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THE PASSIVE-AGGRESSIVE VIRTUES

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Reduced to its simplest, the crux of Justice Jackson’s enigmatic¹ dissent in *Korematsu*² was that the federal courts—and the Supreme Court in particular—should avoid deciding wartime cases turning on claims of exigency.³ In Justice Jackson’s view, such disputes presented the judiciary with two equally unappealing alternatives: either uphold the government’s conduct, and thereby risk the consequences of lending legal imprimatur to an effectively unreviewable claim of military necessity (which is what ended up happening in *Korematsu* itself), or invalidate the contested act, and risk being ignored by the executive—perhaps at substantial expense to the Court’s power and legitimacy going forward.⁴ Given these options, Justice Jackson seems to have concluded that the only winning move was not to play.⁵

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1. Eugene Rostow called it “a fascinating and fantastic essay in nihilism.” Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *Yale L.J.* 489, 510 (1945).

2. *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting).

3. As Jackson famously put it,

A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, 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.

Id. at 246.

4. See, e.g., Dennis J. Hutchinson, “The Achilles Heel” of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 *Sup. Ct. Rev.* 455, 489–90 (2002) (noting Jackson’s fear that executive might refuse to comply with judicial order granting relief to detainees if military order was found to be constitutionally invalid).

5. Stephen I. Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law After the Bush Administration*, in *When Governments Break the Law: The Rule of Law and the*

That understanding may help to explain the Supreme Court's track record with regard to the war in Vietnam. As others have documented in detail,⁶ between 1965 and 1973, the Court found virtually every conceivable way (and some previously inconceivable ones)⁷ to avoid deciding on the merits any fundamental questions about the legal nature or scope of the Vietnam War.

True, the Court heard various disputes *related* to the war,⁸ several of which, like the *Pentagon Papers* case,⁹ *Cohen v. California*,¹⁰ and *United States v. O'Brien*,¹¹ are now part of our constitutional canon. But every time a litigant (including the State of Massachusetts, which tried to invoke the Court's original jurisdiction in one exceptional case)¹² sought to contest the legality of the U.S. activities in Southeast Asia or the means by which soldiers were conscripted, the Court ducked, declining to review lower court decisions (virtually all of which had themselves concluded that such disputes were nonjusticiable).¹³ And whereas many of the Court's decisions not to decide often provoked pointed dissents,¹⁴ those dissents had no visible effect on the

Prosecution of the Bush Administration 183, 185 (Austin Sarat & Nasser Hussain eds., 2010).

6. See, e.g., Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 Washburn L.J. 275, 278–303 (1994) (detailing each Vietnam case presenting claims of unconstitutionality and Supreme Court's refusal to intervene); see also Sanford V. Levinson, *Fidelity to Law and the Assessment of Political Activity (Or, Can a War Criminal Be a Great Man?)*, 27 Stan. L. Rev. 1185, 1190–91 (1975) (book review) (“The United States Supreme Court systematically refused to subject any phase of the Vietnam War to legal analysis.”).

7. See, e.g., *Schlesinger v. Holtzman*, 414 U.S. 1321, 1322 (1973) (Marshall, Circuit Justice) (staying order of district court in response to order by Justice Douglas lifting stay imposed by Second Circuit and noting telephonic concurrence of other seven Justices).

8. Although the Court did not address the constitutionality of the draft, it did address, in a series of cases arising out of criminal convictions, questions of statutory interpretation with regard to conscientious objector status. E.g., *Clay v. United States*, 403 U.S. 698, 700, 704 (1971); *Gillette v. United States*, 401 U.S. 437, 447 (1971); *Welsh v. United States*, 398 U.S. 333, 343 (1970); *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

9. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

10. 403 U.S. 15 (1971).

11. 391 U.S. 367 (1968).

12. *Massachusetts v. Laird*, 400 U.S. 886, 886 (1970) (mem.) (denying leave to file original bill of complaint). None of the other challenges to the war were brought either (1) by a state; or (2) directly in the Supreme Court.

13. E.g., *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973); *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), cert. denied, 405 U.S. 979 (1972); *Orlando v. Laird*, 443 F.2d 1039, 1043–44 (2d Cir.), cert. denied, 404 U.S. 869 (1971); *Berk v. Laird*, 429 F.2d 302, 305–06 (2d Cir. 1970); *Mora v. McNamara*, 387 F.2d 862, 862 (D.C. Cir.), cert. denied, 389 U.S. 934 (U.S. 1967); *Luftig v. McNamara*, 373 F.2d 664, 665–66 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967).

14. See, e.g., *Holtzman v. Schlesinger*, 414 U.S. 1316, 1320 (1973) (Douglas, Circuit Justice) (“The merits of the present controversy are therefore, to say the least, substantial, since denial of the application before me would catapult our airmen as well as Cambodian peasants into the death zone.”); see also *Sarnoff v. Shultz*, 409 U.S. 929, 929–32 (1972) (Douglas, J., dissenting from denial of certiorari); *DaCosta*, 405 U.S. at 979–81 (Douglas, J., dissenting from denial of certiorari); *Massachusetts v. Laird*, 400 U.S. at 886–900 (Douglas, J., dissenting from the denial of leave to file an original bill of complaint); *Hart v. United States*, 391 U.S. 956, 956–60 (1968) (Douglas, J., dissenting from denial of certiorari); *Holmes v. United States*, 391 U.S. 936, 936–49 (1968) (Douglas, J., dissenting from the denial of certiorari); *Mora v. McNamara*, 389 U.S. 934, 935–39 (1967) (Douglas, J., dissenting from denial of certiorari); *Mitchell v. United States*, 386 U.S. 972, 972–74 (1967) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas was not always alone. In *Sarnoff*, for example, Justice Brennan joined in his

Court's majority, which hardened against intervention as the war dragged on.¹⁵

Whatever the merits of the Court's Vietnam approach, one way to understand it is as powerfully echoing Professor Alex Bickel's plea for judicial restraint in the 1961 *Harvard Law Review* Foreword.¹⁶ Stressing the "wide area of choice open to the Court in deciding whether, when, and how much to adjudicate,"¹⁷ Bickel's thesis in "The Passive Virtues" was that the federal courts in general (and the Supreme Court in particular) could become an even more powerful and well-respected institution by relying on justiciability doctrines as a means of avoiding controversial constitutional decisions on the merits, leaving resolution of such disputes to the political branches—if at all. Whether or not the Court's Vietnam-era jurisprudence was virtuous, the conclusion that it was passive is inescapable.¹⁸

In contrast, most recent narratives of the role of the federal courts in the war on terrorism stress their *active* involvement, highlighted by the Supreme Court's role in the detainee cases. Indeed, one can readily identify at least six decisions by the Supreme Court in cases directly arising out of post-September 11 military detention policies,¹⁹ and three others that, though one step removed, are certainly no less relevant.²⁰ Thus, many of those who would both

dissent. 409 U.S. at 929 (Douglas, J., dissenting from denial of certiorari). In *Mora*, Justice Stewart wrote his own dissent in addition to Justice Douglas's dissent, which Justice Stewart joined. See *Mora*, 389 U.S. at 934–35 (Stewart, J., dissenting from denial of certiorari). And in *Massachusetts v. Laird*, Justices Harlan and Stewart would have ordered briefing and argument on the questions of standing and justiciability. 400 U.S. at 886. But whereas the other Justices' participation was sporadic, Justice Douglas dissented in each of these cases.

