would not be) enough to satisfy the Constitution, without specifying what process *would* suffice.<sup>104</sup> Moreover, if one is willing to read between the lines, one can also find five votes against the government's authority to detain Padilla as an enemy combatant.<sup>105</sup> However, the Court did not expressly say so, opting instead to rely on a procedural technicality and to force Padilla to re-file his claims in South Carolina.<sup>106</sup>

In a sense, the government appeared to receive part of the message sent in these cases. Just over one week after the decisions were handed down, the Department of Defense announced that it was establishing CSRTs at Guantánamo to afford each of the detainees an individualized status determination.<sup>107</sup> By the fall, the government had negotiated a release agreement with Hamdi, rather than pressing ahead with a minimum of evidence.<sup>108</sup>

But the government also pressed ahead with the military tribunals established pursuant to President Bush's November 2001

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103. See *supra* notes 30–31, 33.

104. See WITTES, *supra* note 4, at 105.

105. In particular, four of the dissenters in *Hamdi*—Justices Stevens, Scalia, Souter, and Ginsburg—would presumably have reached a similar result on the merits in *Padilla*. And Justice Breyer, who joined Justice O'Connor's plurality opinion in *Hamdi*, joined in a key footnote to Justice Stevens's *Padilla* dissent, which noted that, "Consistent with the judgment of the Court of Appeals, I believe that the Non-Detention Act prohibits—and the Authorization for Use of Military Force Joint Resolution does not authorize—the protracted, incommunicado detention of American citizens arrested in the United States." *Rumsfeld v. Padilla*, 542 U.S. 426, 455, 464 n.8 (2004) (Stevens, J., dissenting) (citations omitted).

106. See *id.* at 451 (majority opinion).

107. See Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

108. See Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15.

Military Order.<sup>109</sup> Moreover, after the Court granted certiorari in *Hamdan* to review the legality of those efforts,<sup>110</sup> Congress attempted—albeit ineptly—to strip the Court of the power to so decide via the jurisdiction-stripping provisions of the Detainee Treatment Act (“DTA”).<sup>111</sup> In response, the Court in *Hamdan* held that the tribunals were inconsistent with limits that Congress had placed on the President’s authority, and that Congress’s attempt to take away its jurisdiction to say so was insufficiently clear.<sup>112</sup>

The Court, though, went further. In the key footnote noted above,<sup>113</sup> Justice Stevens suggested that congressional limits on presidential power are presumptively enforceable (notwithstanding the Bush Administration’s strenuous arguments to the contrary).<sup>114</sup> And Justice Stevens held that Common Article 3 of the Geneva Conventions applies to the conflict with Al-Qaeda.<sup>115</sup> He also concluded, in a part of the opinion where he was speaking for a plurality, that the offense with which Hamdan was charged—conspiracy—was not recognized as triable by a military commission under the laws of war.<sup>116</sup> Again, the decision left considerable room for the political branches to respond. But it also began to suggest, however implicitly, that there might be some limits on that discretion, including limits on Congress’s power over the jurisdiction of the federal courts; limits derived from Common Article 3; and limits on the substantive range of offenses jurisdiction over which Congress *could* bestow upon military tribunals.<sup>117</sup>

Again, Congress responded, and again, it apparently received some—but not all—of the message. The Military Commissions

109. See generally *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004) *rev’d by Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

110. *Hamdan v. Rumsfeld*, 546 U.S. 1002 (2005) (mem.).

111. See Detainee Treatment Act of 2005, § 1005(e) Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739, 2741-43 (codified as amended at 28 U.S.C. § 2241 (2006)). The DTA was enacted less than six weeks after the cert. grant in *Hamdan*. See *id.*; *Hamdan*, 546 U.S. at 1002.

112. See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

113. See *supra* note 64 and accompanying text.

114. See *Hamdan*, 548 U.S. at 593 n.23.

115. See *id.* at 630-31; see also *id.* at 642-43 (Kennedy, J., concurring in part) (agreeing that Common Article 3 applies).

116. See *id.* at 600 (plurality opinion).

117. I briefly take up the extent to which the Constitution imposes substantive limits on military jurisdiction in Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. COLLOQUY 172, 174-76, 178-80 (2008).

