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Where Liberty Lies: Civil Society and Individual Rights After 9/11

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WHERE LIBERTY LIES: CIVIL SOCIETY AND INDIVIDUAL RIGHTS AFTER 9/11

DAVID COLE†

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I was co-counsel in Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010), and Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009), discussed herein. In addition, I have had and continue to have relationships with many of the civil society organizations discussed here. I am a Board Member of the Center for Constitutional Rights, am co-chair of the Liberty and Security Committee of the Constitution Project, served on the domestic advisory council of Human Rights Watch, represented the American-Arab Anti-Discrimination Committee in an immigrants’ rights case, and have litigated many cases with lawyers from the American Civil Liberties Union.
I. INTRODUCTION

Had someone told you, on September 11, 2001, that the United States would not be able to do whatever it wanted in response to the terrorist attacks of that day, you might well have questioned their sanity. The United States was the most powerful country in the world, and had the world’s sympathy in the immediate aftermath of the attacks. Who would stop it? Al Qaeda had few friends beyond the Taliban. As a historical matter, Congress and the courts had virtually always deferred to the executive in such times of crisis. And the American polity was unlikely to object to measures that sacrificed the rights of others—Arabs and Muslims, and especially Arab and Muslim foreigners—for Americans’ security.

Yet perhaps the most important and surprising lesson of the past decade is that constitutional and human rights, which seemed so vulnerable in the attacks’ aftermath, proved far more resilient than many would have predicted. President George W. Bush’s administration initially chafed at the constraints of constitutional, statutory, and international law, which it treated as inconvenient obstacles on the path to security.1 The administration acted as if no one would dare to—or could effectively—check it. But in time, the executive branch of the most powerful nation in the world was compelled to adapt its response to legal demands.

Equally surprising is that these restraints for the most part were imposed not by the formal mechanisms of checks and balances, but by more informal influences, often sparked by efforts of civil society organizations that advocated, educated, organized, demonstrated, and litigated for constitutional and human rights. The American constitutional system is traditionally understood to rely on the separation of powers and judicial review to protect liberty and impose legal restrictions on government officials. After September 11, however, as in

other periods of crisis in American history, all three branches were often
compromised in their commitments to liberty, equality, dignity, fair
process, and the “rule of law.”\(^2\) By contrast, civil society groups
dedicated to constitutional and rule-of-law values, such as the American
Civil Liberties Union, the Center for Constitutional Rights, the American
Bar Association, Human Rights Watch, Human Rights First, the Bill of
Rights Defense Committee, the Constitution Project, the Muslim Public
Affairs Council, and the Council on American Islamic Relations,
consistently defended constitutional and human rights—and in so doing
reinforced the checking function of constitutional and international law.
They issued reports identifying and condemning lawless ventures;\(^3\)
provided material and sources to the media to help spread the word;\(^4\)
filed lawsuits in domestic and international fora challenging allegedly
illegal initiatives;\(^5\) organized and educated the public about the
importance of adhering to constitutional and human rights
commitments;\(^6\) testified in Congressional hearings on torture, illegal
surveillance, and Guantánamo;\(^7\) and coordinated with foreign
governments and international nongovernmental organizations to bring
diplomatic pressure to bear on the United States to conform its actions to
constitutional and international law.\(^8\)

Scholars have long focused on the role constitutions and the formal
structures of government that they create play in reinforcing
commitments to long-term principles when ordinary political forces are

\(\text{\(2\) In referring to the “rule of law,” I mean not merely the Fullerian sense of}
\text{transparency and procedural regularity, see Lon Fuller, The Morality of
Law (1964), but the more colloquial modern-day sense of that term, which is often used as short-hand
to encompass commitments to liberty, equality, privacy, dignity, and the separation of
powers. I will also refer to these as “constitutional and human rights” as I mean to refer
not only to domestic constitutional law but to international human rights and
humanitarian law, and to statutory restrictions that further such rights (such as the
Uniform Code of Military Justice and the criminal torture and war crimes statutes).
}\)

\(\text{\(3\) See, e.g., Presumption of Guilt: Human Rights Abuses of September 11 Detainees,}
}\)

\(\text{\(4\) Id.}
\)

\(\text{\(5\) ACLU in the Courts Since 9/11, Am. Civ. Liberties Union (Oct. 12, 2006),}
}\)

\(\text{\(6\) See generally, Presumption of Guilt, supra note 3.}
\)

\(\text{\(7\) See, e.g., Testimony of Washington Legislative Office Director, Caroline}
Fredrickson, At A Democratic Hearing to Investigate NSA Wiretapping Program (Jan.
20, 2006), available at testimony-washington-legislative-office-director-caroline-
fredrickson-democratic-h.
}\)

\(\text{\(8\) See infra notes 131-145 and accompanying text.}
\)
inclined to seek shortcuts. The United States’ experience during the decade following September 11 suggests that this focus is incomplete; we should pay at least as much attention to the work civil society groups do to “enforce” constitutional rights. Much like a constitution itself, such groups stand for, and can shore up, commitments to principle when those commitments are most tested. And while we often speak metaphorically about a “living Constitution,” civil society groups are actually living embodiments of these commitments, comprised of human beings who have joined together out of a shared, lived dedication to constitutional and human rights principles. As such, they are well positioned to influence the polity’s and the government’s reactions in real time, and in crisis periods may be the only institutional counterforce to the impulse to sacrifice rights for security.

These organizations’ interventions often call on the formal structures of government to heed their legal claims, but the post-9/11 experience suggests that their work can have traction beyond the formal confines of judicial opinions and enacted statutes. In the first decade after September 11, civil society appears to have played at least as critical a role in the restoration of constitutional and human rights values as the formal institutions of government. In this period, the constraints on executive power operated through what I will call “civil society constitutionalism,” in which nongovernmental organizations advocated in multiple ways for adherence to the rule of law, in court and out, and in so doing, did much of the “work” of constitutionalism.

In examining the nexus between civil society and constitutionalism, I am especially interested in those nongovernmental groups that define themselves by their collective commitment to constitutional or rule-of-law values. “Civil society” can mean many things to many people, but I will use it in this essay principally as shorthand for this particular subset of nongovernmental organizations. Ernest Gellner provisionally defined the broader civil society as “a set of diverse non-governmental institutions which is strong enough to counterbalance the state and, while not preventing the state from fulfilling its role of keeper of the peace and arbitrator between major interests, can nevertheless prevent it from dominating and atomizing the rest of society.” The broader civil society, including such institutions as the New York Times, Fox News,


the Federalist Society, Planned Parenthood, the U.S. Chamber of
Commerce, the Catholic Church, and “super PACs,” also plays a role in
struggles over constitutional meaning, and a full account of civil
society’s role would have to address these influences as well. As the
success of gun rights groups in establishing a “right to bear arms,”
“right-to-life” groups in cutting back on rights of reproductive choice, or
the Chamber of Commerce and similar organizations in invalidating
restrictions on corporate spending in election campaigns all demonstrate,
civil society interventions are by no means necessarily progressive. My
claim is only that we miss out on much of the work of constitutionalism
if we disregard their role.

“Civil society constitutionalism,” like “popular constitutionalism”\(^\text{11}\) and “democratic constitutionalism,”\(^\text{12}\) calls for a reorientation of
constitutional theory and practice away from the traditional focus on
courts to a consideration of the role of the people. All three concepts can
be said to stem from Judge Learned Hand’s famous observation that
“liberty lies in the hearts of men and women; when it dies there, no
constitution, no law, no court can save it; no constitution, no law, no
court can even do much to help it.”\(^\text{13}\) “Popular constitutionalism,” as
articulated by Mark Tushnet and Larry Kramer, among others, is
affirmatively antagonistic to courts, and seeks to take the Constitution
away from judges in order to reinsure the general public with
responsibility for constitutional meaning.\(^\text{14}\) “Democratic
constitutionalism,” advanced by Robert Post and Reva Siegel, embraces
the role of courts, but stresses the dynamic by which popular responses
to constitutional decisions help ensure that constitutional law remains
responsive to contemporary constitutional commitments.\(^\text{15}\) As such, Post
and Siegel view positively what others lament as “backlash” to Supreme
Court decisions, because such popular engagement with constitutional
questions is critical to maintaining the living and evolving relevance of
the Constitution.\(^\text{16}\) Both of these theories offer important insights into the
role of politics in constitutional law. But these conceptions of

\(^{\text{11}}\) For “popular constitutionalism,” see Larry Kramer, The People Themselves:
Popular Constitutionalism and Judicial Review (2004); Mark Tushnet, Taking
the Constitution Away from the Courts (1999).

\(^{\text{12}}\) For “democratic constitutionalism,” see Robert Post & Reva Siegel, Roe Rage:

\(^{\text{13}}\) Learned Hand, “The Spirit of Liberty” Speech at “I Am an American Day”
ceremony in Central Park, New York City (May 21, 1944), available at
www.providenceforum.org/spiritoflibertyspeech.

\(^{\text{14}}\) See Kramer, supra note 11; Tushnet, supra note 11.

\(^{\text{15}}\) Post & Siegel, supra note 12.

\(^{\text{16}}\) See generally, id.
constitutional law are vulnerable to the criticism that they fail to resolve an internal contradiction. If the Constitution is meant to constrain democratic politics, how can it be delegated to democratic politics without losing its distinctive value as a check on such politics? Just as we cannot entrust enforcement of the Constitution to the executive or legislative branches without undermining its ability to restrain them, so, too, we cannot entrust it to “the people” if it is designed in significant part to constrain the people.

“Civil society constitutionalism” suggests a way out of this internal contradiction. It points to the unique role that civil society organizations committed to constitutional rights play in bridging the gap between formal constitutional law and ordinary politics, and in reinforcing the respect for constitutional limits that Learned Hand saw as essential. Unlike “popular constitutionalism,” it acknowledges the importance of judicial enforcement of constitutional law, because courts are best situated to give meaning to long-term constitutional principles and to resist short-term political pressures. But “civil society constitutionalism” maintains that by standing up for constitutional rights at times when the courts, the political branches, and “the people themselves” are likely to discount or dismiss such rights, civil society groups help to reinforce the culture of rights essential to a robust Constitution. In times of crisis, when all other forces are arrayed against constitutional rights, civil society organizations may well be the last defense.

To be sure, the more formal separation of powers also played a significant role in checking the President after September 11. For example, the Supreme Court imposed important limits on military detention and trial, and Congress reinforced the universal application of the treaty ban on cruel, inhuman, and degrading treatment. But as I will show, these were exceptions; the vast majority of curbs on arguably lawless initiatives were effectuated without a court order or enactment of a statute. And when the Court and Congress did play a checking role, their interventions were prompted, framed, and informed by the work of civil society.

Thus, in the first post-9/11 decade, constitutional and rule-of-law values were brought to bear on executive conduct by the interaction of the informal political, legal, and cultural work of civil society and the formal operation of law. This experience suggests that while it remains critical to adhere to and reinforce formal checks and balances, it is at least as important to build up a culture of resilience with respect to constitutional rights and the rule of law. Civil society organizations dedicated to those values are uniquely situated to play that checking role, and constitutional scholarship would do well to examine the particular role civil society plays in achieving, building, and reinforcing the constitutional culture so central to meaningful constitutional protections. Civil society, in short, is where much of the work of democratic and popular constitutionalism is done.

Part II of this essay briefly reviews the arc of counterterrorism policy and practice in the United States in the decade since September 11. While the government’s initial response seemed to dismiss human rights and basic legal constraints in the name of doing everything possible to avert another attack, over time the executive branch curtailed virtually all of its most aggressive ventures. As a result, the Bush administration in its second term was more law-abiding in its counterterrorism policy than it was in the first term. President Obama came to office condemning many of his predecessor’s choices and vowing to pursue national security through the law rather than in opposition to it. 20 While significant areas of concern remain, the general landscape with respect to legality improved substantially under Obama. Some will object that the improvements under both administrations were only marginal, leaving a deeply troubling apparatus of state power in place. I resist that characterization, 21 but for purposes of my argument here, one need only be convinced that there were indeed curtailments, and that, as I will demonstrate below, those changes cannot be attributed to formal checks and balances.