15. Importantly, this period also coincided with a significant turnover in the Court's membership. Chief Justice Burger replaced Chief Justice Warren in 1969; Justice Blackmun replaced Justice Fortas in 1970; Justice Powell replaced Justice Black in 1972; and then-Justice Rehnquist replaced the younger Justice Harlan in 1972. Both as a group and individually, the newer Justices were no more sympathetic—and in some cases far less sympathetic—to the plaintiffs' claims in these cases.

16. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 *Harv. L. Rev.* 40, 40–79 (1961).

17. *Id.* at 79; see also Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111–98 (2d ed. 1986) (elaborating on "passive virtues" thesis).

18. See generally John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (1993) (summarizing legal issues raised—and not resolved—by conflict in Southeast Asia).

19. *Kiyemba v. Obama*, 130 S. Ct. 1235, 1325 (2010) (per curiam) (remanding habeas petitions brought by Guantánamo detainees due to "change in the underlying facts"); *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (holding Guantánamo detainees protected by Suspension Clause); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding military commission convened to try Guantánamo detainee could not proceed as commission had violated Uniform Code of Military Justice and Geneva Conventions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion) (requiring "that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker"); *Rasul v. Bush*, 542 U.S. 466, 478 (2004) (holding federal courts have jurisdiction to hear Guantánamo detainees' challenges to legality of detention); *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004) (rejecting habeas corpus claim of U.S. citizen designated as enemy combatant on procedural grounds).

20. See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (holding "an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive"); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010)

bury and praise the Court for its efforts over the past decade seem to have one thing in common: a shared belief that, whatever the merits, the Court has aggressively interjected itself as an institution into one of the critical constitutional conversations of our time.²¹

In this Essay, I offer a distinct assessment of the Court's work since September 11. Although the Justices have repeatedly acted to assert and preserve the institutional role of the federal courts more generally, they have been decidedly unwilling to engage the substance of counterterrorism policies, especially in cases in which those policies relate to alleged abuses of individual civil liberties. For example, whereas the Court in four different decisions has ensured that the federal courts will play a central role in reviewing the detentions of noncitizens at Guantánamo,²² it has refused to take any case raising detention questions on the merits, including the substantive standard for detention,²³ the evidentiary burden on the government,²⁴ the relevance vel non of international law,²⁵ whether detainees are entitled to notice and a hearing prior to their transfer to a third-party country,²⁶ and various other key procedural issues.²⁷ So, too, the Court has refused to consider claims by former Guantánamo detainees that they were mistreated while detained, leaving intact a D.C. Circuit decision that held in the alternative that the defendants were entitled to qualified immunity and that the plaintiffs failed to state a viable cause of action.²⁸ Taken together, these decisions have been widely read (including by judges on the D.C. Circuit)²⁹ as reflecting an unwillingness on the Justices' part to do anything vis-à-vis Guantánamo other

(upholding, as applied to plaintiffs, constitutionality of federal statute prohibiting provision of material support to foreign terrorist organizations); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942–43 (2009) (holding respondent failed to state claim that he was deprived of clearly established constitutional rights while in federal custody).

21. See, e.g., Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* 15–16 (2008) (“What the Supreme Court has done is carve itself a seat at the table.”); Richard Klingler, *The Court, the Culture Wars, and Real Wars*, A.B.A. Nat'l Security L. Rep., June 2008, at 1, 4 (arguing *Boumediene* could be read “as abandoning true separation of powers and the tradition of judicial deference to Congress and the Executive in matters military and diplomatic”).

22. See *Kiyemba*, 130 S. Ct. at 1235 (remanding case but implying ability to review detentions following lower court proceedings); *Boumediene*, 553 U.S. at 732–33 (reviewing detention at Guantánamo on constitutional basis); *Hamdan*, 548 U.S. at 567 (reviewing detention in light of Uniform Code of Military Justice and Geneva Convention); *Rasul*, 542 U.S. at 485 (asserting courts' jurisdiction to review detentions at Guantánamo).

23. E.g., *Al-Bihani v. Obama*, 131 S. Ct. 1814 (2011) (mem.).

24. E.g., *Al Odah v. United States*, 131 S. Ct. 1812 (2011) (mem.).

25. E.g., *Al-Bihani*, 131 S. Ct. at 1814.

26. E.g., *Khadr v. Obama*, 131 S. Ct. 2900 (2011) (mem.); *Kiyemba*, 130 S. Ct. at 1880.

27. See, e.g., *Rasul v. Myers*, 130 S. Ct. 1013, 1014 (2009) (mem.) (denying review of damages claim brought by former Guantánamo detainees).

28. E.g., *Rasul v. Myers*, 563 F.3d 527, 528, 532 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1013 (2009). But see *Gul v. Obama*, No. 10-5117, 2011 WL 2937166, at *1 (D.C. Cir. July 22, 2011) (holding former detainees could not continue to pursue their habeas petitions once released from Guantánamo).

29. See, e.g., Hon. A. Raymond Randolph, Remarks at the University of Oklahoma Institute for the American Constitutional Heritage (Mar. 25, 2011), http://fvbpps-flash.ou.edu/videoplayer/videoplayer6.html?source=rtmp:/vod/IACH_Symposium/IACH_Symposium_Dinner.flv.

than assert their jurisdiction.

If anything, this pattern has been even more pervasive in non-Guantánamo cases. There, the Court has refused to review a series of lower court decisions that each relied on different justiciability doctrines to sidestep claims arising out of the U.S. government's alleged "extraordinary rendition" of noncitizens to countries in which they were tortured.³⁰ To similar effect, the Court has also refused to review lower court decisions finding various justiciability bars to challenges to the NSA's warrantless wiretapping program.³¹ And the Court has not yet found a post-September 11 terrorism conviction worth its time, even as lower court judges have stressed both the importance and novelty of some of the procedural and evidentiary issues that their decisions have confronted.³²

Even on the rare occasions in which the Court *has* granted certiorari in a post-September 11 terrorism case not related to military detention, it has only been to reverse lower court decisions ruling against the government—with each Supreme Court ruling in turn cutting off the plaintiff's claim for relief.³³ Put succinctly, the Supreme Court since September 11 has found exactly *one* counterterrorism policy that it believed to be unlawful; even there, the defect was only the absence of congressional authorization—and the vote was 5-3.³⁴

Given the Vietnam experience, one reaction to this trend is that it is simply history repeating itself—that, for the same reasons that drove the courts' behavior during Vietnam, it's better for the Supreme Court as an

30. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc) (dismissing based on state secrets doctrine), cert. denied, 131 S. Ct. 2442 (2011); *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009) (en banc) (dismissing for failure to state *Bivens* claim), cert. denied, 130 S. Ct. 3409 (2010); *El-Masri v. United States*, 479 F.3d 296, 299–300 (4th Cir.) (dismissing based on state secrets doctrine), cert. denied, 552 U.S. 947 (2007).