Act of 2006 (“MCA”) provided the substantive authority for military commissions the Court found lacking in *Hamdan*, but did much more.<sup>118</sup> It incorporated a sweeping definition of who could be tried by military commissions,<sup>119</sup> a broad list of offenses over which such commissions would have jurisdiction (including conspiracy);<sup>120</sup> a provision precluding the enforcement of any rights derived from the Geneva Conventions;<sup>121</sup> and, most controversially, the jurisdiction-stripping provision the Court subsequently invalidated in *Boumediene*.<sup>122</sup> Thus, the Court finally had to answer the question it had assiduously avoided in the earlier cases—whether the Guantánamo detainees actually have constitutional rights.<sup>123</sup> Even then, Justice Kennedy’s opinion for the majority in *Boumediene* held only that the Constitution’s Suspension Clause protects the detainees; the Court simply did not reach whether—and to what extent—other constitutional provisions might apply.<sup>124</sup>

Even in one case the Court sidestepped, it found a way to send a subtle message to the government. In his opinion concurring in the denial of certiorari after the proceedings on remand in *Padilla*, Justice Kennedy (joined by Chief Justice Roberts and Justice Stevens) was fairly clear that the Court would step back in if the government sought to re-detain Padilla as an enemy combatant

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118. See Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

119. See 10 U.S.C. § 948c (giving commissions jurisdiction over “[a]ny alien unlawful enemy combatant”); § 948a(1)(A) (defining “unlawful enemy combatant”).

120. See § 950v(b)(28).

121. See Military Commissions Act § 5(a), 120 Stat. at 2631 (codified at 28 U.S.C. § 2241 note (2006)).

122. See 28 U.S.C. § 2241(e)(1); *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008). The MCA also includes another jurisdiction-stripping provision—codified at 10 U.S.C. § 950j(b)—that purports to bar collateral habeas review of all military commission proceedings. See Military Commissions Act § 3(a)(1), 120 Stat. 2623 (codified at 10 U.S.C. § 950j(b) (2006)). Although *Boumediene* calls the constitutionality of that provision into some doubt, see, e.g., Vladeck, *supra* note 117, at 181–82, the district courts confronted with that question have thus far punted. See *Khadr v. Bush*, 587 F. Supp. 2d 225, 234 (D.D.C. 2008); *Hamdan v. Gates*, 565 F. Supp. 2d 130, 135 (D.D.C. 2008).

123. See, e.g., *Rasul v. Bush*, 542 U.S. 466, 485 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).

124. See *Boumediene*, 128 S. Ct. at 2262; see also *Kiyemba v. Obama*, No. 08-5424, 2009 WL 383618, at \*37 (D.C. Cir. Feb. 18, 2009) (holding, notwithstanding *Boumediene*, that the Fifth Amendment’s Due Process Clause does not apply to Guantánamo).

once his criminal proceedings had terminated, directly invoking the Court's authority to entertain "original" habeas petitions.<sup>125</sup>

The point of the above summary is not to attempt an exhaustive recounting of these decisions, but to only suggest that one could easily find in these cases judicial modesty, rather than aggressiveness. The Court was willing to draw the line when it needed to be drawn, but each successive decision used only slightly stronger reasoning, leaving room for the political branches to attempt to avoid forcing the Court's hand. In the end, one can hardly blame the Court if Congress and the executive branch failed to take heed.

### B. *Cases Denied / Opportunities Missed*

In addition, as much as the Court's decisions in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene* represented a repudiation of at least part of the government's position, Wittes omits from his narrative the far greater number of cases where governmental counterterrorism policies were challenged, the government prevailed in the lower courts, and the Supreme Court denied review.<sup>126</sup> Although it is axiomatic that denials of certiorari have no precedential value (and thus one cannot read too much into the decisions not to decide),<sup>127</sup> the point of including these cases in the discussion is because one might have expected the Court—were it in favor of a more "aggressive" model of judicial review—to have left fewer of these decisions (and, *a fortiori*, the challenged governmental policies) intact.

For example, well over a year before it decided *Hamdi*, *Rasul*, and *Padilla*, the Court was asked to resolve a circuit split over the constitutionality of the "Creppy Memo"—a directive adopted by the Chief Immigration Judge ten days after September 11 that ordered the closure to the public of all "special interest" removal proceedings without individualized case-by-case determinations.<sup>128</sup> The Sixth Circuit struck down the policy as violating the

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125. See *Padilla v. Hanft*, 547 U.S. 1062, 1063–64 (2006) (Kennedy, J., concurring in the denial of certiorari).