In Part III, I consider what contributed to the restoration of rule-of-law values. While much attention has been paid to the surprising role of the Supreme Court, 22 I will demonstrate that neither the Court nor Congress were the principal points of resistance or protection. The Court’s decisions involving “enemy combatants,” while important

20. See infra notes 74-81.
21. See infra text at notes 252-265 and accompanying text.
contributors to a cultural narrative about constitutional and rule-of-law values, were at the same time quite limited in what they actually required. Two decisions, *Rasul v. Bush* and *Hamdan v. Rumsfeld*, rested entirely on statutory construction, which meant that Congress could—and in both cases promptly did—reverse their results through ordinary legislation. *Boumediene v. Bush*, the most significant of the four decisions, concluded that Congress had violated the Constitution’s Suspension Clause by repealing habeas corpus for Guantánamo detainees, but the decision established only the threshold right to a day in court, and said nothing further about what rights the detainees might have once their petitions were heard. *Hamdi v. Rumsfeld* held that a U.S. citizen captured on the battlefield in Afghanistan allegedly fighting as part of a Taliban regiment was constitutionally entitled to a fair opportunity to be heard on charges that he was detainable as an “enemy combatant.” But the Court left the procedural details to be worked out. President Bush then managed to avoid elaboration of those constraints by transferring Hamdi (and the only other U.S. citizen military detainee, Jose Padilla) out of military custody before further Supreme Court review. As many commentators have previously noted, all four decisions were in fact quite minimalist.

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27. The only two citizens in military custody at the time of the *Hamdi* decision were Hamdi himself and Jose Padilla. See *id.* at 577 (Scalia, J., dissenting). The government released Hamdi on condition that he agree to go to Saudi Arabia and remain there, a promise the government could not enforce. Eric Lichtblau, *U.S., Bowing to Court, to Free ‘Enemy Combatant’*, N.Y. TIMES, Sept. 23, 2004, available at http://www.nytimes.com/2004/09/23/politics/23hamdi.html. When Jose Padilla’s case appeared on its way to the Supreme Court, the government transferred him out of military custody and tried him in criminal court, thereby avoiding a Supreme Court showdown. *See Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005) (denying government application to transfer Padilla to civilian criminal custody); *Hanft v. Padilla*, 546 U.S. 1084 (U.S. 2006) (granting application to transfer Padilla to civilian criminal custody).
Less noted is the remarkable amount of doctrinal work the Court undertook in order to rule against the President. As I will show, none of the results in these cases was foreordained by doctrine. What precedent there was appeared to favor the president. Furthermore, in two of the Guantánamo cases in particular, the legal standards that proved decisive were extremely open-ended, turning on questions of “practicability.” It would have been at least as easy, if not easier, to write decisions upholding the President’s power. Something was driving the Court, and it was not the independent force of legal doctrine.

I will argue that civil society played a critical role both in helping to shape these decisions and in pressuring the President to curb his initiatives in the many areas that never reached a judicial decision. The changes cannot be attributed to ordinary political pressure from “we the people;” on few if any of these issues did a majority of the American people demand change. Legal battles provided a focal point for much of civil society’s work, but only one of many. Civil society’s claims were founded on appeals to law and justice—but they were not made solely or even predominantly to courts. In the end, it was the interrelationship of civil society, law, and culture that succeeded in checking the executive.

Part III concludes by considering alternative accounts of what transpired in the first decade after September 11. I find unpersuasive contentions that constitutional and human rights were not in any significant way restored, and that we have simply normalized the exception. I acknowledge that there is a “pendulum” effect, in which states typically overreact to crises initially, but correct themselves once the crisis has passed, but suggest that the arc and speed of the pendulum is likely to be affected by the strength of civil society. And while there are certainly other factors that contributed to the pressure the Bush administration felt to conform its actions to legal norms, including widespread dissatisfaction with the Iraq war, I maintain that civil society’s work in advocating for constitutional and human rights played an important role in shaping the response.

The fourth and final section of the article maintains that the role of civil society in preserving constitutional rights has important implications in three areas: constitutional theory, constitutional law, and constitutional practice. First, as a matter of theory, I suggest that constitutional scholars would do well to focus more attention on the role

30. See infra notes 94-151 and accompanying text.
civil society plays in effectuating constitutional protections in a democracy. The institutional role that the civil society sector plays has been largely ignored in constitutional theory to date, even in approaches, like “popular constitutionalism,” that stress the importance of the public’s constitutional engagement. Understanding how civil society reinforces, preserves, and advances constitutionalism would add measurably to our understanding of how constitutions actually work.

Second, the role of civil society in sustaining a robust Constitution has implications for the substance of constitutional law—in particular, the law that guarantees space for civil society to operate. It underscores the fundamental importance of preserving First Amendment safeguards for the freedoms of association and speech. In this sense, civil society is as dependent on constitutional law as constitutional law is dependent on it. Civil society operates under the umbrella of the First Amendment’s protection, and in this way the First Amendment plays a structural role in sustaining the constitutional system writ large. While the culture of free dissent and criticism in the United States has been relatively healthy for the most part since September 11, there are troubling signs in the targeting of Muslim communities, the resurrection of guilt by association in the form of prohibitions on “material support” to proscribed political groups, and the Supreme Court’s excessive deference in its only decided case pitting national security interests against free speech since September 11: Holder v. Humanitarian Law Project.

Third, and most importantly, “civil society constitutionalism” has implications for constitutional practice; that is, how we live as citizens in a constitutional community. The concrete contributions of civil society underscore for all of us the critical importance of engagement, through civil society organizations and associations, with the constitutional issues of our day. As Learned Hand noted, constitutional responsibility ultimately lies with us. The most effective way to honor that responsibility is to join with others in groups dedicated to constitutional and human rights. The strength of a society’s constitutional and human rights commitments turns in significant part on its civil society organizations, and therefore on our involvement with them.

33. 130 S. Ct. 2705, 2370 (2010).
II. THE ASSAULT ON CONSTITUTIONAL AND HUMAN RIGHTS—AND THEIR PARTIAL RESTORATION

Much has undoubtedly changed since September 11. The United States launched two wars, one against the country that harbored Al Qaeda, the other against a country that did not. The federal government undertook the largest bureaucratic reorganization since the New Deal,\textsuperscript{34} creating the Department of Homeland Security,\textsuperscript{35} the Office of the Director of National Intelligence,\textsuperscript{36} and the National Counterterrorism Center.\textsuperscript{37} The Federal Bureau of Investigation shifted its focus from law enforcement to intelligence-gathering and preventing terrorism, aggressively employing informants and provocateurs to “flush out” would-be terrorists before they acted—and sometimes, it seemed, even if the targets never would have taken any action absent government provocation.\textsuperscript{38} Congress expanded the government’s authority to gather intelligence on people within the United States,\textsuperscript{39} to prosecute speech and association that allegedly provided “material support” to groups labeled as terrorist organizations,\textsuperscript{40} and to impose preventive detention and military trials on suspected “enemy combatants.”\textsuperscript{41}

A. Initial Measures

The most radical changes in our security operations occurred in the first two years after September 11, 2001. The vast majority of them were undertaken unilaterally by the Bush administration, though some had congressional backing via the USA Patriot Act or the Authorization for


Use of Military Force (AUMF). The Bush administration indefinitely imprisoned hundreds of people it called “enemy combatants,” sought to keep them beyond the reach of courts or the law, and denied them even basic Geneva Conventions protections, such as humane treatment—protections the United States had afforded its foes in all previous armed conflicts. It “disappeared” suspects into secret CIA prisons, or “black sites,” holding them incommunicado and refusing to acknowledge even the fact of their detention for years at a time. It subjected suspects to systematic torture and cruelty, including waterboarding, extended sleep deprivation, forced nudity, slamming them into walls, and forcing them into painful stress positions for hours at a time. It “rendered” still other

42. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); AUMF, Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress also implicitly authorized some of these initiatives through its decisions to fund them. However, many of the programs, including “enhanced interrogation techniques,” the CIA’s black sites, renditions, and the NSA’s warrantless surveillance, were covert, and therefore Congress as a whole was unaware of them. See Tom Daschle, Power We Didn’t Grant, WASH. POST, Dec. 23, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/22/AR2005122201101.html. While the executive branch briefed the “Gang of Eight” (the leaders of the two parties from both the Senate and House of Representatives, and the chairs and ranking minority members of both the Senate and House Intelligence Committees) on these covert operations, the briefings were conducted on the condition that these eight members not share what they learned with anyone else, including their colleagues. As a result, this “notification” did not in any meaningful sense put Congress on notice regarding the executive’s actions. See ALFRED CUMMING, CONG. RES. SERV., R40691, SENSITIVE COVERT ACTION NOTIFICATIONS: OVERSIGHT OPTIONS FOR CONGRESS (2009), available at http://fpc.state.gov/documents/organization/126834.pdf.

43. Kate Martin & Joe Onek, “Enemy Combatants,” The Constitution and the Administration’s “War on Terror,” AM. CONST. SOCIETY FOR L. AND POL’Y (2004), available at http://www.acslaw.org/pdf/enemycombatants.pdf. President Bush took the position that the Geneva Conventions, including Common Article 3, did not protect Al Qaeda detainees, but stated that “as a matter of policy,” the military would treat detainees “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.” Memorandum from The White House on Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002), available at http://www.pepc.us/archive/White_House/bush_memo_20020207_ed.pdf. However, the Geneva Conventions recognize no exception to the obligation of humane treatment, for “military necessity” or otherwise.


suspects to security services in countries, such as Syria, Egypt, and Morocco, that we had long condemned for using torture as a tool of interrogation, apparently so that they could torture them for us and share any resulting intelligence.\footnote{Jane Mayer, supra note 44, at 110 (discussing extraordinary renditions to torture).}

The Bush administration unilaterally created “military commissions” affording only the most summary process to alleged terrorists.\footnote{Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Noncitizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Tribunal Order].} As originally formulated, the president’s rules would have permitted the imposition of the death penalty on the basis of evidence gained from torture, without any independent judicial review.\footnote{Id.} The administration authorized the National Security Agency (NSA) to conduct warrantless wiretapping, including of U.S. citizens, despite a federal law that made such surveillance a crime.\footnote{See James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Court, N.Y. Times, Dec. 16, 2005, http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=print.}

It subjected more than five thousand Arab and Muslim foreign nationals within the United States to preventive detention in the first two years after 9/11—not one of whom stands convicted of a terrorist offense.\footnote{David Cole & Jules Lobel, Less Safe, Less Free: Why America Is Losing the War on Terror 107-09 (2007).} Furthermore, it insisted that, as commander in chief, the President had unchecked authority under Article II to take any action he deemed necessary to “engage the enemy,” even if Congress or international law expressly forbade it.\footnote{See, e.g., U.S. Justice Dept., Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), reprinted in David Cole, The Torture Memos: Rationalizing the Unthinkable 1-40 (2009) [hereinafter Aug. 1, 2002 Torture Memo].} In short, in the administration’s view, the Constitution effectively placed the President above the law when it came to engaging the enemy during wartime.\footnote{Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to the Deputy Counsel to the President (Sept. 25, 2001), available at http://www.justice.gov/olc/warpowers425.htm [hereinafter Yoo Memo]; cf. David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb, 121 Harv. L. Rev. 689, 694 (2008) and David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 Harv. L. Rev. 941 (2008) (showing that, in fact, Congress has historically regulated virtually all aspects of military decisions during wartime, and that the President’s commander-in-chief power is largely limited to barring Congress from placing the direction of the troops under someone else’s command); Jules Lobel, Conflicts between the Commander in Chief and Congress:
Times like these test the limits of the rule of law. Carl Schmitt argued that in periods of emergency, legality and legitimacy diverge and all that matters is legitimacy, which, in turn, is earned not by following the rules but by delivering security. After the attacks of September 11, the nation wanted security, and the Bush administration took that demand as a mandate to thrust legal restrictions aside.