31. See *Am. Civil Liberties Union v. NSA*, 493 F.3d 644, 648 (6th Cir. 2007) (dismissing based on lack of standing), cert. denied, 552 U.S. 1179 (2008); cf. *Am. Civil Liberties Union v. United States*, 538 U.S. 920, 920 (2003) (mem.) (denying ACLU leave to intervene in order to file a petition for certiorari challenging Foreign Intelligence Surveillance Court of Review's decision upholding constitutionality of wiretapping program in *In re Sealed Case*, 310 F.3d 717, 719–20 (FISA Ct. Rev. 2002) (per curiam)).

32. See, e.g., *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157, 167 (2d Cir. 2008) (holding that, as matter of first impression, "Fourth Amendment's warrant requirement does not govern searches conducted abroad"), cert. denied, 130 S. Ct. 1050 (2010); *United States v. Abu Ali*, 528 F.3d 210, 269 (4th Cir. 2008) (acknowledging difficult nature of proceeding), cert. denied, 129 S. Ct. 1312 (2009); *United States v. Afshari*, 426 F.3d 1150, 1155 (9th Cir. 2005) (upholding constitutionality of conviction for providing material support to designated terrorist organizations even though the defendant could not collaterally attack designation of organization at issue), cert. denied, 549 U.S. 1110 (2007); *United States v. Moussaoui*, 382 F.3d 453, 455 (4th Cir. 2004) (acknowledging "questions [concerning enemy combatant witness access] do not admit of easy answers"), cert. denied, 544 U.S. 931 (2005); see also *United States v. Afshari*, 446 F.3d 915, 915–22 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing en banc) (arguing court should not hesitate "to take a close look at the constitutionality of certain war on terror-related procedures").

33. E.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2731 (2010); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009).

34. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593–94, 635 (2006) (invalidating military commissions established by President Bush on the ground that they were inconsistent with the authority that Congress had provided).

institution to avoid these cases, and for the federal courts more generally to avoid deciding such lawsuits on the merits. On this view, whether or not such a jurisprudential approach is normatively defensible as a matter of first impression, it is at the very least not novel. In the pages that follow, I aim to demonstrate that this view is incorrect—that the Supreme Court’s approach to the war on terrorism *has* materially departed from that baseline, and in a way that at least appears to reflect general substantive acquiescence in most of the government’s counterterrorism policies, whether or not the Justices intend to do so. Indeed, by repeatedly asserting their authority only to routinely sidestep the merits, the Court has been neither passive nor active, but passive-aggressive. To be sure, others have documented this bifurcated pattern in the Court’s work over the past decade. But this Essay goes one critical step further by suggesting that, whatever the merits of Bickel’s thesis in the abstract, there is a fundamental danger to passive-aggressive virtues in judicial decisionmaking, especially during wartime: The more that the line blurs between war and peace—and, in the present context, between war and crime—the more courts are necessarily acting even when they decline to act. To be sure, passive-aggressive decisionmaking may still be preferable to the passivity that marked the Court during Vietnam; my point here is only to suggest ways in which it might have shortcomings of its own.

I. THE WORK OF THE POST-SEPTEMBER 11 SUPREME COURT

For the sake of brevity, and because better summaries are available elsewhere, I will not here provide a comprehensive overview of the Supreme Court’s post-September 11 terrorism jurisprudence. If one counts (as I do) both the short per curiam opinion in *Kiyemba v. Obama*³⁵ and the decision in *Holder v. Humanitarian Law Project*,³⁶ the Court has handed down nine “merits” decisions in this field: these two along with *Padilla I*,³⁷ *Rasul*,³⁸ *Hamdi*,³⁹ *Hamdan*,⁴⁰ *Boumediene*,⁴¹ *Iqbal*,⁴² and *al-Kidd*.⁴³ Rather than walk through these (and other) decisions seriatim, Part I begins by offering a rough grouping of the Court’s work in the field.

A. *Jurisdiction and Institutional Self-Preservation*

Virtually all of the Court’s work in detainee cases might loosely be characterized as going to jurisdiction and/or the preservation of the role of the federal courts.⁴⁴ Of course, *Boumediene* is the most obvious manifestation of

35. 130 S. Ct. 1235 (2010) (per curiam).

36. 130 S. Ct. 2705 (2010).

37. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

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

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

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

41. *Boumediene v. Bush*, 553 U.S. 723 (2008).

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

43. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

44. Because it is not directly about the war on terrorism, I have not included *Munaf v. Geren*, 553 U.S. 674 (2008), even though it is arguably a “wartime” decision given that it arose out of the military detention of two U.S. citizens during hostilities in Iraq. But even if *Munaf* were

this theme, since the Court there held that the Guantánamo detainees were protected by the Suspension Clause, and that Congress had violated that provision by taking away habeas jurisdiction without providing an adequate, alternative remedy.⁴⁵ One need hardly look closely at Justice Kennedy's opinion for the Court to see the central role that preservation of a meaningful judicial role had in the decision,⁴⁶ or the Court's concomitant disinclination to offer any guidance to lower courts about how to proceed on remand.⁴⁷ Thus, it may well be no surprise that the Justices have declined to intercede in any of the post-*Boumediene* cases arising out of the D.C. Circuit, even as lawyers and editorial pages have accused the court of appeals of undermining the Court's 2008 decision.⁴⁸

Although less attention has been paid to the rest of the Court's work, it fits in with this larger theme just as well. Thus, the 2004 trilogy of *Padilla I*, *Hamdi*, and *Rasul* featured one case holding that the detainee had filed in the wrong court, but was free to refile in the proper forum;⁴⁹ one case holding that, by statute, the federal courts *could* entertain habeas petitions brought by Guantánamo detainees (with no view expressed as to the merits of such claims);⁵⁰ and one case holding that the federal courts had a meaningful role to play in reviewing the detention of U.S. citizen "enemy combatants," even if such detention had been authorized by Congress (and even if the Justices refused to explain just what that role should be).⁵¹ Much more could be (and has been) said about these three decisions, but the unifying theme appears to be the Court's simultaneous assertion of judicial power and reluctance to decide the cases before it on anything other than the narrowest grounds—even while several of the Justices dropped hints as to their views on the merits.⁵² Thus,

included, it would unquestionably fit: The Court unanimously sustained the jurisdiction of the federal courts over such claims (despite a division of authority in the D.C. Circuit) and then rejected some of the petitioners' substantive claims while leaving the key issues for remand. *Id.* at 685–88, 703 & n.6. But see *Omar v. McHugh*, 646 F.3d 13, 15 (D.C. Cir. 2011) (holding REAL ID Act of 2005 validly removes federal jurisdiction over such claims).

45. *Boumediene*, 553 U.S. at 798.

46. See, e.g., Stephen I. Vladeck, *Boumediene's* Quiet Theory: Access to Courts and the Separation of Powers, 84 Notre Dame L. Rev. 2107, 2111 (2009) (arguing "the injury the statute [at issue in *Boumediene*] inflicted upon the role of the courts was at least relevant, if not central, to the constitutional analysis").