126. See *supra* note 22.

127. See, e.g., *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)).

128. Memorandum from Michael J. Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (2001), available at <http://f11.findlaw.com/news.find>

First Amendment,<sup>129</sup> whereas a divided panel for the Third Circuit disagreed, voting to uphold the rule.<sup>130</sup> Notwithstanding the marked division of authority on a question of constitutional significance, the Supreme Court refused to intervene, denying the petition for certiorari to review the Third Circuit's decision.<sup>131</sup> In a (seemingly) related case, the Court denied certiorari to review the proceedings before the Eleventh Circuit in the case of Mohamed Kamel Bellahouel.<sup>132</sup> Bellahouel's habeas petition challenging his immigration detention had been kept secret by the lower courts, which sealed not just the filings, but the entire docket.<sup>133</sup>

During the period leading up to its decisions in *Hamdi*, *Padilla*, and *Rasul*, the Court also denied certiorari in three other significant terrorism cases,<sup>134</sup> including a divided D.C. Circuit decision over whether the names of post-September 11 detainees were the proper subject of a Freedom of Information Act ("FOIA") request;<sup>135</sup> a Second Circuit decision adopting an expansive interpretation of the government's authority to detain material witnesses;<sup>136</sup> and the first-ever decision by the Foreign Intelligence Surveillance Court of Review, holding that the USA PATRIOT Act ("Patriot Act")<sup>137</sup> was constitutional in relaxing the standard

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law.com/hdocs/docs/aclu/creppy092101memo.pdf.

129. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710 (6th Cir. 2002).

130. See *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 204–05, 221 (3d Cir. 2002).

131. See *N. Jersey Media Group, Inc. v. Ashcroft*, 538 U.S. 1056 (2003) (mem.).

132. See *M.K.B. v. Warden*, 540 U.S. 1213 (2004) (mem.).

133. See Dan Christensen, *After 2 Years, Broward Man ID'd by Court*, BROWARD DAILY BUS. REV., Mar. 31, 2004, at 1.

134. The Court also refused to hear an appeal from a Ninth Circuit decision dismissing for lack of standing an attempt to challenge the Guantánamo detentions by individuals with no relationship to the detainees. See *Coalition of Clergy v. Bush*, 310 F.3d 1153, 1156 (9th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003).

135. See *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 920 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

136. See *United States v. Awadallah*, 349 F.3d 42, 49, 51 (2d Cir. 2003), *cert. denied*, 543 U.S. 1056 (2005). The district court's decision in *Awadallah* had created an internal division of authority within the Southern District of New York. Compare *United States v. Awadallah*, 202 F. Supp. 2d 55, 76 (S.D.N.Y. 2002), with *In re Application of the United States for a Material Witness Warrant*, 213 F. Supp. 2d 287, 288 (S.D.N.Y. 2002).

137. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (codified at 50 U.S.C. §§ 1804 and 1823 (2006)). Before September 11, courts had read into the Foreign Intelligence Surveillance Act ("FISA") a requirement that foreign intelligence surveillance be the "primary purpose" for obtaining the FISA warrant in order to mitigate potential Fourth Amendment concerns. See, e.g., *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991); *United States v. Truong Dinh Hung*, 629 F.2d

for whether evidence obtained through Foreign Intelligence Surveillance Act (“FISA”) warrants could be used in criminal investigations.<sup>138</sup> There were others, as well, but until the Court granted certiorari in *Rasul* in November 2003, it was not clear whether the Court would *ever* get involved in the myriad challenges to the Bush Administration’s counterterrorism policies—hardly the mark of a Court seeking to carve out a new aggressive role for the judiciary.<sup>139</sup>

After the Court’s first foray into counterterrorism issues in the 2004 trilogy, the same pattern repeated itself. As noted above, the Court denied certiorari over three dissenting votes when Jose Padilla’s case came back up after remand,<sup>140</sup> with Justice Kennedy (joined by Chief Justice Roberts and Justice Stevens) explaining in a rare concurrence that Padilla’s intervening criminal indictment (and transfer to civilian criminal custody in Miami) effectively mooted his challenge to his military detention.<sup>141</sup> The Court also denied certiorari to review the Fourth Circuit’s sweeping endorsement of the state secrets privilege as precluding a damages suit arising out of the “extraordinary rendition” program,<sup>142</sup> and it denied certiorari to review a fascinating Federal Circuit decision

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908, 915 (4th Cir. 1980).

138. See *In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002). Because proceedings before the FISA Court of Review are non-adversarial, the ACLU first sought permission from the Supreme Court for leave to intervene for the purpose of filing a petition for certiorari, permission the Court denied. See *ACLU v. United States*, 538 U.S. 920 (2003) (mem.). The Court of Review thereby reversed the Foreign Intelligence Surveillance Court, which had published a decision for the first time earlier in 2002 adopting rigorous minimization procedures to avoid the question of whether the Patriot Act’s “significant purpose” amendment violated the Fourth Amendment. See *In re All Matters Submitted to the Foreign Intelligence Surveillance Ct.*, 218 F. Supp. 2d 611, 625 (FISA Ct. 2002). More recently, the U.S. District Court for the District of Oregon squarely disagreed with the FISA Court of Review, striking down the “significant purpose” provision on Fourth Amendment grounds in *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1042–43 (D. Or. 2007). But see *In re Directives Pursuant to Section 105b of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1011–12 (FISA Ct. Rev. 2008) (reaffirming the “significant purpose” standard and recognizing a “foreign intelligence surveillance” exception to the Fourth Amendment’s warrant requirement).