B. Restoring Constitutional and Human Rights

In retrospect, what is most striking about the U.S.’s response is not that it overreacted, but that in time was compelled to modify all of its most aggressive initiatives. When the memorandum authorizing the Central Intelligence Agency (CIA) to use waterboarding and other forms of torture and cruelty was leaked and published by The Washington Post, triggering considerable denunciations, the Bush administration retracted it. When civil society groups, legal experts, and even conservative New York Times columnist William Safire, condemned the military commissions for the absence of judicial review, then-White House Counsel Alberto Gonzales wrote an op-ed in the New York Times claiming that the President never meant to deny judicial review—despite having said exactly that in his original order. President Bush eventually moved all the detainees held in “black sites” to Guantánamo Bay prison, where they were no longer considered “disappeared,” and where the International Committee for the Red Cross was for the first time granted

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Concurrent Power Over the Conduct of War, 69 OHIO ST. L.J. 691 (2008) (same); David Cole, Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief, and Executive Power in the War on Terror, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 1 (2006) (arguing that the Bush administration’s Article II theory cannot support its asserted authority to ignore a criminal statute regulating wiretapping).

53. CARL SCHMITT, LEGALITY AND LEGITIMACY 4-13 (1932).


56. Alberto Gonzales, Martial Justice, Full and Fair, N.Y. TIMES, Nov. 30, 2001, http://www.nytimes.com/2001/11/30/opinion/30GONZ.html. The executive order creating the military commissions provided that for persons subject to the order, military commissions would have “exclusive jurisdiction,” and “the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.” Tribunal Order, supra note 47.
access to them.\textsuperscript{57} When civil society groups, European nations, and others denounced renditions to torture, the administration seemed to place the program on hold, and reports of such extraordinary renditions ceased.\textsuperscript{58} In addition, after \textit{The New York Times} revealed the NSA’s illegal warrantless wiretapping program\textsuperscript{59} and the ACLU and the Center for Constitutional Rights challenged the program’s legality in court, the administration, which had been acting without a warrant, applied for and obtained a court order under the Foreign Intelligence Surveillance Act (FISA), which authorizes surveillance subject to judicial oversight.\textsuperscript{60} The administration ultimately sought amendments to that Act, which made clear that the program could continue pursuant to legislative and judicial authorization.\textsuperscript{61}

In a series of extraordinary cases reviewing the administration’s asserted authority to hold “enemy combatants” beyond the law’s reach, the Supreme Court thrice rejected the administration’s position that judicial review was unavailable,\textsuperscript{62} even after Congress had twice sought to insulate those detentions from judicial review.\textsuperscript{63} The Court overruled the administration’s position that the Geneva Conventions were inapplicable to Al Qaeda detainees, thereby confirming that they had a


\textsuperscript{58} European Parliament, Committee on Legal Affairs and Human Rights, Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, Draft report 2006). Extraordinary renditions to torture seem to have been employed most aggressively in the first few years of the Bush administration, and there are far fewer reports thereafter. See \textit{Mayer}, \textit{supra} note 44.

\textsuperscript{59} See Risen & Lichtblau, \textit{supra} note 49.


\textsuperscript{62} \textit{Boumediene}, 553 U.S. at 771; \textit{Hamdan}, 548 U.S. at 576-77; \textit{Rasul}, 542 U.S. at 473.

right to humane treatment. The Court refuted the administration’s position that it could hold U.S. citizens as “enemy combatants” without a hearing and an adequate opportunity to defend themselves. And it declared President Bush’s scheme for military commissions illegal.

In each instance in which the Bush administration reined in its programs, it did so reluctantly. Indeed, it was so reluctant that it sometimes sought to give the impression that it was complying with the law, while secretly continuing to act lawlessly. Thus, after the Justice Department retracted its August 1, 2002, “torture memo,” it secretly wrote a series of additional memos that continued to give the CIA a green light to employ waterboarding and other inhumane and coercive interrogation tactics, even though, in practice, waterboarding was reportedly performed on only three detainees after September 11. And while it transferred detainees out of the CIA’s secret prisons in Romania, Poland, and elsewhere after the Supreme Court ruled that the Geneva Convention protected Al Qaeda detainees, it kept the prisons open for potential future use. It never formally abandoned the “extraordinary rendition” program, even as reports of such renditions grew less and less frequent. Still, by the second term of the Bush administration, U.S. counterterrorism policy and practices had stepped back substantially from their immediate post-September 11 origins.

In his presidential campaign, Barack Obama vigorously attacked the Bush administration’s lawless ways, and promised meaningful reform. He did not feel constrained by the politics of fear to avoid these issues, or to echo President Bush’s bellicosity. Immediately upon taking office,

64. Hamdan, 548 U.S. at 628-35.
70. Hamdan, 548 U.S. at 628-35.
71. See MAYER, supra note 44.
President Obama closed the CIA’s secret prisons, barred the use of “enhanced interrogation techniques,” and vowed to close Guantánamo within a year. President Obama released several previously secret Justice Department memos that had authorized torture and cruel treatment, in the President’s own words, “to ensure that the actions described within them never take place again.” In May 2009, he delivered a major speech on the importance of fighting terrorism within the rule of law, insisting that “time and again, our values have been our best national security asset.”

President Obama expressly renounced his predecessor’s theory that the Commander-in-Chief had unilateral power to violate the law, and maintained instead that his authority was limited by the scope of Congress’s Authorization for Use of Military Force, which had been issued shortly after the September 11 attacks. And when, in 2010, a panel of the U.S. Court of Appeals for the D.C. Circuit ruled that the President’s authority to detain was not bound by the laws of war, the Obama administration took the extraordinary step of arguing that the court had granted it too much power. It told the full court that the President’s authority is indeed constrained by the laws of war. The full court then expressly noted that the panel’s prior reasoning was nonbinding dicta, unnecessary to the result.


80. Id.

81. Al-Bihani v. Obama, rehearing denied, 619 F.3d 1 (D.C. Cir. 2010) (denying rehearing but making clear that panel opinion discussion of international law was dicta).
There remain many areas of concern, to be sure. The United States has a widely used secret policy of targeted killing, which it has used to kill an American citizen in Yemen, far from the battlefield in Afghanistan, without evidence that he was involved in an imminent attack on the United States. The Obama administration has largely maintained its predecessor’s stance on the “state secrets” privilege, using the privilege not merely to protect secrets from disclosure, but to block altogether lawsuits seeking to hold government officials and their collaborators accountable for torture and other criminal conduct. The Obama administration defended an expansive reading of the “material support” statute, taking the position that it is a crime even to file an amicus brief in the Supreme Court if filed on behalf of a group labeled “terrorist.” It opposed the extension of habeas corpus review to detainees held at Bagram Air Force Base in Afghanistan, even including those captured in other countries far from the battlefield and brought to Bagram instead of Guantánamo. And the Obama administration opposed all efforts to pursue accountability for the war crimes, including torture, authorized by high-level U.S. officials in the “war on terror.” Still, there is little doubt that U.S. counterterrorism policy today is significantly more consistent with constitutional and international law than it was in the first couple of years after the September 11 attacks.


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

As noted above, for purposes of my argument, one need only be persuaded that there were indeed curbs put in place, that those curbs cannot be attributed to formal checks and balances or majoritarian political pressure, and that those curbs were not mere window-dressing (a charge I address below). In the following section, I turn to a consideration of the mechanisms by which these reforms were achieved.

III. CHECKS, BALANCES, AND CIVIL SOCIETY

What led the United States to curtail so many of its legally dubious counterterrorism policies in the first decade after September 11? The framers of the Constitution created a divided government in order to limit overreach by any one branch, and established judicial review to ensure that we would have a government “of laws, not men.” In ordinary times, that structure of checks and balances functions reasonably well. But in times of crisis, it has repeatedly proved inadequate. In World War I, Congress made it a crime to speak against the war, the executive prosecuted hundreds for doing so, and the Supreme Court upheld the sentences. During World War II, Franklin D. Roosevelt’s administration interned more than 110,000 people of Japanese descent, Congress did nothing to challenge him, and the Supreme Court upheld the internment policy as constitutional, despite recognizing that it discriminated on the basis of race. And in the McCarthy era, Congress and the Truman administration imposed guilt by association on Communist “sympathizers,” and the Supreme Court did nothing to restrain them until the Senate had censured McCarthy, and he

87. See infra notes 252-265 and accompanying text.
and his allies had lost power and public influence. 91 In each crisis, the political branches were more likely to goad each other on to further excesses than to impose limits, and the Supreme Court either expressly affirmed what went on or looked the other way. 92

Scholars have long worried about this dynamic, expressing concern that if the judicial and legislative branches fail to impose checks on the executive in periods of crisis, there will be no limit to executive overreaching and abuse. 93 In the first post-9/11 decade, however, executive overreaching was in fact checked, and checked in significant part by forces extraneous to the separation of powers. Civil society groups, using legal claims as focal points for their work, appear to have played an important role in the story.

A. The Role of Civil Society

The vast majority of the reforms introduced by the executive were not ordered by a court or compelled by statute. No detainee has been released by order of a court against the executive’s will, yet more than 600 of the 779 people once held at Guantánamo Bay have been released. 94 Neither Congress nor any court ordered administrative hearings or access to attorneys for Guantánamo detainees, yet all detainees now have those rights. Neither Congress nor any court ordered that the International Committee for the Red Cross be granted access to detainees in the conflict with Al Qaeda, yet today such access is routinely afforded. Neither Congress nor any court ordered the end of “enhanced interrogation techniques,” 95 but President Obama banned these techniques, 96 and rescinded and disclosed previously secret Justice Department memos that had twisted the law to give a green light to such methods. 96 Neither Congress nor any court rejected President Bush’s claims of uncheckable authority as Commander-in-Chief under Article II

91. See Stone, supra note 89, at 311-426; Cole, Enemy Aliens, supra note 90 at 129.
92. See generally Stone, supra note 89.
93. See, e.g., Clinton L. Rossiter, Constitutional Dictatorship: Crisis Government in Modern Democracies (1948); Arthur M. Schlesinger, Jr., The Imperial Presidency (1973).
of the Constitution, yet President Obama abandoned it. Neither Congress nor any court ordered suspension of the NSA spying program, but President Bush suspended it in 2007, proceeding instead with a program approved by a FISA court. Neither Congress nor any court questioned the widespread preventive detention of Muslim and Arab immigrants in the United States in the first years after September 11, but that practice was widely condemned, and has not been repeated. Neither Congress nor any court has expressed any opinion on the legality of the “extraordinary rendition” program, but there have been no reported renditions to torture in years. Neither Congress nor any court so required, but the CIA’s “black sites” are now closed. And neither Congress nor any court ordered cessation of “special registration”—a national program of ethnic and religious profiling that selectively required foreign nationals of predominantly Arab and Muslim countries to be fingerprinted, photographed, and interviewed—but in April 2011, after much criticism from civil liberties groups, the government ended the program. While some of the reforms are attributable to President Obama, many were undertaken by President Bush.

If most of these reforms were attributable neither to judicial enforcement nor to congressional mandates, what were the moving forces behind them? The answer is to be found outside the formal institutions of government, in civil society—the loosely coordinated political actions of concerned individuals and groups, here and abroad. Following September 11, many organizations took up the mantle of defending liberty, human rights, and the rule of law—among them the


American Civil Liberties Union, the Center for Constitutional Rights, Human Rights First, Human Rights Watch, the Council on American-Islamic Relations, the Bill of Rights Defense Committee, the Constitution Project, the Muslim Public Affairs Council, and the American Arab Anti-Discrimination Committee.104 These organizations are all, in one way or another, dedicated to the protection of constitutional and human rights. They consist of individuals—citizens and noncitizens, lawyers and laypersons—drawn together by a common commitment to rule-of-law values, and they seek to further those values both politically and legally—doing public education, lobbying Congress and the executive, filing lawsuits, writing reports, and organizing grassroots campaigns.