47. See *Boumediene*, 553 U.S. at 796 ("These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.").

48. See, e.g., Editorial, A Right Without a Remedy, N.Y. Times, Mar. 1, 2011, at A26 ("The United States Court of Appeals for the District of Columbia Circuit . . . has dramatically restricted the *Boumediene* holding."). See generally Stephen I. Vladeck, The D.C. Circuit After *Boumediene*, 42 Seton Hall L. Rev. (forthcoming Dec. 2011) [hereinafter Vladeck, D.C. Circuit] (documenting and analyzing criticisms of D.C. Circuit's jurisprudence).

49. *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).

50. *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

51. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion). Although the government would soon abandon this argument, its initial claim in *Hamdi* was that his detention was categorically unreviewable. *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

52. See, e.g., *Rasul*, 542 U.S. at 483 n.15 ("Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" (quoting 28 U.S.C. § 2241(c)(3) (2000))); *Padilla*, 542 U.S. at 464 n.8 (Stevens, J., dissenting) ("I believe that the Non-Detention Act prohibits—and the Authorization for Use of Military Force

when the government transferred Padilla to criminal detention just before his case returned to the Court in 2006, the Justices denied certiorari by a 6-3 vote. Notwithstanding the denial, Justice Kennedy emphasized for the unprecedented trio of himself, Chief Justice Roberts, and Justice Stevens,⁵³ that Padilla would be entitled to a prompt judicial remedy if the government attempted to return him to military detention, and that the Supreme Court remained available to remedy any mischief, but would otherwise not pronounce on the merits of Padilla's (now-terminated) military detention.⁵⁴

Hamdan, too, can also be seen as at least partly fitting within this theme, since the majority there rejected the government's argument that Congress, in the Detainee Treatment Act of 2005 ("DTA"),⁵⁵ had divested the Supreme Court of jurisdiction over Hamdan's appeal.⁵⁶ Of course, the DTA was enacted *after* the Court granted certiorari,⁵⁷ and so, as discussed below, *Hamdan* was impelled by—and ultimately turned on—different issues. But as in both the 2004 trilogy and *Boumediene*, the Court preserved its ability to reach the merits, whether in the same case or at some future date.

Perhaps the best testament to the self-preservation-but-little-else theme in the Court's post-September 11 jurisprudence, though, is its maneuvering with respect to the Uighurs, a group of ethnically Turkic Chinese Muslims detained at Guantánamo. Shortly after *Boumediene*, the D.C. Circuit held that they could no longer be detained as enemy combatants.⁵⁸ But a separate D.C. Circuit panel subsequently held that they had no right to be released into the United States, notwithstanding the claim that at least some of them could not be resettled elsewhere.⁵⁹ Thus, the Court granted certiorari to decide "whether a federal court exercising habeas jurisdiction has the power to order the release of prisoners held at Guantánamo Bay 'where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy.'"⁶⁰

Because each of the detainees subsequently received an offer of resettlement to another country, the Justices sent the case back to the D.C. Circuit for reconsideration.⁶¹ After the court of appeals adhered to its original

Joint Resolution . . . does not authorize—the protracted, incommunicado detention of American citizens arrested in the United States." (citations omitted)).

53. No other opinion during the five Terms that Chief Justice Roberts and Justice Stevens served together was signed only by the two of them and Justice Kennedy. Indeed, just one non-majority opinion appears to have been signed by all three—Chief Justice Roberts's dissent in *Dolan v. United States*, 130 S. Ct. 2533, 2544 (2010), which was also joined by Justice Scalia.

54. *Padilla v. Hanft*, 547 U.S. 1062, 1063–64 (2006) (Kennedy, J., concurring in denial of certiorari); see also *al-Marri v. Spagone*, 129 S. Ct. 1545, 1545 (2009) (mem.) (vacating Fourth Circuit's en banc decision upholding military detention of noncitizen arrested within territorial United States in light of his criminal indictment and transfer to civilian custody).

55. Pub. L. No. 109-148, 119 Stat. 2680 (codified as amended in scattered sections of 10, 28, and 42 U.S.C. (2006)).

56. *Hamdan v. Rumsfeld*, 548 U.S. 557, 572–84 (2006).

57. Certiorari was granted in *Hamdan* on November 7, 2005. See *Hamdan v. Rumsfeld*, 546 U.S. 1002, 1002 (2005) (mem.). The DTA was signed into law on December 30, 2005.

58. *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008).

59. *Kiyemba v. Obama*, 555 F.3d 1022, 1028–29 (D.C. Cir. 2009).

60. *Kiyemba v. Obama*, 130 S. Ct. 1235, 1235 (2010) (per curiam) (citation omitted).

61. *Id.*

analysis,⁶² the Court denied certiorari, with Justice Breyer explaining for himself and Justices Kennedy, Ginsburg, and Sotomayor that:

[T]hese offers, the lack of any meaningful challenge as to their appropriateness, and the Government's uncontested commitment to continue to work to resettle petitioners transform petitioners' claim. Under present circumstances, I see no Government-imposed obstacle to petitioners' timely release and appropriate resettlement. . . . Should circumstances materially change, however, petitioners may of course raise their original issue (or related issues) again in the lower courts and in this Court.⁶³

In other words, because the Court was no longer faced with the threat to judicial power raised by the specter of individuals who could neither be detained nor released, review was no longer warranted. Taken together with *Hamdi*, *Padilla*, and *Boumediene*, the maneuverings in *Kiyemba* provide further circumstantial evidence of the Court's apparent approach: So long as the power of the federal courts to act on the detainees' claims was unthreatened, the merits did not require the Justices' attention, and could be left to the political branches—or, failing that, the lower courts.

B. *Government Losses in the Courts of Appeals*

In contrast to the judicial self-preservation theme underlying the cases discussed above, the only way to understand the Court's other three major terrorism decisions since September 11 comes from their procedural posture: As the captions suggest, in each of *Ashcroft v. Iqbal*, *Holder v. Humanitarian Law Project*, and *Ashcroft v. al-Kidd*, the court of appeals had ruled against the government, and either had invalidated, or appeared poised to invalidate, some aspect of post-September 11 counterterrorism policy.

In *Iqbal*, for example, the Second Circuit had largely rejected claims of qualified immunity by a host of senior federal officials arising out of the alleged mistreatment of (and discrimination against) a detainee subsequent to his arrest as part of the investigation into the September 11 attacks.⁶⁴ The Supreme Court granted certiorari and reversed, holding that *Iqbal* had failed to plead sufficient facts to support virtually all of his claims.⁶⁵ In addition, in a far less noticed aspect of Justice Kennedy's opinion, the Court also appeared categorically to reject the availability of supervisory liability in *Bivens* actions, even as it said nothing about the potential merits of *Iqbal*'s claims.⁶⁶

In *Humanitarian Law Project v. Mukasey*, the Ninth Circuit had held that

62. See *Kiyemba v. Obama*, 605 F.3d at 1047–48 (“[A]s our original opinion indicated, even if petitioners had good reason to reject the offers they would have no right to be released into the United States.”).

63. *Kiyemba v. Obama*, 131 S. Ct. 1631, 1631–32 (2011) (Breyer, J., respecting denial of certiorari).