139. See *Rasul v. Bush*, 540 U.S. 1003 (2003) (mem.).

140. See *Padilla v. Hanft*, 423 F.3d 386, 390 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006).

141. See *Padilla*, 547 U.S. at 1062–64 (Kennedy, J., concurring in the denial of certiorari). Other judges were less sanguine about the propriety of the government’s transparent attempt to evade Supreme Court review. See *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005).

142. See *El-Masri v. United States*, 479 F.3d 296, 299–300 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007).



dismissing a takings claim arising out of the destruction of a Sudanese pharmaceutical plant on the ground that the President had determined that the plant was “enemy property,” and that such a determination was not reviewable by the courts.<sup>143</sup>

Notwithstanding a poignant dissent from the denial of rehearing en banc by Judge Kozinski,<sup>144</sup> the Court denied review of a Ninth Circuit decision affirming a criminal conviction for providing material support to a terrorist organization, even though the defendants had no opportunity to contest whether the organization was in fact properly designated as such.<sup>145</sup> The Court also refused to review perhaps the most significant of the Fourth Circuit’s many decisions in the Zacarias Moussaoui proceedings,<sup>146</sup> where the Court of Appeals reversed the district court’s holding that Moussaoui’s inability to directly examine potentially exculpatory witnesses in the government’s custody warranted taking the death penalty off the table.<sup>147</sup> The Court also sidestepped an opportunity to pass on the legality of the National Security Agency (“NSA”) wiretapping program, denying certiorari to review a divided Sixth Circuit decision that had dismissed a challenge to the program on standing grounds.<sup>148</sup> Indeed, even in *Boumediene*, the Court initially *denied* certiorari to review the D.C. Circuit’s conclusion that the Suspension Clause did not “apply” to the

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143. See *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1348–49, 1350, 1363–64 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).

144. See *United States v. Afshari*, 446 F.3d 915, 915–22 (9th Cir. 2006) (Kozinski, J., dissenting from the denial of rehearing en banc).

145. See *United States v. Afshari*, 426 F.3d 1150, 1155–56 (9th Cir. 2005), *cert. denied sub nom. Rahmani v. United States*, 549 U.S. 1110 (2007).

146. See *United States v. Moussaoui*, 382 F.3d 453, 456–57 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005). In another significant post-9/11 criminal case, the Court considered—and denied—a petition for certiorari from a U.S. citizen who challenged his conviction for various terrorism-related offenses on grounds including that evidence was obtained based upon torture while he was in the custody of Saudi Arabia, and that various classified evidence was admitted at trial in violation of his Sixth Amendment rights—all claims the Fourth Circuit rejected. See *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, No. 08-464, 2009 WL 425086 (Feb. 23, 2009).

147. See *United States v. Moussaoui*, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003), *rev’d*, 382 F.3d 453, 482 (4th Cir. 2004).

148. See *ACLU v. NSA*, 493 F.3d 644, 648 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008). This came after the district court had ruled in favor of the plaintiffs on the merits. See *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006).

Guantánamo detainees,<sup>149</sup> before reversing course and granting review almost three months later.<sup>150</sup>

The above list is by no means exhaustive. And reasonable people will surely disagree about the propriety of review in each (if not all) of the decisions noted above. But to fully understand the role the Court has played (and contemplates that the federal courts will play going forward), it is worth noting the number of instances where the Court left lower court decisions favoring the government's position intact.

#### IV. NECESSITY VS. LEGALITY: THE SHADOW OF JUSTICE JACKSON

Even if Wittes is correct—that notwithstanding the role the courts have played thus far, we can expect far more aggressive (and invasive) judicial review going forward—that still leaves the question of why such review should be discouraged. Thus, in this Part, I turn to the comparable argument made by Justice Jackson in *Korematsu*, and explain how the shortcomings in Jackson's logic largely undermine Wittes's argument as well.<sup>151</sup>

##### A. *Jackson's Dissent in Korematsu: The Legality/Necessity Paradox*

Recall that Justice Black's opinion for the majority in *Korematsu* controversially sustained the conviction of Fred Korematsu—an American citizen of Japanese descent—under an Act of Congress that made it a crime to violate particular military orders, including the order mandating Korematsu's exclusion from "Military Area No. 1," i.e., the West Coast.<sup>152</sup> In reality, everyone knew

149. See *Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir. 2007), cert. denied, 549 U.S. 1328–29 (2007). As in *Padilla*, Justices Stevens and Kennedy (but not the Chief Justice) wrote separately to explain their basis for denying review. See *Boumediene*, 549 U.S. at 1328 (Stevens & Kennedy, JJ., respecting the denial of certiorari).