The Center for Constitutional Rights brought the first lawsuit seeking habeas review at Guantánamo, and went on to coordinate a nationwide network of volunteer attorneys who represented Guantánamo habeas petitioners.105 The ACLU filed important lawsuits challenging secrecy and government excesses, and succeeded, through the Freedom of Information Act, in disgorging many details about the government’s illegal interrogation program.106 Both the ACLU and Center for Constitutional Rights filed lawsuits and engaged in public advocacy on behalf of torture and rendition victims, and challenged the NSA’s warrantless wiretapping program.107 Human Rights Watch and Human Rights First wrote important reports on detention, torture, and Guantánamo.108


year grassroots campaign that urged towns, cities, and eventually states to enact resolutions condemning the civil liberties abuses of the Bush administration.¹⁰⁹ That campaign ultimately succeeded in getting over 400 such resolutions passed, by most of the nation’s largest cities, hundreds of small and medium-sized towns, and several states.¹¹⁰ These efforts are but a small subset of the broader activities of civil society, at home and abroad, that helped to bring to public attention the Bush administration’s most questionable initiatives, and to portray the initiatives as contrary to constitutional and human rights.

After 9/11, the President, Congress, the courts, and the public at large were all driven to emphasize security over all other values. Yet civil society organizations actively advocated for the enforcement of constitutional and human rights. And in a sense, they were rewarded for doing so. Many organizations saw their membership and financial support grow dramatically in the wake of 9/11, despite (or because of) the fact that their claims were in tension with those of the majority.¹¹¹ When the formal mechanisms of the separation of powers were least likely to check executive initiative, these organizations were in some measure at their strongest. As such, they were uniquely situated to provide a checking influence within American political culture.

Civil society critics of the administration also included prestigious bar associations, most importantly the American Bar Association, which adopted resolutions on torture, Guantánamo, military commissions, and the “state secrets” privilege, and submitted amicus briefs in the Guantánamo cases before the Supreme Court.¹¹² In addition, the Association of the Bar of the City of New York published multiple reports on rendition,¹¹³ interrogations,¹¹⁴ and military commissions.¹¹⁵

The International Commission of Jurists convened an international panel of eminent jurists, which issued an important report on preserving human rights in fighting terrorism that was highly critical of the United States’ approach.116

Human Rights First enlisted retired generals to oppose the Bush administration’s decisions to deny detainees the protections of the Geneva Conventions and the Convention Against Torture. The generals issued statements, signed joint letters, and met with members of Congress and the executive branch. Their intervention helped Congress overcome vigorous opposition from the White House and reaffirm that the prohibition on cruel, inhuman and degrading treatment applied to all persons held by the United States, no matter what their nationality or where they were held.117

Many individual defenders of liberty also spoke out, including Lord Steyn, a former British Law Lord who famously labeled Guantánamo a “legal black hole.”118 175 members of the U.K. Parliament who signed an amicus brief on behalf of Guantánamo detainees in the first detainee case to reach the Supreme Court;119 and individual members of Congress, especially Senators Patrick Leahy, Richard Durbin, Russell Feingold, and Bernie Sanders, and Representatives John Conyers Jr., Jerrold Nadler, and Keith Ellison.120 These individuals echoed civil society’s insistence that the rule of law should not be abandoned in the pursuit of security.121

The media, a particularly influential part of civil society, and often an ally to constitutional and human rights groups, also played an
important role. It was the media that published the leaked Office of Legal Counsel memorandum authorizing waterboarding and other illegal tactics, disclosed the existence of CIA secret prisons, told the stories of rendition and abusive detentions, disseminated the photographs from Abu Ghraib, and revealed the existence of a massive and possibly criminal warrantless wiretapping program run by the National Security Agency at President Bush’s orders. Moreover, the press wrote and published countless editorials questioning President Bush’s initiatives on detention, interrogation, ethnic profiling, surveillance, and other counterterrorism policies.

Perhaps buoyed by civil society, lawyers and officials within the government also resisted government abuse. Navy General Counsel Alberto Mora personally intervened to pressure Secretary of Defense Donald Rumsfeld to rescind an order authorizing cruel and degrading interrogation tactics at Guantánamo. Joseph Darby, an Army reservist in Iraq, helped bring torture and other war crimes at Abu Ghraib to the world’s attention by delivering a CD containing photographs of abuse at Abu Ghraib prison to the Army’s Criminal Investigation Command. Col. Morris Davis, an Air Force lawyer, resigned in 2008 from his position as Chief Prosecutor in the Guantánamo military commissions system to protest plans to rely on evidence obtained through coerced testimony. Others risked criminal prosecution by leaking secret information about programs that violated criminal law, including the CIA “enhanced interrogation techniques” and the NSA’s warrantless wiretapping program. In each instance, what drove these government officials to speak up was, in a fundamental sense, the respect for liberty,

human dignity, and the rule of law that civil society organizations were vigorously defending.

In the absence of effective formal avenues for checking at home, civil society groups often operated at a transnational level to bring pressure to bear on the United States. Domestic organizations played a leading role, to be sure; but perhaps more than in any prior crisis, international pressure had a key part. The Internet and globalization have made it infinitely easier for civil society institutions to share information and collaborate across national borders. For example, a report by Human Rights First on the treatment of those rounded up after September 11 is immediately accessible on its website from all parts of the world.130 In part because most of the victims of U.S. government overreach were nationals of other countries—Guantánamo, for example, housed prisoners from forty-two different nations131—domestic avenues for redress were often unresponsive. But by the same token, the countries from which the victims came were often keenly interested in the plight of their citizens at U.S. hands. As a matter of necessity, the tactics of constitutional and human rights groups began to merge. Civil society organizations accustomed to invoking “hard law” domestic remedies were forced to look elsewhere for support. Constitutional rights organizations had to adopt the transnational “shaming” tactics of human rights groups accustomed to operating with “soft law” tools. One civil society organization initially created to represent detainees at Guantánamo, Reprieve, located its headquarters in London because it found that international pressure was more effective in freeing prisoners than the formal avenues of the American legal system.132 Reprieve represented more than fifty Guantánamo prisoners, of whom all but fifteen have been released.133 Yet only one was ordered released by a federal court.134

Stories of rights violations often garnered more attention in the victim’s home country than in the United States. Consider, for example, Maher Arar, a Canadian citizen who the United States stopped at New York’s JFK Airport as he was changing planes on his way home to Canada, and forcibly rerouted to Syria via a federally chartered jet,

134. Id.
where he was tortured and locked in an underground cell the size of a grave for nearly a year. Arar is a household name in Canada. His return to Canada sparked a high-level commission of inquiry, resulting in a full exoneration. The Canadian Parliament issued Arar a formal apology and paid him ten million dollars (Canadian) for his injuries, even though it was the United States, not Canada, that decided to send Arar to Syria. In 2004, Time (Canada) named Arar its Person of the Year. In the United States, by contrast, the government successfully moved to dismiss a lawsuit Arar brought against the federal officials who sent him to be tortured, and it is likely that few people would recognize his name.

The international concerns sparked by reports of such abuses made their way back to the United States. Many nations lobbied the United States to release their nationals from Guantánamo. The global nature of the terrorist threat required the United States to obtain the assistance and cooperation of intelligence and law enforcement agencies of other nations, and that need required the United States to be more sensitive to international criticism than it might otherwise have been. At the same time, international attention to U.S. abuses, especially at Abu Ghraib and Guantánamo, played into Al Qaeda’s hands, as it fueled resentment of the United States and recruitment for Al Qaeda. The fact that Guantánamo had become a universal symbol of U.S. lawlessness by the

138. Id.
143. See Press Release, Remarks of the President on National Security supra note 76.
time the first habeas corpus case, Rasul v. Bush, reached the Supreme Court almost certainly played a role in the Court’s unwillingness to defer to executive claims that the prisoners there were beyond the protection of the law.¹⁴⁴ Thus, the pressure brought to bear on the United States from civil society was distinctly transnational, and operated via a number of avenues outside the U.S. constitutional system altogether. This transnational element was a particularly important feature of civil society’s appeal to rule-of-law values after 9/11, given American citizens’ and politicians’ historic indifference to the denial of foreign nationals’ rights.¹⁴⁵ By involving other nations, civil society organizations were able, at least in some circumstances, to overcome their own nation’s traditional indifference to the rights of “others.”

Nevertheless, restoration of constitutional and human rights cannot be attributed merely to the fact that civil society mobilized in defense of liberty. Civil society mobilizes around many issues, and as often as not it is unable to make much, if any, headway. Think, for example, of global warming or campaign finance reform. Moreover, civil society was arrayed on both sides of the fault lines. The American Enterprise Institute, the Federalist Society, Fox News, the Wall Street Journal, and other conservative voices pushed security interests over rights concerns, especially when the concerns were the rights of “the enemy.” Much of the media supported the drumbeat for war that preceded the U.S. invasion of Iraq. That the criticisms leveled by constitutional and human rights groups were as effective as they were may attest to the residual power in American culture of the ideals they advocated—liberty, equality, fair process, and dignity. Those values were strong enough, when pressed by a range of voices, to restrain the highest officials of the most powerful country in the world, even without much support from Congress, the courts, or the public at large. Margaret Mead famously warned that one should “never underestimate the power of a few committed people to change the world.”¹⁴⁶ One should also never underestimate the power of concerted appeals to constitutional and human rights. The relative success of these claims implies that, the executive’s initial reactions notwithstanding, a fairly robust culture of respect for constitutional and rule-of-law values was available to be called upon and mobilized. Civil society institutions were critical both to

¹⁴⁴ See Devins, supra note 28, at 500-03.
¹⁴⁵ See generally DAVID COLE, ENEMY ALIENS, supra note 90.
building and sustaining that culture in ordinary times and to reinforcing it in a period of crisis, when much of the rest of society would just as soon have ignored it.

The relative robustness of a constitutional culture depends in large measure on the work of civil society. Constitutional rights are but words scribbled on paper absent the efforts of concerned individuals and groups to give them meaning. When the Supreme Court rejected a constitutional challenge to the internment of more than 110,000 people of Japanese descent in 1944,\textsuperscript{147} the Constitution on its face guaranteed equal protection of the laws, but in practice guaranteed no such thing. It took the sustained efforts of civil society groups, in particular the ACLU and several Asian American groups and lawyers, to lead, forty-four years later, to an official apology and the payment of reparations.\textsuperscript{148} As a result, by the time the Supreme Court took up the \textit{Rasul} and \textit{Hamdi} cases in 2004, \textit{Korematsu} had been widely condemned.\textsuperscript{149} The Justices in 2004 had to be worried about repeating the mistake the Court had made in \textit{Korematsu}.\textsuperscript{150} To drive the point home, the Brennan Center for Justice, another civil society group, filed amicus briefs on behalf of Fred Korematsu in those cases.\textsuperscript{151} Thus, the sustained efforts of civil society created a legacy around the Japanese internment that almost certainly played a hand in 2004 as the Court was once again asked to defer blindly to executive claims about the need to detain without legal process. More broadly, efforts of constitutional rights and civil rights and liberties groups over the years prior to September 11 helped build a culture of commitment to constitutional rights, which they were then able to invoke to roll back executive encroachments on basic rights thereafter.

\textsuperscript{147} \textit{Korematsu}, 323 U.S. at 214 (1944).

\textsuperscript{148} \textsc{Peter Irons}, \textsc{Justice At War: The Story of the Japanese-American Internment Cases} (1993). Lawsuits succeeded in disclosing, among other things, that the Justice Department misled the Supreme Court about key facts involved in the case, in particular its ability to distinguish those who posed a danger from those who did not. Some of the convictions were vacated on that basis. Eventually, in 1988, Congress enacted the Civil Liberties Restoration Act, H.R. 442, 100th Cong. (1988), which officially apologized to the internees and paid reparations to them and their survivors.

\textsuperscript{149} See \textsc{Cole, Enemy Aliens}, supra note 90 at 99.

\textsuperscript{150} I am indebted to Steve Shapiro of the ACLU for this observation.

B. The Role of the Courts

With few exceptions, the federal courts, including the Supreme Court, have historically deferred to the President on matters of national security in times of crisis. There are isolated exceptions, to be sure. In the Civil War, Chief Justice Roger Taney, sitting as a single federal circuit judge, declared President Lincoln’s suspension of habeas corpus unconstitutional. In the Korean War, the Court invalidated President Harry Truman’s seizure of steel mills. And near the end of the Vietnam War, the Court refused to block the New York Times’ publication of the Pentagon Papers. But these are exceptions to the rule of deference in times of crisis.