64. *Iqbal v. Hasty*, 490 F.3d 143, 178 (2d Cir. 2007).

65. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009).

66. See *id.* at 1948–49 (“In a . . . *Bivens* action—where masters do not answer for torts of their services—the term ‘supervisory liability’ is a misnomer. Absent vicarious liability, each Government official . . . is only liable for his or her own misconduct.”); see also *id.* at 1957–58 (Souter, J., dissenting) (describing and criticizing majority's discussion of supervisory liability).

several provisions of the federal “material support” statute, which makes it a crime to provide material support to designated foreign terrorist organizations,⁶⁷ were unconstitutionally vague.⁶⁸ In particular, the court of appeals struck down the statute’s ban on the provision of “training,” “service,” and “other specialized knowledge,” even as it upheld other provisions that had been amended by Congress in response to earlier decisions in the same case.⁶⁹ The Supreme Court reversed, unanimously concluding that the challenged provisions were not vague at least as applied to the plaintiffs,⁷⁰ even as it divided 6-3 on whether the statute otherwise violated the First Amendment.

Finally, in *al-Kidd v. Ashcroft*, the Ninth Circuit had affirmed the district court’s denial of a motion to dismiss a damages suit claiming that then-Attorney General Ashcroft had used the material witness statute⁷¹ as a pretext for detaining terrorism suspects against whom there was insufficient evidence to support criminal charges.⁷² Specifically, the court of appeals held that the Fourth Amendment prohibits pretextual arrests absent probable cause, and that Attorney General Ashcroft was not entitled to absolute or qualified immunity.⁷³ The Supreme Court once again reversed, unanimously concluding that Ashcroft was entitled to qualified immunity whether or not his conduct was in fact unlawful.⁷⁴ In addition, a 5-3 majority held that, on the merits, Ashcroft’s alleged conduct could not have violated the Fourth Amendment, because subjective intent is irrelevant to the propriety of an arrest made pursuant to a validly obtained material witness warrant.⁷⁵

At least as relevant here, *al-Kidd* is perhaps most telling because the majority consciously attempted to resolve the unnecessary Fourth Amendment issue, since the qualified immunity holding rendered the merits beside the point. As Justice Scalia explained, “Although not necessary to reverse an erroneous judgment, doing so ensures that courts do not insulate constitutional decisions at the frontiers of the law from our review or inadvertently

67. See 18 U.S.C. § 2339B (2006).

68. See *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 929–30 (9th Cir. 2009) (holding terms “training,” “service,” and “personnel” to be “impermissibly vague”).

69. As the Ninth Circuit explained in 2009, the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603, 118 Stat. 3638, 3762–64, amended § 2339B at least in part to respond to the court of appeals’s prior decision in *Humanitarian Law Project v. United States Department of Justice*, 352 F.3d 382 (9th Cir. 2003). See *Humanitarian Law Project v. Mukasey*, 552 F.3d at 923–24 (detailing changes made by IRTPA).

70. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010) (“[T]he scope of the material-support statute may not be clear in every application. But the dispositive point here is that the statutory terms are clear in their application to plaintiffs’ proposed conduct, which means that plaintiffs’ vagueness challenge must fail.”).

71. See 18 U.S.C. § 3144 (2006). The Supreme Court had previously denied certiorari to review on direct appeal one of the most sweeping endorsements of the government’s post-September 11 use of the material witness statute. See *United States v. Awadallah*, 349 F.3d 42, 49–51 (2d Cir. 2003) (holding federal material witness statute allows arrest and detention of grand jury witness), cert. denied, 543 U.S. 1056 (2005).

72. See *al-Kidd v. Ashcroft*, 580 F.3d 949, 958, 973 (9th Cir. 2009) (holding Attorney General Ashcroft not entitled to absolute or qualified immunity).

73. *Id.*

74. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011).

75. *Id.* at 2080–83.

undermine the values qualified immunity seeks to promote.”⁷⁶ Thus *al-Kidd* appeared to be the rare exception—a case where the Court went out of its way to answer a question on the merits even though it was not strictly necessary to the decision.⁷⁷

Little unites these three cases other than their outcomes. But as the above descriptions hopefully indicate, one can hardly look to the decisions in *Iqbal*, *Humanitarian Law Project*, or *al-Kidd* as either obviously active or obviously passive. Clearly, the Court felt compelled to act in each case given the government’s request for review. And *Iqbal* and *al-Kidd* both turned on principles with significance far beyond the facts at hand. Even still, neither *Iqbal* nor *al-Kidd* definitively passed on the validity of the government’s conduct vis-à-vis the plaintiffs; and *Humanitarian Law Project* hinted that the challenged provisions might very well run into First Amendment problems as applied to other fact patterns. Thus, the Court again asserted itself, albeit to do little more than endorse the government’s position, deny relief, and otherwise withdraw from the field.

C. “Merits” Cases, Granted and Denied

As *al-Kidd* suggests, even when the Court has looked to the substantive law at issue in post-9/11 terrorism cases, it has treaded lightly. In *Hamdi*, for example, both of the Court’s holdings were exceedingly narrow, with the plurality carefully circumscribing its holding that the Authorization for Use of Military Force (AUMF)⁷⁸ authorized Hamdi’s detention,⁷⁹ and stressing that, although “some evidence” was an insufficient evidentiary burden to impose upon the government, the actual mechanics of resolving Hamdi’s claims could—and should—be worked out by the lower courts.⁸⁰

And in *Hamdan*, the one case in which the Court categorically invalidated a post-September 11 counterterrorism policy, the Justices were at pains to stress the limited nature of their conclusion—turning, as it did, on the absence of statutory authorization for military commissions.⁸¹ As Justice Breyer put it in his concurrence, “Nothing prevents the President from returning to Congress to seek the authority he believes necessary,”⁸² which is exactly what happened

76. *Id.* at 2080.

77. As Justices Kennedy, Ginsburg, and Sotomayor all pointed out in separate opinions, the Court’s debatable factual assumptions had the effect of leaving the real questions the case presented for another day. See *id.* at 2085 (Kennedy, J., concurring) (“The Court’s holding . . . leaves unresolved whether the Government’s use of the Material Witness Statute in this case was lawful.”); *id.* at 2087–88 & n.3 (Ginsburg, J., concurring in the judgment); *id.* at 2090 (Sotomayor, J., concurring in the judgment). Thus, even while purporting to decide the merits, the Court did not actually resolve the legal issue at the heart of *al-Kidd*.

78. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

79. *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (plurality opinion).

80. *Id.* at 537–39.

81. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 & n.23 (2006) (noting that holding centered on the absence of statutory authorization).