150. See *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (mem.).

151. For as much as Wittes's critique of judicial review matches up with the critique offered by Justice Jackson in his dissent in *Korematsu*, what is perhaps most surprising is that Wittes never even mentions Jackson, and only cites *Korematsu* once—as an example of exactly Jackson's point, i.e., that the courts have erred in the past when failing to distinguish between legality and necessity. See WITTES, *supra* note 4, at 121 & 278 n.13.

152. See *Korematsu v. United States*, 323 U.S. 214, 216–17 (1944). Korematsu's conviction was subsequently invalidated on a writ of *coram nobis*, after it became clear that the government had affirmatively misrepresented the military conditions leading to its assertion that the exclusion orders were still "necessary" by mid-1943. See *Korematsu v. United*

that those subject to the exclusion order were sent to internment camps, and so in upholding Korematsu's conviction (even while applying strict scrutiny), the Court would implicitly be upholding the camps. As it turns out, by the time the Court decided *Korematsu* on December 18, 1944, the Roosevelt Administration had beaten it to the punch, announcing the day before that the camps were to be closed.<sup>153</sup>

Given this fact, had the Court accomplished anything in sustaining Korematsu's conviction? In Jackson's view, it had, and nothing good.<sup>154</sup> At the heart of his relatively short dissent is the idea that the Court had set a disastrous precedent by upholding an exclusion scheme based entirely on race.<sup>155</sup> As he wrote:

[I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . . [H]ere is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.<sup>156</sup>

Although Jackson thus suggested that he would invite the invalidation of such a law during peacetime, he was more circumspect about the propriety of such judicial review during wartime.<sup>157</sup>

This was not a new theme for Justice Jackson. He had been puzzling over the dilemma of judicial review of the war power—what he called “the Achilles Heel of our constitutional system”<sup>158</sup>—since his tenure as Attorney General (before his eleva-

States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). It also now appears that the government made similar material misrepresentations to the Court in *Korematsu's* key predecessor case—*Hirabayashi v. United States*. See 320 U.S. 81 (1943), *vacated*, *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); Eric L. Muller, *Hirabayashi: The Biggest Lie of the Greatest Generation* (unpublished manuscript, Aug. 18, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1233682](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1233682). *Hirabayashi's* conviction was also later invalidated in a *coram nobis* proceeding. See *Hirabayashi*, 828 F.2d at 593–94. See generally PETER IRONS, *JUSTICE DELAYED: THE RECORD OF THE JAPANESE-AMERICAN INTERNMENT CASES* (1989) (documenting the *coram nobis* proceedings).

153. See Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1935 (2003).

154. See *Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting).

155. *Id.*

156. *Id.* at 243; see also John Q. Barrett, *A Commander's Power, a Civilian's Reason: Justice Jackson's Korematsu Dissent*, 68 LAW & CONTEMP. PROBS. 57, 59–61 (2005).

157. See *Korematsu*, 323 U.S. at 243–44.

158. See Dennis J. Hutchinson, “The Achilles Heel” of the Constitution: *Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455, 468. The metaphor comes from a draft concurrence in *Hirabayashi v. United States*, 320 U.S. 81 (1943) that Justice Jackson did not publish. See Hutchinson, *supra* at 467–68.

tion to the Supreme Court in 1941).<sup>159</sup> And as Jack Goldsmith<sup>160</sup> and Dennis Hutchinson<sup>161</sup> have separately noted, Jackson drafted opinions in the case of the Nazi saboteurs<sup>162</sup> and in two of the other Japanese exclusion cases attempting to more fully state his views.<sup>163</sup> For various reasons, he declined to publish those opinions, but with Justice Black's majority opinion in *Korematsu*, he could wait no longer.<sup>164</sup>

Rejecting the idea that the exclusion orders could be upheld so long as they were "reasonable," Jackson was adamant that the propriety of the order was not just a difficult question; it was one entirely beyond judicial competence:

When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. . . . Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.<sup>165</sup>

In other words, Jackson was arguing for a form of martial law—and for the courts to leave military decisions to military commanders.<sup>166</sup> And, in a passage that reverberates quite force-

159. See generally Barrett, *supra* note 156, at 68–70.

160. Jack Goldsmith, *Justice Jackson's Unpublished Opinion in Ex parte Quirin*, 9 GREEN BAG 2D 223, 223 (2006).

161. Hutchinson, *supra* note 158, at 456.

162. See *Ex parte Quirin*, 317 U.S. 1, 20–21 (1942).

163. The two other cases were *Hirabayashi*, 320 U.S. at 104, in which the Court sustained the constitutionality of the West Coast curfew orders, and *Ex parte Endo*, 323 U.S. 283, 303–04 (1944), decided the same day as *Korematsu*, in which the Court ordered the release of a 14-year-old Japanese-American girl whose loyalty was conceded by the government.