After 9/11, however, the Supreme Court broke from its past record, repeatedly rejecting presidential claims to deference on national security matters while the war and the crisis was very much ongoing. The Court insisted that it was responsible for reviewing detentions during wartime, rejected claims that it must defer to the executive on who may be detained, ruled that Al Qaeda and Taliban detainees must be accorded Geneva Conventions protections, and, most extraordinarily, kept the courthouse door open for the Guantánamo detainees even after Congress and the President, acting together, had unequivocally sought to close it. These groundbreaking decisions were undeniably important, but it would be a mistake to attribute to the Court the lion’s share of the credit for checking the President’s legally dubious counterterrorism measures. The Court actually mandated very little, and as detailed above, the vast majority of the reforms adopted by the executive branch were not ordered by any court.

Two decisions—Rasul and Boumediene—addressed only whether Guantánamo detainees could be heard in court, and said nothing about the law that would apply once their claims were adjudicated. Many district courts subsequently ruled that Guantánamo detainees should be released for lack of evidence. Thus far, however, the Obama administration has won every case that it has appealed to the D.C.

152. See generally Stone, supra note 89; William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime (1998).

153. Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861).


157. See supra Part II.A.

158. Rasul, 542 U.S. at 485; Boumediene, 553 U.S. at 779.

Circuit, and the Supreme Court has declined to exercise further review.\footnote{160} Thus, in nearly ten years, not a single detainee has been released by an unappealable court order.\footnote{161} And the D.C. Circuit has ruled that courts lack the power to order the release of detainees into the United States, meaning that where, as is often the case, the detainee cannot be returned to his native country, even an order that a detention is unlawful does not compel release.\footnote{162}

The Supreme Court’s ruling in Hamdi v. Rumsfeld that a U.S. citizen was entitled to due process upon being held as an “enemy combatant” was limited to U.S. citizens, and therefore did not, on its face, apply to the vast majority of detainees in the ongoing conflict.\footnote{163} Even as to citizens, the Court failed to specify the particular procedures due, and the administration avoided further court review by releasing Hamdi on the condition that he resettle in Saudi Arabia.\footnote{164}

The Court’s decision in Hamdan v. Rumsfeld, which declared President Bush’s military commissions illegal, rested on statutory grounds, and the Court expressly invited Congress to overrule it if it disagreed.\footnote{165} Congress promptly did just that, enacting the Military Commissions Act of 2006, which authorized military trials while making only modest improvements over the procedures that President Bush had created unilaterally.\footnote{166}

At the same time, while these decisions may not have formally demanded much from the administration, their indirect and informal effects were significant. The mere fact that the Court granted certiorari in Rasul v. Bush prompted the administration to introduce a number of reforms at Guantánamo, including the provision of administrative hearings. The voting alignment in two decisions involving U.S. citizens held as enemy combatants suggested that a majority of the Court would deny the President the power to detain a citizen captured within the


161. Id. The administration has forgone appeals in some cases and released detainees, but given its record of success in the court of appeals, these releases were for all practical purposes a matter of choice, not truly legally compelled. Id.


163. Hamdi, 542 U.S. at 533. There have been only two U.S. citizens detained by the military in the conflict with Al Qaeda—Yaser Hamdi and Jose Padilla. Id. at 577 (Scalia, J., dissenting).


165. Hamdan, 548 U.S. at 594.

United States in a case properly before it. That prospect ultimately led President Bush to remove Jose Padilla, the only U.S. citizen in military custody captured in the United States, from military detention before his case reached the Supreme Court on the merits. The Court’s decision to extend habeas corpus review led the military to grant access to the military base to counsel for the detainees, and to grant those lawyers access to classified evidence regarding their clients subject to a protective order and security clearances. And the Court’s decision in Hamdan v. Rumsfeld, the military commission case, impelled the military to countermand the President’s prior determination that Common Article 3 of the Geneva Conventions did not protect Al Qaeda detainees. That determination, in turn, likely played a role in President Bush’s decision to move “high-value detainees” out of CIA black sites and into Guantánamo. More broadly, all four cases rejected the Bush administration’s most extreme contention that as Commander-in-Chief, the President had the final word on how to “engage the enemy.” Thus, while the Court’s formal mandates were minimal, their informal and indirect effects were anything but.

While many scholars have stressed the minimalist character of the Supreme Court’s formal rulings, few have noted the prodigious amount of doctrinal work the Court had to do to rule against the President. The results in these cases were far from foregone conclusions. The sheer effort necessary to reach the Court’s results suggests that doctrine did not “control” here, and that therefore some informal force beyond legal doctrine was at play even in the most formal of the Bush administration’s legal defeats. In each of the three Guantánamo cases, for

167. In Padilla v. Rumsfeld, four Justices suggested in dissent that the President lacked such power, but the five-Justice majority dismissed the challenge because Padilla’s lawyers had filed in the wrong court. Padilla v. Rumsfeld, 542 U.S. 426, 461-62 (2004) (Stevens, J., dissenting). Justice Scalia, who joined the majority’s jurisdictional holding in Padilla, had taken the position in Hamdi v. Rumsfeld that the President lacked power to impose military detention on a U.S. citizen captured abroad. Hamdi, 542 U.S. at 554. Hence, there appeared to be five votes against military detention for U.S. citizens captured in the United States.


171. See President Bush’s Speech on Terrorism (Sept. 6, 2006), available at http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all

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

*Johnson v. Eisentrager* also appeared to support the executive in *Boumediene*, as it had denied habeas review of enemy detentions during war time, and had been interpreted by the Supreme Court subsequently as authority for the proposition that constitutional rights do not extend to non-citizens outside the United States’ borders. Another World War II precedent, *Ex parte Quirin*, seemed to support the President’s position in *Hamdan*, as it had upheld the President’s authority to try “enemy aliens” for war crimes in military commissions created by presidential order. In fact, President Bush’s order creating the military tribunal before which Hamdan was to have been tried was modeled directly on the President Roosevelt order upheld in *Quirin*. To rule against the

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174. Id.; *Rasul*, 542 U.S. at 467.
177. Id. at 493.
180. 317 U.S. 1 (1942).
181. Id. at 597. *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (citing *Eisentrager* for proposition that “[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders”).
President was far from impossible in light of these precedents; none was squarely on point, and constitutional, statutory, and international law had evolved in the intervening fifty years. But considered purely in doctrinal terms, it would have been much easier to affirm the President’s actions.

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

Similarly, the Court appeared to reach out almost on its own initiative to address the important Geneva Conventions issue in *Hamdan v. Rumsfeld*. Once the Court concluded that the military commission procedures unjustifiably departed from the procedures established for courts-martial, it had a sufficient basis to rule for Hamdan. It need not have reached the independent ground that the commissions violated the laws of war. And again, the Court did so virtually on its own. Petitioner barely pressed the issue, relegating discussion of Common Article 3 to the last three pages of his fifty-page principal brief, and did not even argue that the conflict with Al Qaeda was a non-international armed
conflict, the linchpin of the Supreme Court’s reasoning. Yet in what ultimately proved to be the Court’s most important holding, the Court concluded that the conflict was indeed a non-international armed conflict governed by Common Article 3, and that the military commission procedures violated that provision, as it was incorporated into the Uniform Code of Military Justice. This ruling had implications far beyond military commissions, because Common Article 3 also prohibits any humiliating or cruel treatment of detainees, and at the time any violation of Common Article 3 was a war crime under the federal war crimes statute. This meant that the Bush administration’s “enhanced interrogation techniques” were criminal even if they did not amount to torture, as Common Article 3 prohibits both “cruel treatment” and “humiliating or degrading treatment.”

It might be objected that doctrine rarely determines results at the Supreme Court level, where there are often splits in the circuit courts and reasonable arguments to be made on both sides of the dispute. In the Guantánamo cases, however, there were no splits in the circuits; the cases came up from the D.C. Circuit, which had consistently and unanimously ruled for the President—even after being reversed by the Supreme Court. In any event, the role of external influences is surely more significant where the Court departs from precedent—consider, for example, the political and economic forces at play when, with the “switch in time that saved nine,” the Supreme Court broke with its previous Commerce Clause and Due Process jurisprudence and began to uphold New Deal statutes; the role of the civil rights movement and Cold War politics in the Court’s decision in Brown v. Board of

188. Hamdan, 548 U.S. at 631.
191. Denniston, supra note 160.
192. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding Washington’s minimum wage law); see also Quinn Ho, Did a Switch in Time Save Nine?, 2 J. LEGAL ANALYSIS 1, 2 (2010), available at http://www.law.berkeley.edu/files/Switch.pdf (“The prevailing popular, but contested, account of the ‘switch in time that saved nine’ begins with a Court of four stalwart conservatives who battled with three liberal ‘musketeers’ for the survival of the New Deal.”).
Education to overturn Plessy v. Ferguson’s doctrine of “separate but equal,” or the role of the gay rights movement and changing social mores in the Court’s rejection of Bowers v. Hardwick in Lawrence v. Texas, which held a Texas law criminalizing homosexual sodomy unconstitutional. The Court’s military detention and trial cases did not directly overrule any precedents, but their general purport departed substantially from the Court’s historical deference to executive claims of national security in times of crisis. Thus, it is especially appropriate here, as in the New Deal, segregation, and sodomy cases, to look to influences beyond the law itself.

Moreover, the Court that ruled four times against the President was a distinctly conservative Court. It was largely the same Court that decided the 2000 election for George W. Bush by halting the recount in Florida. It was not known for its protection of individual rights and liberties. Thus, the ideological makeup of the Court does not in any straightforward way account for its decision either.

What explains the decisions is not legal doctrine, but the Court’s choice to align itself with the rule of law against a narrative of lawlessness and “law-free zones.” At stake in each case was a claim that the executive’s actions were beyond the law’s reach. In each case, the Court resisted that claim, insisting, above all, that constitutional, statutory, and/or international law have a role in regulating and constraining the nation’s response to the threat of terrorism. The question in Rasul and Boumediene was whether persons whom the President had sought to place beyond the law’s reach could bring law to bear on their detentions (and on the executive’s authority) by pursuing a writ of habeas corpus. A similar threshold issue was presented in Hamdan, and once again the Court ruled that law, and the Court, have a role to play. The Hamdan Court’s holding that the conflict with Al Qaeda was a “non-international armed conflict” governed by Common Article 3 similarly brought law to bear, by enforcing a baseline of legal human rights protections for all detainees. In short, all three cases are best understood as demanding that the President’s “war on terror” must be subject to the rule of law.

197. Devins, supra note 28, at 500-03.
199. Boumediene, 553 U.S. at 723; Rasul, 542 U.S. at 466.
201. Id. at 631.
In *Hamdi*, the question of law versus lawlessness was less starkly put, but only slightly. By the time that case reached the Supreme Court, the Bush administration had conceded that a U.S. citizen held in military custody in the United States could file a writ of habeas corpus, and to that extent, all parties agreed that Hamdi’s detention was subject to judicial review. But here, too, the administration argued that for all intents and purposes, the President was the judge of his own actions. The Solicitor General argued that the President’s Article II authority as Commander-in-Chief permitted him to detain U.S. citizens without any statutory authorization, and even that a legislative restriction on that authority might be unconstitutional. And he maintained that the reviewing court must uphold the detention as long as the government provided “some evidence” that the individual fell into the category of an “enemy combatant,” and argued that a two-page affidavit based exclusively on hearsay was sufficient to meet that burden. In the administration’s view, there was no place for any sort of judicial inquiry into the truth of its assertions; the executive’s word would have to be taken as true. The Court declined to accept these arguments. It concluded that Congress had authorized detention of persons captured on the battlefield fighting for the Taliban, and therefore did not need to reach the president’s Article II arguments. And it held that due process required notice, a meaningful opportunity to respond, and a neutral trier of fact. In short, in all four cases, the Court insisted that law must govern the detention and trial of those accused of being “the enemy,” and rejected arguments made by the President that, formally or practically, his actions were unconstrained by law.