82. *Id.* at 636 (Breyer, J., concurring); see also *id.* at 637 (Kennedy, J., concurring in part) (“If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.”).

next.⁸³

The above is not to suggest that no substantive law emerged from these decisions. On the contrary, *Hamdi's* analysis of the relationship between the AUMF and the laws of war have been a critical issue in the ongoing litigation in the D.C. Circuit arising out of Guantánamo,⁸⁴ and its outright rejection of the “some evidence” standard is also the likely culprit for the court of appeals’s grudging adoption of a preponderance standard in those cases, as well.⁸⁵ Similarly, *Hamdan's* conclusion that the war on terrorism is not an international armed conflict triggering Common Article 3 of the Geneva Conventions was itself a massively important development,⁸⁶ as was the Court’s more subtle repudiation of claims to indefeasible presidential power.⁸⁷ Even as the Court has stepped carefully, it has sent both indirect and thinly veiled messages to the Executive Branch that, without question, have had a salutary impact on the parameters of subsequent counterterrorism policy.⁸⁸ We may never know just how vital a role these assertions of judicial authority played in reshaping governmental conduct after September 11, but one need not look particularly hard to see the very real ways in which the government’s approach changed after each of these decisions—even on issues on which the Supreme Court had provided no guidance whatsoever. Thus, one cannot plausibly argue—and I do not here suggest—that the Court’s holdings in these cases have not dramatically shaped at least *some* aspects of counterterrorism policy over the past decade, especially with regard to the detention, treatment, and trial of enemy combatants. Clearly, they have.

But important as these holdings may have been, they are the exceptions that prove the rule, for the Court has otherwise refused to pass upon the validity of every other counterterrorism initiative that has come before it. As noted above,⁸⁹ the denials encompass cases arising out of extraordinary rendition, warrantless wiretapping, and a host of other controversial post-

83. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, and 28 U.S.C.) (authorizing use of military commissions).

84. See, e.g., *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., and Ginsburg, Henderson, Rogers, Tatel, Garland, & Griffith, JJ., concurring in denial of rehearing en banc) (suggesting that panel’s discussion of the relevance of international law was dicta, and therefore declining to reconsider it), cert. denied, 131 S. Ct. 1814 (2011).

85. See, e.g., *Al-Adahi v. Obama*, 613 F.3d 1102, 1104–05 & n.2 (D.C. Cir. 2010) (adopting preponderance standard for case but declining to hold that preponderance standard is legally required), cert. denied, 131 S. Ct. 1001 (2011). See generally Vladeck, D.C. Circuit, *supra* note 48 (documenting court of appeals’s criticism of government for not advocating “some evidence” standard).

86. See *Hamdan*, 548 U.S. at 629–31.

87. See *id.* at 593 & 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, 958–61 (2007) (discussing larger implications of footnote 23 in *Hamdan* decision).

88. In an earlier piece, I referred to the Court’s approach to detention as reflecting a form of “creeping incrementalism,” with the Court sending stronger messages to the political branches as time went on—and as the earlier messages appeared to go unheeded. See Stephen I. Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox*, 43 *U. Rich. L. Rev.* 893, 909 (2009) (book review).

89. See *supra* notes 30–32 and accompanying text.

September 11 policies and practices. And at least in civil lawsuits, the lower court decisions that the Justices have declined to disturb rested on various justiciability doctrines—including standing, mootness, the political question doctrine, and the “litigation-barring” iteration of the state secrets privilege—to foreclose relief without passing upon the legality of the challenged governmental conduct.

Thus, except in cases implicating the federal courts’ power, or those in which the government lost in the court of appeals, the Supreme Court has had remarkably little to say about the underlying legality of virtually all of the government’s post-September 11 counterterrorism initiatives.

II. THE VIRTUES OF JUDICIAL PASSIVITY IN THE WAR ON TERRORISM

I am by no means the first to identify this pattern of decisionmaking by the post-September 11 Supreme Court. In 2008, for example, Professor Jenny Martinez attributed this bifurcation to the age-old distinction between process and substance, suggesting that a host of factors contributed to the post-September 11 judiciary’s focus on the former at the expense of the latter.⁹⁰ And just last year, Professor Richard Fallon described the “noteworthy disparity” arising out of the “juxtaposition of the Court’s assertiveness in upholding judicial jurisdiction with its reticence regarding substantive rights.”⁹¹ Given the chorus of scholars reaching similar conclusions,⁹² the descriptive pattern appears to be objectively unassailable.

Tellingly, though, to describe the pattern is not necessarily to criticize it. Professor Fallon, for example, has all but lauded the Court’s discretion, suggesting that it has “cautiously extended the margins along which judicial power can operate. Partly as a result, more substantive rulings, and possibly more recognitions of substantive rights, may now lie in prospect.”⁹³ To similar effect, others have suggested that the Court’s relatively passive approach to post-September 11 counterterrorism issues may have had a beneficial impact behind the scenes, shaping governmental policy even without providing clear legal rulings.⁹⁴

But there are reasons to hesitate before accepting such praise of the

90. Jenny S. Martinez, Process and Substance in the “War on Terror,” 108 *Colum. L. Rev.* 1013 (2008).

91. Richard H. Fallon, Jr., The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science, 110 *Colum. L. Rev.* 352, 391 (2010).

92. E.g., Neal Devins, Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, 12 *U. Pa. J. Const. L.* 491 (2010); John Ip, The Supreme Court and House of Lords in the War on Terror: *Inter Arma Silent Leges?*, 19 *Mich. St. J. Int’l L.* 1 (2010); Mark S. Kende, The U.S. Supreme Court, the War on Terror, and the Need for Thick Constitutional Review, 80 *Miss. L.J.* 1539 (2011); Joseph Landau, Muscular Procedure: Conditional Deference in the Executive Detention Cases, 84 *Wash. L. Rev.* 661 (2009).

93. Fallon, *supra* note 91, at 396–97.

94. See, e.g., Trevor W. Morrison, The Middle Ground in Judicial Review of Enemy Combatant Detentions, 45 *Willamette L. Rev.* 453, 471 (2009) (“[T]he Court possesses a variety of interpretive tools enabling it to combine substantial deference to the political branches with at least some provisional, modest limits on executive power. . . . And to the extent we doubt the Court’s ability to fix the outer boundaries of war (and related) powers in any durably satisfactory way, that is the course we should want it to take.”).

Court's restraint over the past decade. For starters, passivity in the present context differs in rather substantial ways from the passivity that marked the Vietnam-era Court. And in any event, there is a critical difference between passivity in the form of abandoning the field and passivity only after continued reassertions of a strong judicial role. If anything, such an approach may well reflect a rather disturbing conclusion about the purpose of judicial review during wartime—as existing largely, if not only, to perpetuate itself, or at the very least, as existing more for the purpose of protecting institutional checks and balances than individual rights.

A. Passivity During Wartime: Vietnam and 9/11 Contrasted

The Court's well-documented passivity during the conflict in Vietnam centered almost entirely on two distinct—but related—legal questions: the underlying legality of the war (and of particular aspects thereof), and the constitutionality of the draft.⁹⁵ Although there were myriad additional ways in which the conflict spilled over onto the homefront, the legal issues that the Court sidestepped were quintessential wartime questions governing the conscription of troops and the legality of their deployment. Thus, the parties who were most aggrieved by the decisions not to decide were those citizens sent overseas to fight, and those members of Congress who felt that the President was usurping their constitutional authority. Practically, this meant that, the longer the war dragged on, the more the political pressure against the conflict ratcheted up—and the less that judicial intervention appeared to present the only available remedy.