164. For the atmospheric, see generally Hutchinson, *supra* note 158, at 456–57. In particular, Hutchinson suggests that Jackson's decision to take his views public were motivated at least in part by "the trampling of the Maginot Line he thought had been fixed in *Hirabayashi*"—that Jackson had been under the impression that he had foregone publishing his views in the earlier cases in exchange for the Court going no further than what it had there sanctioned. See *id.* at 488.

165. *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting).

166. See *id.*

fully today (especially vis-à-vis current debates over the state secrets privilege), Jackson noted:

In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.<sup>167</sup>

Maintaining that discretion was the better part of valor, Jackson suggested that this dilemma counseled against judicial review.<sup>168</sup> He “would not lead people to rely on this Court for a review that seems to me wholly delusive.”<sup>169</sup> Instead, he concluded, “If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint.”<sup>170</sup> So framed, Jackson’s dissent was (and remains) incredibly controversial—what Peter Irons has called “a curious kind of judicial schizophrenia.”<sup>171</sup> Professor Hutchinson suggests, though, that it was emblematic of a choice between two equally unsatisfying alternatives:

Jackson conceded after the war that his opinion in *Korematsu*, disclaiming power to review military orders, risked inviting the government to frustrate habeas corpus by simply declaring martial law and suspending the writ. But he was moved by what he viewed to be a graver possibility: that if he, and the Court, found the military order constitutionally invalid, and consequently that “100 district courts” began granting relief to detainees, then the War Relocation Authority might refuse to comply with the courts’ orders. For Jackson, that would drive a stake through the heart of the rule of law. He thought the possibility hypothetical, if not likely, but he was not willing to take the risk, either in *Korematsu* or in unforeseen cases in the future.<sup>172</sup>

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167. *Id.* at 245.

168. As Professor Barrett has suggested, Jackson not only suggested that the courts were incompetent, but that “civilian judges *never* would presume to declare a wartime military measure unconstitutional.” Barrett, *supra* note 156, at 62.

169. *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting).

170. *Id.*

171. PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES 332 (1983).

172. Hutchinson, *supra* note 158, at 489 (citation omitted).

Instead, Jackson “bet on the future,” assuming first “that the excesses of the executive branch will be self-curing once the emergency expires,” and second, that “as long as the judiciary withholds its formal approval of those excesses, the Constitution will remain intact.”<sup>173</sup>

### B. *The Limits of Jackson’s Dissent—and of Wittes’s Argument*

As much as Jackson’s dissent has been celebrated for attacking the substance of Black’s majority decision, its argument against judicial involvement has been roundly criticized.<sup>174</sup> In what became the authoritative critique of *Korematsu*, Eugene Rostow denounced Jackson’s opinion as “a fascinating and fantastic essay in nihilism.”<sup>175</sup> Even Professor Hutchinson, among Jackson’s more sympathetic commentators, noted two obvious flaws: “some emergencies may not be resolved quickly or clearly, and judicial abstention may popularly and even formally be understood as tacit approval.”<sup>176</sup>

These concerns are even more poignant when applied to Wittes’s work. Twice as much time has passed since Congress enacted the AUMF as that which elapsed between Pearl Harbor and V-E Day. Moreover, the war on terrorism has the potential to drag on for generations, which would turn temporary exercises of military necessity into permanent policy, a prospect Jackson himself railed against in a 1948 concurrence.<sup>177</sup>

But I also think the risk runs deeper. Even if one takes Jackson’s logic at face value, it holds not just that the underlying military conduct is unreviewable, but that the assertion of military necessity (as justifying the decision not to review the underlying conduct) is itself unreviewable. Just like recent scholarly debates over whether procedurally valid suspensions of habeas corpus are substantively reviewable by the courts (that is, whether the sus-

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173. *Id.* at 493.

174. See, e.g., Barrett, *supra* note 156, at 65; Charles Fairman, *Associate Justice of the Supreme Court*, 55 COLUM. L. REV. 445, 453 n.30 (1955).

175. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 510 (1945).