Beyond the military detention and trial cases, however, the judiciary’s record is largely consistent with its traditionally deferential approach. In *Holder v. Humanitarian Law Project*, the Court in 2010 ruled that Congress had authorized detention of persons captured on the battlefield fighting for the Taliban, and therefore did not need to reach the president’s Article II arguments. And it held that due process required notice, a meaningful opportunity to respond, and a neutral trier of fact. In short, in all four cases, the Court insisted that law must govern the detention and trial of those accused of being “the enemy,” and rejected arguments made by the President that, formally or practically, his actions were unconstrained by law.

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203. *Id.* at 508.
205. *Id.* at 9-10.
207. *Id.* at 536-39.
209. *See infra* notes 323-28 and accompanying text.
statute penalized speech on the basis of its content,210 but failed to require the government to demonstrate that the law was narrowly tailored to further compelling ends, the usual burden in such circumstances. Instead, in the name of deference to the political branches’ judgments on national security and foreign relations judgments, the Court advanced its own speculative justifications—justifications that the government itself had never even suggested, much less supported with evidence—and then upheld the law based on these untested speculations.211

The Court also dismissed two suits against Attorney General John Ashcroft arising out of his authorization of widespread preventive detention after September 11—one for mistreatment of persons detained in connection with the September 11 investigation, on grounds that the plaintiffs had insufficiently pleaded facts establishing Ashcroft’s personal responsibility;212 and the other for abuse of the “material witness” statute to lock up a Muslim man without probable cause, on grounds of qualified immunity.213

The Court has declined to review many cases in which the lower courts have been extremely deferential to national security assertions despite disturbing allegations of constitutional abuses. Several courts of appeals have dismissed suits seeking damages for torture victims, on grounds of the “state secrets” privilege, qualified immunity, or the treatment of national security as a “special factor” militating against recognition of a Bivens remedy.214 The Court of Appeals for the Third Circuit upheld the deportation of a foreign national for providing “material support” to organizations labeled terrorist even where the support consisted of providing a prayer tent and some food during a religious service that was attended by some members of a guerrilla

210. 130 S. Ct. at 2720.
The Court of Appeals for the Sixth Circuit dismissed for lack of standing a challenge to the NSA warrantless wiretapping program because the plaintiffs could not prove that they were subjected to the program, all of whose targets were secret. The D.C. Circuit permitted the government to keep secret the identities of hundreds of foreign nationals it had subjected to preventive detention in the United States after September 11, even though none was found to be a terrorist. The Court of Appeals for the Second Circuit upheld the pretextual use of immigration authority to detain foreign nationals after September 11, even where the individuals had agreed to leave the country, thereby vitiating any immigration purpose for their detention. The same court upheld the Border Patrol’s authority to detain and interrogate several Muslim citizens who had attended a religious conference in Toronto. Several courts of appeals upheld the freezing of assets of U.S. charities denominated as “terrorist,” without a warrant or probable cause, without notice of the charges, and largely on the basis of secret evidence—although some courts have more recently ruled otherwise. And as noted above, the D.C. Circuit has consistently ruled for the government in Guantánamo habeas appeals, and the Supreme Court has thus far turned down all petitions to review those decisions.

Thus, aside from the Supreme Court’s threshold decisions in the “enemy combatant” cases, the judiciary has done relatively little, at least as a formal matter, to compel the administration to change course after September 11. Most of the administration’s adjustments were made without being ordered by a court to do anything. The courts were not the moving force in the taming of the United States’ most aggressive post-9/11 security measures.

218. Turkmen v. Ashcroft, 589 F.3d 542 (2d Cir. 2009).
219. Tabaa v. Chertoff, 509 F.3d 89 (2d Cir. 2007).
220. Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003); Global Relief Found., Inc. v. O’Neill, 315 F.3d 748 (7th Cir. 2002); but cf. Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury, 660 F.3d 1019 (9th Cir. 2011) (holding that the Treasury Department violated the Fourth Amendment by freezing designated entity’s assets without a warrant, violated the Fifth Amendment by relying on classified evidence and failing to provide adequate notice and an opportunity to respond; and violated the First Amendment by barring coordinated advocacy with the designated group); KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 647 F. Supp. 2d 857 (N.D. Ohio 2009) (holding that freezing an entity’s assets pending investigation on classified evidence and without a warrant violated the entity’s Fourth and Fifth Amendment rights).
C. The Role of Congress

Congress did even less than the courts to protect rights in the wake of September 11. It passed the USA Patriot Act shortly after the attacks, and while it did not give the President all that he asked for, the Act expanded his authority to conduct surveillance, gather intelligence, detain and deport foreign nationals on grounds of political association and belief, and freeze assets based on secret evidence, while relaxing judicial oversight and other constraints on these powers. As noted above, when the Supreme Court declared the President’s military commissions illegal, Congress made them legal by authorizing them in the Military Commissions Act of 2006. When the Court held that the habeas corpus statute extended to persons held without charge at Guantánamo, Congress repealed that portion of the statute in the Detainee Treatment Act. It granted retroactive immunity to telecommunications service providers who, at the executive’s request, engaged in illegal warrantless electronic surveillance. And Congress has repeatedly obstructed President Obama’s efforts to close Guantánamo by barring the expenditure of any funds to transfer detainees to the United States, even to stand trial in a criminal court, and requiring certifications for any transfer to a foreign country that are so onerous that transfers ceased for fifteen months.
The one exception to Congress’ otherwise abject deference was its reaffirmation, in the “McCain Amendment” to the Detainee Treatment Act, that the prohibition on cruel, inhuman, and degrading treatment found in the Convention Against Torture (CAT) applied to all persons held by U.S. authorities, anywhere in the world, regardless of their nationality.\textsuperscript{228} This provision, enacted over vigorous opposition personally directed by Vice-President Richard Cheney, repudiated the Bush administration’s contention that the CAT prohibition did not apply to foreign nationals held outside the United States.\textsuperscript{229} That theory, counter to the text and spirit of the CAT,\textsuperscript{230} was driven by the administration’s desire to inflict cruel and inhuman treatment on terror suspects, especially in the CIA’s secret prisons.\textsuperscript{231} In the McCain Amendment, Congress reaffirmed that this human rights protection applied equally to all human beings, whatever their nationality and wherever they are held.\textsuperscript{232} However, Congress provided no mechanism for enforcing the provision.\textsuperscript{233} Moreover, foreseeing that it might lose the vote in Congress on the issue, the administration had already prepared a secret legal memorandum concluding that none of its “enhanced interrogation techniques” were in fact cruel, inhuman, or degrading in violation of CAT, even when inflicted in combination.\textsuperscript{234}

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

\textbf{D. The Role of Politics}

The force of ordinary electoral politics also cannot account for the shift in U.S. counterterrorism policy. None of the Bush administration’s initial initiatives sparked majoritarian opposition. To the contrary,

\begin{itemize}
  \item \textsuperscript{228} 42 U.S.C. § 2000dd (2006).
  \item \textsuperscript{230} \textsc{Michael John Garcia, Cong. Research Serv., RL 32890, Renditions: Constraints Imposed by Laws on Torture} 8 (2009).
  \item \textsuperscript{231} Cole, \textit{supra} note 229.
  \item \textsuperscript{232} \textit{Id.}
  \item \textsuperscript{233} \textit{Id.}
  \item \textsuperscript{234} U.S. Justice Dep’t, Office of Legal Counsel, Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Technique That May Be Used in the Interrogation of High Value Al Qaeda Detainees (May 30, 2005).
\end{itemize}
President Bush, who had very low approval ratings shortly before 9/11, shot up in popularity when he declared the “war on terror,” and was re-elected in 2004, in large measure on his promise to deliver security. Apart from opposition to the war in Iraq, there was little widespread popular pressure on President Bush to rein in his security initiatives. Despite this evidence, Eric Posner and Adrian Vermeule have argued that in the modern era, political checks are all there are when it comes to restraining executive power. They maintain that Congress, the courts, and the law itself cannot effectively constrain the executive, especially in emergencies, but that this need not concern us because the executive is adequately limited by political forces. At first blush, the past decade might appear to vindicate Posner and Vermeule’s views, as political forces, broadly speaking, seem to have been at least as effective at checking the President as were Congress or the judiciary. But there is in fact little evidence that electoral politics or majoritarian sentiment played much, if any, role in persuading President Bush to ratchet back his security initiatives. While formal judicial and legislative checks cannot tell the whole story, the alternative account is not “politics” as Posner and Vermeule define and describe it, but a much more complex interplay of civil society, law, politics, and culture: what I have called “civil society constitutionalism.”

Posner and Vermeule contend that the separation of powers is, for all practical purposes, defunct, as executive power has dramatically expanded relative to the other branches in the modern era. Like many commentators before them, Posner and Vermeule attribute this development to the growth of the administrative state and to the near-constant state of emergency in which modern American government now seems to operate. But where other commentators view these developments as profound challenges to our constitutional order, Posner and Vermeule insist that ordinary political constraints on the executive are sufficient.

237. See supra Part III.A.
238. POSNER & VERMEULE, supra note 236, at 63, 208.
239. Id. at 11, 100.
241. Id.
In my view, Posner and Vermeule simultaneously underestimate the constraining force of law and overestimate the influence of political limits on executive overreaching. Sounding like Critical Legal Studies adherents, they sweepingly claim that law is so indeterminate and manipulable as to constitute only a “façade of lawfulness.”

But in assessing law’s effect, they look almost exclusively to formal indicia—statutes and court decisions. That approach disregards the role that law plays without coming to a head in a judicial decision or legislative act. As the post-9/11 period illustrates, when law is reinforced and defended by civil society institutions, it can have a disciplining function long before cases reach final judgment, and even when no case is ever filed, a reality to which anyone who has worked in the executive branch will attest. Executive officials generally cannot know in advance whether their actions will attract the attention of civil society watchdogs, or lead to court review. They often cannot know whether such oversight—whether by a court, a legislative committee, or a nongovernmental organization—will be strict or deferential. As long as there is some risk of such oversight, the resultant uncertainty itself is likely to have a disciplining effect on the choices they make. There are, in short, plenty of reasons why executive lawyers generally take legal limits seriously. And they cannot predict when a legal claim will be advanced against them. Similarly, in focusing exclusively on statutes and their enforcement by courts, Posner and Vermeule disregard the considerable checking function that Congress’s legal oversight role plays through means short of formal statutes, such as by holding hearings, launching investigations, requesting information about doubtful executive practices, or restricting federal expenditures. The effectiveness of these checks, moreover, will often turn on the strength of civil society. If there are significant watchdogs in the nongovernmental sector and/or the media focused on executive actions, ready to bring allegedly illegal conduct to public attention, the law will have substantial deterrent effect, with or without actual court decisions.

While they are overly skeptical about law, Posner and Vermeule are unrealistically romantic about the constraining force of majoritarian politics. The political checks they identify consist solely of the fact that Presidents must worry about election returns, and must cultivate

242. Id. at 90.
243. Id.
244. See Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 102 (2007) (arguing that the executive’s national security function is excessively governed by law).
credibility and trust among the electorate.\textsuperscript{245} There are several reasons to doubt that these political realities are sufficient to guard against executive overreaching.

First, and most fundamentally, while the democratic process is well designed to protect the majority’s rights and interests, it is poorly designed to protect the rights of minorities, and not designed at all to protect the rights of foreign nationals, who have no say in the political process.\textsuperscript{246} In times of crisis, the executive nearly always selectively sacrifices the rights of foreign nationals, often defending its actions by claiming that “they” do not deserve the same rights that “we” do.\textsuperscript{247} To say the law is superfluous because we have elections is to relegate foreign nationals, and minorities generally, to largely unchecked abuse.

Second, the ability of the political process to police the executive is hampered by secrecy. Much of what the executive does, especially in times of crisis, is secret, and even when some aspects of executive action are public, its justifications often rest on grounds that are assertedly secret.\textsuperscript{248} Courts and Congress have at least some ability to pierce that veil and to insist on accountability. Absent legal rights, such as those created by the Freedom of Information Act, the general public has virtually no ability to do so.\textsuperscript{249}

Third, the electoral process is a blunt-edged sword. Presidential elections occur only once every four years, and congressional elections every two years. Congressional elections will often involve an unpredictable mix of local and national matters, and there is little reason to believe they will concentrate on executive overreaching. Presidential elections also inevitably encompass a broad range of issues, most of which will have nothing to do with security and liberty. Elections are therefore unlikely to be effective at addressing specific abuses of power. Voters’ concerns about abstract institutional issues such as executive power may clash with their interests on the substantive merits of particular issues, such as whether to use military force in support of Libyan rebels. There is no guarantee that citizens will separate these issues in their minds, and no reason to believe that if they do so, they will favor abstract institutional concerns over specific policy preferences at the ballot box.