In decided contrast to the war in Vietnam,⁹⁶ the counterterrorism policies at the heart of the war on terror have (1) been the subject of widespread *domestic* implementation; and (2) often been directed toward noncitizens, a group with a much weaker political constituency.⁹⁷ Whether in the context of extraordinary rendition, material witness detention, warrantless wiretaps, or other controversial governmental programs, the reality is that political remedies have been effectively unavailable for victims of governmental

95. See *supra* notes 12–14 (collecting sources).

96. A question more akin to the kind of issues the Court was asked to confront during the Vietnam era is raised by the ongoing use of U.S. troops in Libya, notwithstanding the expiration of the “clock” provided by the War Powers Resolution, 50 U.S.C. § 1544(b) (2006). Cf. *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000) (holding suit by members of Congress challenging constitutionality of U.S. participation in NATO airstrikes in Kosovo was not justiciable).

97. The domestic salience of policies such as warrantless wiretapping, FISA warrants, national security letters, and even detention has been well documented. For more on the citizenship issue, see Neal Katyal, *Equality in the War on Terror*, 59 *Stan. L. Rev.* 1365, 1366, 1392 (2007) (noting “[s]ince the September 11 attacks, the government has repeatedly singled out aliens for special disfavor” and arguing that “by splitting our legal standards on the basis of alienage, we are in effect jeopardizing our own safety and national interest”); Dawinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court’s Disregard for Claims of Discrimination*, 58 *Buff. L. Rev.* 419, 423 (2010) (arguing Supreme Court in *Ashcroft v. Iqbal* “erred in finding unremarkable Iqbal’s allegations that the government engaged in blanket racial profiling of Muslims and Arabs” and as a result “the case . . . will provide the government with greater latitude to institute security programs and policies that are discriminatory”).

overreaching in the war on terrorism. Moreover, the legal issues that have arisen throughout the past decade have a permanence that separates them from prior national security crises, at least to the extent that the threat posed by international terrorism remains a fixture in the ensuing years and decades.

Finally, and unlike the war in Vietnam (or virtually any other prior American conflict), the war on terrorism brings into sharp tension two competing means of evaluating the legality of governmental conduct: the war paradigm, and the law enforcement paradigm.⁹⁸ As a result, many of these cases raise legal issues with implications for ordinary law enforcement, whether in the context of surveillance, interrogations, detention and extradition, or even prosecution.⁹⁹ Unlike during prior wars, these issues will not necessarily expire, and so judicial decisions not to pass upon them on the merits will necessarily leave such policies intact for the future.

I do not mean to make too much of this point, for there are certainly examples of civil liberties issues that arose during the Vietnam war where comparable concerns were articulated. The critical point for present purposes is the unique intersection of the war on terrorism's temporal indeterminacy with its merger of the military and criminal paradigms. Unlike during World War II, when Justice Jackson could take solace in the view that the emergency would pass,¹⁰⁰ or Vietnam, when Congress increasingly stood up to the President, the reality is that neither time nor political pressure will moot these legal questions.¹⁰¹ In that context, decisions not to decide may well in effect lend the very sanction that the courts declined to provide formally, given the absence of meaningful alternative remedies. To be sure, that may be the Court's intent—but it just as well may not be. The critical point for present purposes is that, absent resolution of the underlying legality of these measures, no law stops current or future government officials from repeating them. Such

98. See, e.g., Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *Stan. L. Rev.* 1079, 1100–20 (2008) (discussing convergence of procedural and substantive criteria for detention in military detentions and civilian criminal trials).

99. To take just two examples, consider the Fourth Circuit's decision in *Abu Ali*, which held that it did not violate the Sixth Amendment's Confrontation Clause to allow at trial the use of video testimony against the defendant by Saudi intelligence officials, *United States v. Abu Ali*, 528 F.3d 210, 238 (4th Cir. 2008), cert. denied, 129 S. Ct. 1312 (2009), and the FISA Court of Review's 2008 decision recognizing for the first time a "foreign intelligence surveillance" exception to the Fourth Amendment's Warrant Clause, *In re Directives [redacted text]** Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008). It should not be hard to see how both of these decisions could apply just as easily in nonterrorism cases.

100. See, e.g., Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 *Buff. L. Rev.* 103, 115–16 (1951) (reflecting on *Korematsu* decision).

101. On the potential indeterminacy of the war on terrorism (and the consequences thereof), see Mary L. Dudziak, *Law, War, and the History of Time*, 98 *Calif. L. Rev.* 1669, 1671 (2010) (arguing "the conception of time that has been embedded in thinking about the law and war is in tension with the practice of war in the twentieth century"). As for the unlikelihood of political pressure serving as a meaningful check on abuses arising out of counterterrorism policies, I suspect it suffices to note Congress's reaction to the warrantless wiretapping program—i.e., to immunize telecom providers for any violations of federal law that might have occurred as a result. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 18 and 50 U.S.C.).

judicial passivity when the questions left unresolved are separation-of-powers disputes that can only arise in the unique circumstance of war on a foreign battlefield is one thing. But passivity in the face of controversial governmental policies allegedly affecting individual rights, and which may have no other remedy, is something else altogether.

B. Debunking the Virtues of Passive-Aggressive Decisionmaking

Although the above discussion goes to why passivity in the war on terrorism may be problematic in the abstract, there is also something qualitatively different about the passivity that characterizes the Court's approach to "merits" issues over the past decade as compared to that which prevailed forty years ago. The central virtue of passivity from Bickel's perspective was the extent to which it signaled a desire to leave momentous legal questions for the political branches. In the war on terrorism, in contrast, the Court has made it quite clear that it sees itself as no less of an equal player—and perhaps more so—than Congress or the President, intervening whenever it appeared that the political branches were attempting to forego, or otherwise marginalize, judicial review.

But what is the point of such intervention if the Court does not mean to provide guidance on the merits, or to otherwise resolve central questions concerning the substance of post-September 11 counterterrorism policies? There are three (related) possibilities, each of which is discomfiting in its own right: First, it is possible that the point of these decisions is for the Supreme Court to assert the institutional authority of the federal judiciary, and then to leave the "harder" questions for the lower courts as a matter of first—and last—impression. Thus, the Court preserves both the ability of the courts in general to resolve the issue presented, and a historical record in which the Supreme Court in particular did not actually set a precedent on the merits one way or the other. On this view, whether the lower courts decided these cases on their merits (as in the post-*Boumediene* Guantánamo litigation), or relied on justiciability bars to avoid the issue (as in the rendition and wiretapping cases), the federal courts will have had the last word, even if the Supreme Court itself did not. Of course, at least where the lower courts are relying on justiciability bars, the same passivity concerns documented above would arise.

Second, it is possible that the Justices simply have not yet confronted a "merits" case the issue in which merited certiorari. To that end, the Court's assertiveness in *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene* put the Justices in a position to act when an appropriate case came along, but that just has not happened yet. Rather than consciously deferring to the lower courts, this view would suggest that the Court *intends* to supervise their judicial subordinates, but has not yet been impelled to do so.

Third, it may also be the case that at least some of the Justices believe that decisions protecting the judicial role are an end unto themselves—that the merits don't matter nearly as much as the protection of the ordinary functioning of the separation of powers (including the Supreme Court's prerogative) more generally. So understood, the work of the lower courts in these cases is largely irrelevant to the larger project, at least so long as their

decisions *do not* implicate checks and balances going forward.