176. Hutchinson, *supra* note 158, at 493.

177. See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146–47 (1948) (Jackson, J., concurring) (“I cannot accept the argument that war powers last as long as the effects and consequences of war, for if so they are permanent—as permanent as the war debts.”).

pension of habeas corpus itself prevents the courts from passing upon the legality of the suspension),<sup>178</sup> the underlying idea is that once the government makes a threshold procedural showing, there is nothing for the courts to do. What, then, would stop the government from invoking necessity even when the circumstances did not warrant such a claim?

Moreover, even if one believes that suspensions *are* unreviewable, there is a critical difference between the Suspension Clause and the issue here: at least with regard to the former, there is a colorable claim that the Constitution *itself* ousts the courts from reviewing whether there is a “Case [ ] of Rebellion or Invasion [where] the public Safety may require” suspension—and even then, only for the duration of the suspension.<sup>179</sup> In contrast, Jackson’s argument sounds purely in pragmatism—courts should not review whether military necessity exists because such review will lead either to the courts affirming an unlawful policy, or to the potential that the political branches will simply ignore a judicial decision invalidating such a policy.<sup>180</sup> Like Jackson before him, Wittes seems to believe that the threat to liberty posed by judicial deference in that situation pales in comparison to the threat posed by judicial review.

The problem is that such a belief is based on a series of assumptions that Wittes does not attempt to prove. First, he assumes that the executive branch would ignore a judicial decision invalidating action that might be justified by military necessity.<sup>181</sup> While Jackson may arguably have had credible reason to fear such conduct (given his experience with both the *Gold Clause Cases*<sup>182</sup> and the “switch in time”),<sup>183</sup> a lot has changed in the past

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178. Compare, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 577–78 (2004) (Scalia, J., dissenting), with *Amanda L. Tyler, Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 359 (2006). If the entire point of suspending habeas corpus is to prevent judicial review, one might argue that it is circular to allow courts to first decide if the suspension is valid. Of course, that only begs the question of whether the suspension of habeas corpus *authorizes* the underlying detention, or merely postpones the judicial review thereof. See, e.g., *Trevor W. Morrison, Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007) (debating this question).

179. See U.S. CONST. art. I, § 9, cl. 2.

180. See *Korematsu v. United States*, 323 U.S. 214, 246 (Jackson, J., dissenting); Hutchinson, *supra* note 158, at 489.

181. See WITTES, *supra* note 4, at 111.

182. *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Perry v. United States*, 294 U.S. 330 (1935).

183. See Hutchinson, *supra* note 158, at 489–90.

six-and-a-half decades, to the point where I, at least, cannot imagine a contemporary President possessing the political capital to squarely refuse to comply with a Supreme Court decision. But perhaps I am naïve.<sup>184</sup>

Second, Wittes assumes that a judicial decision invalidating action that might be justified by military necessity will therefore preclude the relevant government official from taking such action.<sup>185</sup> Of course, it will not; it merely will require that official to make the “moral” choice between doing what is legal and doing what he or she believes is “right.” Just as legality does not follow from necessity, illegality does not compel the conclusion that the particular conduct is unnecessary. I do not mean to devolve into metaphysics; there is a rich and deep literature on “states of exception” and I could not pretend to do anything here other than refer interested readers to more detailed discussions.<sup>186</sup> Rather, I mean only to point out that this is a relevant consideration that Wittes’s critique overlooks. There may in fact be something to gain from requiring government officials to break the law in such extreme circumstances—and there is a lot to lose by not doing so.

Finally, at a more basic level, there is history, to which we—unlike Justice Jackson—are privy. The government affirmatively misled the Court in *Korematsu*, just as it apparently did in *Hirabayashi*, claiming military necessity where none truly existed.<sup>187</sup> Given this history—and any number of additional episodes—we cannot afford to have faith that the government would only choose to invoke Jackson’s “military necessity” exception to judicial review in cases of urgent need, especially when the invocation itself is unreviewable. In the end, I think Wittes (like Jackson before him) is right to focus our attention on the potential dilemma that courts face in these cases. Their solution, however, would be significantly worse than the disease.

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184. For an argument that the President could, in some cases, constitutionally act in such a manner, see William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1809–10 (2008).

185. See generally WITTES, *supra* note 4, at 108–11 (discussing the problems associated with courts reviewing military decisions).

186. For just a smattering, see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011 (2003); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989); and Benedetto Fontana, *Notes on Carl Schmitt and Marxism*, 21 CARDOZO L. REV. 1515 (2000).