\textsuperscript{245} Posner & Vermeule, supra note 236, at 5.
\textsuperscript{246} Cole, supra note 90.
\textsuperscript{248} Cole, supra note 90.
\textsuperscript{249} Id.
Fourth, the political process is notoriously focused on the short term, while constitutional rights and separation of powers generally serve long-term values.\textsuperscript{250} It was precisely because ordinary politics tend to be shortsighted that the framers adopted a constitutional democracy. The Constitution identifies those values that society understands as important to preserve for the long term, but knows it will be tempted to sacrifice in the short term.\textsuperscript{251} If ordinary politics were sufficient to protect such values, we would not need a constitution in the first place.

Thus, there is little evidence in fact that majoritarian politics played a significant checking role in the aftermath of 9/11, or that such politics would generally be a sufficient checking force in times of crisis. And more generally, there is little reason to believe that political checks will be sufficient to restrain presidential abuse. The story is infinitely more complicated. As I have sought to illustrate here, in the aftermath of 9/11, the interplay of law, politics, and culture, framed and prompted by civil society organizations, was critical to rendering effective constitutional and international legal checks.

E. Alternative Accounts

In the preceding sections, I have sought to show that the curtailments of President Bush’s initial counterterrorism initiatives cannot be attributed to the formal checks and balances of judicial review or legislation, or to majoritarian political forces, and that as a general rule, these sources are unlikely to impose significant checks during times of crisis. What checks there were, I suggest, seem to have been driven in significant part by nongovernmental institutions—in particular, civil society groups devoted to constitutional and human rights. There are, to be sure, alternative accounts of the first post-9/11 decade. In this section, I argue that while some of these alternative accounts may tell part of the story, they do not convincingly rule out the significant role that civil society has played.

1. Continuity, Not Change

Some have argued that the real story is not the restoration of rights and legality, but the institutionalization of “the state of the exception.”\textsuperscript{252}

\textsuperscript{251} Id. at 2319.
\textsuperscript{252} See, e.g., Mark Danner, \textit{After September 11: Our State of Exception}, N.Y. REV. OF BOOKS (Oct. 13, 2011), available at
According to this view, Obama has largely continued the Bush initiatives, rendering them, if anything, more resistant to challenge because they are now cloaked in the legitimacy of an administration perceived as more sensitive to civil rights and civil liberties. This view is articulated by advocates on the left who are disappointed that Obama has not made more substantial changes, and by advocates on the right who point to Obama’s actions as evidence that Bush’s policies were not as extreme as many critics portrayed them. This account, however, unfairly discounts the significant changes that have been made since the first two years after 9/11, and especially since Obama took office.

The principal difference between the Bush and Obama administrations lies in their attitudes toward domestic and international legal constraints. Bush viewed the law in Schmittian terms as secondary, with security his only real mandate. Accordingly, his administration did all it could to avoid legal dictates, reading some laws (such as the Geneva Conventions, the Non-Detention Act, and the prohibition on cruel, inhuman, and degrading treatment) as inapplicable altogether; implausibly interpreting other laws (such as the bans on torture and warrantless wiretapping) as not encompassing conduct they were plainly meant to prohibit; and asserting the President’s authority to disregard and override any contrary law by virtue of his alleged Article II authority as Commander in Chief. President Obama, by contrast, has insisted from the outset that he will fight terrorism within and pursuant to the rule of law, and that the nation will be stronger for doing so.


253. Margulies & Metcalf, supra note 252.


255. See supra text accompanying note 52.

256. See discussion supra Part II.A.

257. See, e.g., Remarks of the President on National Security, supra note 76.
him too much power, when a panel of that court ruled that Guantánamo detentions need not be cabined by the laws of war.\textsuperscript{258}

From the left, the criticism that Obama is no different from Bush seems largely to stem from frustration that he has not ended the practices of military detention, military commissions, and targeted killing.\textsuperscript{259} For example, with respect to Guantánamo, the mantra of many in the human rights community has been “try or release;” they argue that if terrorists cannot be convicted in an ordinary civilian criminal court, they should be released.\textsuperscript{260} Terrorists should be apprehended and brought to trial, they maintain, not assassinated by drones.\textsuperscript{261} But these critiques tend to ignore that we are in an ongoing armed conflict, where military detention, military justice, and killing itself are not per se violations of international law, international human rights, or domestic law.\textsuperscript{262} On the contrary, all are customary elements of a nation’s arsenal when it is at war.\textsuperscript{263} The United States is still engaged in an armed conflict in Afghanistan and the border regions of Pakistan with Al Qaeda and the Taliban, and accordingly has authority to kill or hold in military detention people fighting for the other side, as well as to use military criminal process to try them for war crimes. There is of course substantial room for debate about the proper scope of the authority to kill, detain, and/or try in the military system, but the notion that there is no authority for such measures finds little support in precedent or international law.\textsuperscript{264}

Many complaints about President Obama’s measures assume that the appropriate benchmark for assessment is the peacetime approach that prevailed before the attacks of September 11; from that perspective, we

\textsuperscript{258} See supra note 79.


\textsuperscript{260} See, e.g., CENTER FOR CONSTITUTIONAL RIGHTS, Rights Groups Mark Beginning of a Decade of Wrongful Detentions at Guantánamo and Demand Obama Close Island Prison with Justice, available at http://www.ccrjustice.org/newsroom/press-releases/rights-groups-mark-beginning-of-decade-of-wrongful-detentions-guant%C3%A1namo-and, (calling on administration to try or release detainees at Guantanamo)


\textsuperscript{263} See sources cited supra note 262.

\textsuperscript{264} Id.
have “established a new normal,” as the ACLU and others have maintained. But if one accepts that there is an ongoing, armed conflict with Al Qaeda and the Taliban, centered in Afghanistan, the appropriate lens is not peace, but war. And from that perspective, there are significant differences between President Bush’s initial measures and those that the United States is now employing.

In short, while problems undoubtedly remain, it can hardly be denied that a nation not engaged in torture, renditions, disappearances, detention without hearings or judicial review, and warrantless wiretapping is more consistent with rule-of-law principles than one that is so engaged.

2. The Pendulum Effect

A second alternative account acknowledges that meaningful reforms have been made, but maintains that such corrections are inevitable when the moment of crisis passes, and that all we have seen in the last decade is a regression to the mean. It is certainly true as a historical matter that governments often overreact in the heat of a crisis, and that once the crisis cools, calmer heads more often prevail. In the heat of the moment, we are likely to panic and overestimate what is appropriate or necessary to address the threat. As time passes and fear subsides, there may well be more room for rationality to return. But this account, often depicted as the swing of a pendulum, is too thin, and risks complacency to the extent that it portrays the shift as almost automatic.

The pendulum does not swing of its own accord; there is no analogical force to gravity involved. After all, as another common observation has it, government officials who gain expanded powers in periods of crisis are loath to surrender it thereafter. It takes opposition, criticism, and dissent to create momentum for society and the government to move in the other direction. This is especially so given the weight of the forces arrayed on the side of overreaction. The power of fear, the sheer size of the national-security-industrial complex, and the fact that by and large the rights sacrificed have been of foreign nationals combine to create extraordinary pressure in favor of overreaching, and none of these elements produces a corrective of its own accord. Even if some pendulum effect is likely, the vigor of opposition and dissent

265. Establishing a New Normal, supra note 259; Margulies & Metcalf, supra note 252.

266. Joseph Margulies and Hope Metcalf characterize this as the dominant narrative in post-9/11 legal scholarship. Margulies & Metcalf, supra note 252, at 434-35.
voiced by civil society may well determine both the extent of the initial overreaction and the speed with which corrections are made.  

3. Judicial Self-Interest

A third account focuses on the Supreme Court’s role in particular, and characterizes its interventions as driven largely, if not exclusively, by concern for its own power, and not for liberty or human rights. However, this explanation, even if one were to accept it on its own terms as a rationale for the Court’s conduct, addresses only a small part of the picture. As discussed above, most of the reforms were undertaken without an order from the Supreme Court.

Moreover, this account is not persuasive even as an explanation of the Court’s own role. The same institutional self-interest in judicial power presumably existed in other crises; yet, before the post-September 11 cases, the Supreme Court had almost uniformly deferred to claims of executive prerogative on issues of national security in times of crisis. Apart from the steel seizure and Pentagon Papers cases, this was the first time the Court intervened to restrain a President during wartime. In World War I, World War II, and during the height of the Cold War, the Court remained on the sidelines or deferred to questionable assertions of national security needs. Only when those conflicts came to an end did the Court assert itself.

Indeed, a court concerned about conserving its own institutional power might be more likely to defer during times of crisis. One cannot be certain how the public will respond to a decision. Ruling for “the enemy” during wartime could be a risky proposition. A court primarily concerned about maintaining its institutional capital might therefore make the strategic choice to defer in times of crisis so as to avoid showdowns that could undermine its legitimacy, thereby preserving its power for ordinary circumstances.

267. See generally Matthew & Shambaugh, supra note 31.
268. See, e.g., Vladeck, supra note 28; Joseph Landau, Muscular Procedure: Conditional Deference in the Executive Detention Cases, 84 WASH. L. REV. 661 (2009) (arguing that the courts after 9/11 “reinforced their critical role in the broader tripartite framework [ ] by grounding decision-making within their own area of expertise”); see Hamdi, 542 U.S. at 536 (noting that the Constitution “envisions a role for all three branches when individual liberties are at stake”).
269. See Hamdi, 542 U.S. at 546-48; Devins, supra note 28, at 500-03; David Cole, Judging the Next Emergency, supra note 156.
271. REHNQUIST, supra note 152.
272. Cole, supra note 156.
times. Accordingly, it is not obvious that the Supreme Court’s own institutional interests in times of crisis push it in the direction of intervention, rather than deference or avoidance.

Moreover, to the extent that the Supreme Court in the combatant cases viewed its choice as one of siding with law or lawlessness, as I have suggested above, that seems likely to be the result of the successful framing that civil society organizations were able to give those cases by the time they reached the Court.

4. The Iraq War

A fourth account points to the effect of the Iraq war in turning public opinion against the administration. The Bush administration’s insistence on pursuing that costly and unpopular war, coupled with the absence of weapons of mass destruction there, the ostensible reason for invading, dramatically undermined the public’s trust in the administration. The presidency was much weaker after going to war with Iraq than before, and that weakness undoubtedly contributed to the success of broader reform efforts. But this explanation is insufficient standing alone. First, in the absence of pressure from civil society on issues of constitutional and human rights, there is no particular reason that the President’s weakness on Iraq would translate into strengthened human rights claims with respect to counterterrorism efforts more generally. On the contrary, it might conceivably have created further pressure for even more extreme measures, to “reassure” a questioning public.

Second, what made the Iraq war debacle particularly influential with respect to human rights and the “war on terror” was that the problems there echoed the broader problems that plagued the rest of the administration’s counterterrorism policies. The Iraq war, like many of President Bush’s most questionable initiatives, was said to be driven by concern about terrorism. And as with the other national security initiatives surveyed above, the administration largely thrust law to the side with respect to the Iraq war. The U.N. Charter forbids invasion of another country without authorization of the Security Council, except in

\[\text{References:}\]

274. See supra notes 198-207 and accompanying text.
276. Id.
277. Id.
278. Id.
response to armed attack. Many experts interpret international law to permit in addition a unilateral act of self-defense against an imminent, but not yet launched, attack. In the case of Iraq, however, the United States faced neither. Yet the administration went to war anyway, without approval from the U.N. Security Council.