Whatever may be said about each of these possibilities, it should at the very least be clear that none of them are models of judicial passivity. To the contrary, each bespeaks a variation on the same theme: passive-aggressive behavior, in which the Court as an institution gives the appearance of standing on the sidelines, even as it continually reminds the relevant players of the role that it can—and, if provoked, stands ready to—play. Thus, from the perspective of both the government and the subjects of governmental counterterrorism policies, the courts are there to serve as a check on the political branches (unlike in Vietnam), but perhaps only as an end unto itself.

And whereas Bickel may have been right a half-century ago to extol the virtues of judicial passivity in the abstract, it appears at first blush that passive-aggressive judicial decisionmaking is not nearly as virtuous. After all, even if the Court is not expressing a view on the merits in cases challenging, *inter alia*, extraordinary rendition and wiretapping, the fact that it has otherwise asserted itself throughout the war on terrorism could easily leave the impression that it views these *specific* issues as not warranting review. Indeed, just in the context of alleged torture of detainees, the Court has refused to review separate lower court decisions (1) refusing to recognize a cause of action; (2) holding that qualified immunity would bar relief in any event; and (3) holding that the state secrets privilege prevents courts from even reaching the cause-of-action and immunity issues.¹⁰² The net effect of these decisions, coupled with the assertions of judicial power, is to suggest that courts are *capable* of hearing at least some of these disputes, but that there will not ever be (or at least has not yet been) a viable claim for relief. That is to say, the Court's jurisprudence may well create a form of functional impunity, even as it declines specifically to address the legality of the government's conduct.¹⁰³ Juxtaposed against the Vietnam experience, where one could draw no such conclusion about how the Justices would view civil remedies for wartime abuses, the contrast is striking.

Of course, one response may well be that counterterrorism policy is being affected even by the *filing* of these lawsuits—that the plaintiffs' invocation of federal jurisdiction is having a salutary effect, even if it is not producing precedential decisions concerning the substantive law that defines the liability of federal officers for counterterrorism abuses. On this view, the upside of passive-aggressive decisionmaking is the Court's ability stealthily to shape the government's conduct without having publicly to reprimand specific government officers. But even if there was public evidence of changes in Executive Branch practice supporting such a thesis, those changes in practice would be—just like the government's changes in litigation strategy throughout some of the higher-profile cases of the past decade—entirely volitional. They may well produce the same *result*—a discontinuation of practices that were allegedly unlawful. But absent judicial precedent to that effect, nothing besides the politics of the moment would stop future Presidents, in response to future

102. See *supra* notes 28–30 (citing cases).

103. Cf. *Pearson v. Callahan*, 129 S. Ct. 808, 813 (2009) (allowing—if not encouraging—courts to sidestep the question of whether particular governmental conduct *is* unlawful in suits for damages so long as the illegality was not clearly established at the time the conduct took place).

crises, from claiming comparable authority.¹⁰⁴ Thus, this central virtue of passive-aggressive decisionmaking is also its signal vice.

A second response is that this kind of passive-aggressive behavior has a “least-worst” quality to it—that, as compared to the Supreme Court taking these cases on the merits and affirmatively endorsing the challenged governmental conduct, the Court’s behavior over the past decade has been a model of compromise in the name of institutional responsibility. In that vein, a critique of the Court’s passive-aggressive approach may be motivated by a view of *how* one thinks these cases should be decided by the Justices, and not just *that* one thinks they should be. If it is likely (or perhaps even possible) that the Court would uphold the contested governmental initiatives rather than strike them down, perhaps passive-aggressive behavior beats the alternative—indeed, that may have been precisely Justice Jackson’s point in *Korematsu*.

Ultimately, this concern turns on two assumptions that are not necessarily obvious: First, it presupposes that, when confronted with specific counterterrorism policies on the merits, the Justices *will* continually rule for the government—and on terms as broad as those the government has claimed. We need look no further than the “merits” cases of the past decade, though, to see how this might not be the case. The government does not always win on its own terms, and every now and then, as in *Hamdi* and *Hamdan*, the government loses—and loses big. Second, even assuming for the sake of argument that the Court *might* side with the government on the merits in all of these cases, a Supreme Court merits decision, in contrast to a denial of certiorari, may have a salutary effect to the extent that it might provoke dissents from the minority Justices, raise public awareness about the underlying issues, and perhaps even impel the political branches to pursue reform. To be sure, I do not mean to oversell the point; I just mean to suggest the possibility that one does not have to have a fixed view of how these cases should come out to believe that we might be better off with a decision one way or the other.

CONCLUSION

In the last decision it handed down before September 11, the Supreme Court in *Zadvydas v. Davis* held that the Due Process Clause imposes a presumptive six-month limit on how long the government may continue to detain a noncitizen who had been ordered—but, for various reasons, could not be—deported.¹⁰⁵ In an eerily prescient passage, Justice Breyer offered an

104. In this regard, I part company with those who have argued that rigorous internal constraints within the Executive Branch may be the ideal means of protecting the separation of powers (and, by implication, individual rights) during national security crises. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *Yale L.J.* 2314, 2348 (2006) (“[J]udicial checking is bound to fail. It will often occur too late, if at all. Courts lack expertise in many areas, and they may intervene when they should not and refrain from intervening when they should. For this reason, . . . a set of institutional design choices must be made that permits both sources of executive legitimacy—democratic will and expertise—to function simultaneously.”). The Executive Branch should always *aspire* to check itself, but when it matters most, such aspirations cannot be trusted as adequate without underlying (and judicially enforceable) legal constraints, as well.

105. 533 U.S. 678 (2001). *Zadvydas* was one of four cases decided on June 28, 2001—the

important caveat to the otherwise categorical holding of his majority opinion: “Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”¹⁰⁶

Suffice it to say, the Court over the past decade has repeatedly confronted such “special arguments.” But the most remarkable feature of the Court’s jurisprudence is how seldom it has actually *passed* on those arguments on the merits, whether in detention cases or suits challenging other counterterrorism policies. Instead, the past decade has been marked by repeated assertions of judicial authority devoid of resolution of the legality of the challenged governmental conduct. Such a mix of aggressive judicial intervention in some cases and categorical judicial passivity in others may well be a novel approach to the role of the federal courts during national security crises, but it raises the distinct concern that such passive-aggressive judicial review will be received the wrong way by the Executive Branch, which simultaneously is confronted with the specter of judicial review and with a vanishing set of cases in which that review actually results in the repudiation of governmental policy.

At the end of his opinion for the Court in *Boumediene*, Justice Kennedy may have alluded to this concern. In his words, “Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.”¹⁰⁷ As a reflection on the Court’s historical role during wartime, Justice Kennedy’s suggestion may be debatable. As an implicit warning about the dangers of passive-aggressive judicial behavior, though, we would do well to take heed.

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last day of the Court’s October 2000 Term—and appears last of the four in the U.S. Reports.

106. *Id.* at 696.

107. *Boumediene v. Bush*, 553 U.S. 723, 797–98 (2008).