187. See Rostow, *supra* note 175, at 520–23.



## V. CONCLUSION

Dissenting in *Olmstead v. United States*, the Supreme Court's famous 1928 decision sustaining a criminal conviction based upon evidence obtained through a warrantless wiretap, Justice Brandeis rejected the argument that the wiretap could be justified as an exercise of law enforcement powers justified by necessity.<sup>188</sup> In his words:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.<sup>189</sup>

As the story usually goes, Brandeis's view of the constitutionality of such warrantless wiretapping—or lack thereof—was subsequently vindicated when the Warren Court overruled *Olmstead* in *Berger v. New York*<sup>190</sup> and *Katz v. United States*.<sup>191</sup> Such conventional wisdom, though, may well have been another casualty of September 11, given the Bush Administration's own admission that it engaged in a systematic program of domestic warrantless wiretapping,<sup>192</sup> a program that, even if constitutional, seems difficult to reconcile with the exclusivity provisions of FISA<sup>193</sup>—at least prior to the 2008 amendments thereto.<sup>194</sup>

Putting the substance of Brandeis's dissent aside (at least for the moment), the above-quoted passage may be the perfect epigraph to describe the Bush Administration's conduct of the war on terrorism, which consists of policies that have been pursued by “men [and women] of zeal, well-meaning but without understand-

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188. 277 U.S. 438, 471, 479–80 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347, 353 (1967).

189. *Id.* at 479 (Brandeis, J., dissenting).

190. 388 U.S. 41, 50–51, 63–64 (1967).

191. 389 U.S. 347 (1967).

192. See U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), *available at* <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

193. 18 U.S.C. § 2511(2)(f) (2006) (“[P]rocedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted.”).

194. See FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified in scattered sections of 8, 18, and 50 U.S.C.).

ing.”<sup>195</sup> Jane Mayer certainly thought so—her important recent book, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Values*,<sup>196</sup> placed Brandeis’s sentiment right on the back cover, just above President Bush’s assertion in his 2003 State of the Union address that “[o]ne by one, the terrorists are learning the meaning of American justice.”<sup>197</sup>

Mayer’s book is significant here in another respect, as well, for it is the most thorough account yet of the government’s mistreatment of detainees—and the role that senior governmental officials played in promulgating policies directly leading to that mistreatment. As Mayer’s account makes clear, even with the jousting over definitional semantics, there can no longer be any question that the U.S. government has tortured detainees in its custody during the war on terrorism.<sup>198</sup> And as I suggested above, I suspect that it is the specter of courts reviewing torture claims that prompts the judicial review paradox of which Wittes is so concerned.

One could argue, as Alice Ristroph (among others) has, that torture is a singularly bad example of a situation where courts should defer on whether torture is “necessary” to those with “expertise.”<sup>199</sup> After all, as Ristroph notes, the real “experts” all seem to agree that torture is counterproductive.<sup>200</sup>

Even if torture actually worked, and even if one accepted that the completely fantastical ticking-bomb hypothetical could actually happen someday,<sup>201</sup> there would still be government officials claiming the need to use such extreme authority when it was not strictly necessary. That is Brandeis’s point: even the most well-intentioned of officers will cloak in the guise of “necessity” actions that are neither necessary nor appropriate, which is exactly *why*

195. See *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

196. JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN VALUES* (2008).

197. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 86 (Jan. 28, 2003).

198. See Scott Horton, *Justice After Bush: Prosecuting an Outlaw Administration*, HARPER’S MAG., Dec. 2008, at 49–50.

199. Alice Ristroph, *Professors Strangelove*, 11 GREEN BAG 2D 245, 250–51 (2008) (reviewing ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2008)); see also Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569, 560–75 (2008) (reviewing POSNER & VERMEULE, *supra*).

200. See Ristroph, *supra* note 199, at 247–49, 252–54 & nn.6–12.

201. See *id.* at 253.

judicial review is so essential.<sup>202</sup> Otherwise, the rule of law becomes little more than the rule of men,<sup>203</sup> and the courts become little more than rubber stamps for unreviewable (and ultimately unjustified) claims of necessity—like the government's in *Korematsu*.

The great irony in all of this is Justice Jackson. Profoundly affected by his experience as lead American prosecutor at the Nuremberg war crimes tribunal, where he witnessed firsthand the chaos and calamity that could ensue when courts stopped serving as a check on the tyranny of the majority,<sup>204</sup> he became more circumspect later in his career about whether the courts *should* ever defer to executive claims of need, even while still worrying about whether they would. As he concluded his landmark concurrence in *Youngstown*:

With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.<sup>205</sup>

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202. For much more on the inherent dangers posed by arguments based upon "necessity," see generally Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. REV. 221 (2008).

203. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

204. See generally Dennis J. Hutchinson, *Justice Jackson and the Nuremberg Trials*, 1996 J. SUP. CT. HIST. 105.

205. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).