The Iraq war, like Bush’s counterterrorism policy more generally, featured a willingness to use the state’s most coercive authority to “prevent” speculative future attacks, in disregard of fundamental legal constraints, and on the basis of shoddy evidence. The revelations of torture at Abu Ghraib prison, closely linked to the administration’s coercive interrogation practices at Guantánamo and elsewhere, dramatically reinforced the connections. In short, what was wrong with the Iraq war was also wrong with the administration’s preventive counterterrorism paradigm more generally. But again, absent a strong foundation for the broader critique of Bush’s policies, the Iraq war fallout might not have contributed to the restoration of legality in U.S. counterterrorism policy more generally.

At a minimum, claims that there has been no meaningful resurrection of the rule of law, that all we have witnessed is the inevitable swing of a pendulum, that it is all a matter of judicial self-interest, and that the unpopularity of the Iraq war drove the reforms, cannot fully account for what happened in the first post-9/11 decade. Even if some of these perspectives illuminate part of the story, a more complete account requires consideration of the influence of civil society.

IV. LESSONS OF THE POST-SEPTEMBER 11 DECADE

The lessons of the last decade suggest that if we are to resist executive overreaching in the future, developing and reinforcing a culture of resilience with respect to constitutional and human rights may be as important as the formal checks and balances enshrined in the Constitution, and civil society organizations have a unique role to play in fostering that culture and advancing those claims. This observation in

283. Id. at 1-19.
turn has implications for constitutional theory, law, and practice. First, as to theory, scholars and students of the Constitution would do well to pay as close attention to the rights-reinforcing and checking functions of civil society as they traditionally have to courts, Congress, and the formal separation of powers. Second, with respect to the content of constitutional law, the First Amendment freedoms of speech and association should be understood as essential to ensure that there is room for civil society organizations to operate. Vincent Blasi argued long ago that the First Amendment serves a critical function in checking government abuse; but it is not the First Amendment itself, but the civil society that it protects, that actually does the checking. Third, and most importantly, as a matter of practice, the experience of the first post-9/11 decade underscores the important value of our active engagement as citizens in civil society organizations dedicated to constitutional and human rights. Without that engagement, a constitution is likely to be as thin as the parchment on which it is written.

A. Theory: Civil Society Constitutionalism

If pressure from civil society contributed to the restoration of legality in the decade after September 11, it is essential for constitutional theorists to pay closer attention to how that pressure works, and in particular, to the effect of civil society on constitutionalism and human rights. I have argued above that the surprisingly robust post-9/11 checks on the executive branch can be attributed neither to law in the formal sense, nor to ordinary politics. One cannot understand the transformation without considering the role played by civil society groups committed to constitutional and human rights. Constitutional theory has traditionally looked to the Constitution itself and the separation of powers, especially judicial review, for the enforcement of legal limits on government power. But the post-9/11 experience suggests that a robust civil society dedicated to constitutional and human rights may be as important as the more formal elements of separation of powers in checking executive abuse. At the same time, there is a complex interrelationship between the informal power of civil society and more formal legal constraints. Legal disputes and claims provide the focal point of many of these groups’ activities, but their activities are by no means limited to seeking injunctive relief in court. They also invoke legal claims in the informal sphere of civil discourse, calling on government officials, elites, and the

population at large to adhere to the commitments reflected in the Constitution and human rights instruments.

Some constitutional theorists have begun to criticize American constitutional law and scholarship for its near-exclusive focus on courts.\textsuperscript{285} They argue that courts are inherently conservative institutions with severely limited remedial capabilities, and that even when they happen to issue rights-protective decisions, those decisions may spark backlash that does more harm than good. At the same time, they maintain, excessive focus on courts as the enforcers of constitutional rights makes the other branches of government and the people at large less likely to take responsibility themselves to effectuate the Constitution. So-called “popular constitutionalism” argues that we must “take the Constitution away from the courts,” and empower and inspire “the people themselves” and/or their representatives to take on a more affirmative constitutional role.\textsuperscript{286}

The focus on constitutionalism outside the courts builds upon an important truth; namely that, as Learned Hand noted in 1944, “liberty lies in the hearts of men and women.”\textsuperscript{287} But popular constitutionalism’s prescription is flawed. The Constitution is designed to constrain us, in recognition that the people themselves and their representatives will be tempted to disregard long-term commitments to fundamental values when those values conflict (as they often will) with short-term popular preferences. To “take the Constitution away from the courts” and assign its enforcement to Congress, the President, or the people themselves, is to ask the fox to guard the henhouse. In a fundamental sense, then, “popular constitutionalism” is a contradiction in terms.\textsuperscript{288}

In what they have termed “democratic constitutionalism,” Robert Post and Reva Siegel have sought to take the insights of “popular constitutionalism” seriously, but without discounting or denigrating the role of courts.\textsuperscript{289} They acknowledge that courts play a central role in


\textsuperscript{287} See supra note 13.


\textsuperscript{289} See, e.g., Post & Siegel, supra note 12.
enforcing constitutional protections against majoritarian pressures. But they also insist that the “authority of the Constitution depends on its democratic legitimacy, upon the Constitution’s ability to inspire Americans to recognize it as their Constitution.” As such, they see a role for both courts and the people, and argue that popular reactions to constitutional decisions, worryingly described by other scholars as “backlash,” should be viewed positively as expressing “the desire of a free people to influence the content of the Constitution.” As they put it, “[b]acklash can promote constitutional solidarity and invigorate the democratic legitimacy of constitutional interpretation.” Thus, Post and Siegel seek to avoid the contradiction of “popular constitutionalism” by focusing instead on the interaction between popular political movements and judicial decisions about constitutional meaning.

Both “popular” and “democratic” constitutionalism recognize a central paradox of constitutional and human rights in a democracy: namely, that those rights are designed to check the force of popular opinion and ordinary politics, but, as Learned Hand noted, they are effective only to the extent that the people are committed to them. How does constitutional law check politics if it is ultimately dependent upon political commitment?

This article’s focus on the particular role played by civil society organizations committed to constitutional rights suggests an answer. Because such civil society organizations define themselves by their institutional dedication to rights, operate through appeals to rights, and lack the formal authority to “enforce” rights themselves, they necessarily bridge the gap between politics and constitutional law, by building, supporting, and reinforcing a culture of resilience with respect to constitutional and human rights.

Civil society, in other words, performs an essential function in making rights meaningful, and in furthering Hand’s requirement that “liberty lies in the hearts of men and women.” Much like a constitution itself, a civil society organization committed to constitutional or human rights represents a collective decision to defend certain fundamental values. Unlike a constitution, however, civil society is not simply a piece of paper, but a living embodiment of those commitments. And when, as in times of crisis, the executive, the legislature, the courts, and the general population are most inclined to

290. Id.
291. Id. at 374.
292. Id. at 376.
293. Id.
294. Id.
favor broad executive power over fidelity to fundamental principle, civil society organizations play their most critical role. Because those organizations are defined by their commitment to constitutional and human rights values, they are less likely to lose sight of those values in times of crisis. 295

Indeed, these civil society organizations often thrive precisely when it appears that all other forces in society are directed toward undermining constitutional and human rights. Thus, the ACLU, the Center for Constitutional Rights, and the Council on American-Islamic Relations all grew substantially in the wake of 9/11, as supporters saw those institutions as critically important checks on government abuse and flocked to join and support them like never before. 296 And despite their lack of any governmental or similarly formalized power, they played an important role in prompting the United States to bring its counter-terrorism policies and practices more in line with constitutional and human rights limits. 297

Nor is the role of civil society organizations in formulating, shaping, and helping to enforce constitutional meaning limited to times of crisis. In future scholarship, I aim to examine the broader role that such groups play in giving rights meaning. But suffice it to note here that it is difficult to name a single advance in the development of constitutional rights that has not been prompted and accompanied by the active participation, and often, leadership, of civil society organizations. Civil society groups committed to eliminating racial injustice, including the NAACP, the NAACP Legal Defense Fund, and a host of other civil rights groups, were critically important to the dismantling of official segregation and racial discrimination. 298 Women’s rights groups, including the ACLU under the guiding hand of Ruth Bader Ginsburg, played a central role in establishing the constitutional principle that distinctions based on sex are presumptively suspect under the Equal Protection Clause, and that the right to terminate a pregnancy is a central aspect of equality. 299 And civil

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

296. Drinkard, supra note 111 and accompanying text.

297. See discussion supra Part III.A.


society groups dedicated to gay rights played an important part in the Supreme Court’s invalidation of homosexual sodomy laws in *Lawrence v. Texas*, as well as in the ongoing movement to recognize the right of same-sex couples to marry.\textsuperscript{300} Attempting to understand these developments either as a matter of pure doctrine, or as a function of politics writ large, misses the distinctive role that civil society organizations have played in formulating, developing, and enforcing constitutional rights claims.

Civil society organizations, of course, do not always push in progressive directions. The U.S. Chamber of Commerce, for example, spends vast resources to press the rights of big business over the interests of consumers, workers, and the environment. The National Rifle Association and other gun rights groups, with substantial financial backing from the gun industry, successfully advocated to establish a right to bear arms that contributes to violent crime nationwide. Religious organizations have worked long and hard to roll back the protections the Supreme Court afforded pregnant women in *Roe v. Wade*. And so-called super PACs, also a part of “civil society,” have served to obscure the efforts of the super-rich to skew presidential and congressional elections through massive anonymous spending on campaign advertising.

In fact, some of the most successful civil society ventures in the last two decades have been conservative, opposing affirmative action, universal health care, gay rights, and environmental regulation.\textsuperscript{301} Moreover, for every *New York Times* editorial criticizing a national security initiative for violating civil liberties, the *Wall Street Journal* seems to run an editorial promoting a hard-line security position. Thus, there is no guarantee that civil society will help constitutional rights evolve in a progressive direction. My claim is rather that much of the work of constitutionalism will be done in the civil society sector, and that in order to understand how constitutions and the rights they guarantee actually work, scholars need to pay more attention to the role these nongovernmental institutions play in the struggle over constitutional meaning.

Civil society constitutionalism, by focusing on the catalytic and reinforcing role of civil society organizations, helps to explain how constitutional and human rights values are effectuated and protected in a democracy. It is not “the people themselves,” an abstraction, but individuals acting together in specific nongovernmental organizations


and associations, that play a critical role. Civil society organizations are at once committed to constitutional law and actually engaged in advancing that law. They bridge the gap between ordinary politics and formal constitutional law, and help to reinforce the culture that is so essential to preserving the Constitution as a living embodiment of our society’s deepest commitments.

Like the popular constitutionalists, Joseph Margulies and Hope Metcalf criticize post-9/11 legal scholarship for focusing inordinately on the role of courts in protecting and preserving rights. In their view, whether rights are actualized turns less on formal judicial decisions than on which narrative prevails in American culture—one that sees rights (often, the rights of others) as obstacles to national security or one that sees respect for rights as an important component of American values and a source of strength. Court decisions and political elections play a part in the competing narratives, and those narratives in turn play a part in judicial decisions and elections, but there is no necessary correspondence. A judicial or electoral victory may reinforce one set of views or, conversely, prompt a backlash. Margulies and Metcalf thus properly emphasize the need to consider the interrelation of law, culture, and politics. This essay maintains that civil society plays a critical role in affecting which narrative prevails; what results obtain in the courts, Congress, and the executive branch; and what responses those results are likely to engender. In short, we cannot understand the arc of constitutionalism without paying close attention to the work of civil society groups.

It is important to distinguish the role of civil society from democratic politics more generally. As I have shown above, while political forces played an important role in checking President Bush, what was significant was the particular substantive content of that politics; it was not just any political pressure, but pressure to maintain fidelity to constitutional and human rights. Politics standing alone is as likely to fuel as to deter abuse; consider the lynch mob in the United States or the Nazi Party in Germany. What we need if we are to check abuses of executive power is a culture that champions constitutional and human rights. And civil society groups sharing those commitments are integral

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302. Margulies & Metcalf, supra note 252, at 437, 450.
303. See id. at 456–70 (criticizing legalistic and court-centric understanding of rights, and advocating more attention to the political and symbolic uses of rights).
304. Id. at 461 (“A loss can produce a sense of threat and mobilize people to act, while success invariably encourages complacency and quiescence”).
305. See discussion supra Part III.
to building and sustaining that culture, and to invoking it in times of crisis.

Unlike the majoritarian electoral politics Posner and Vermeule imagine, the work of civil society cannot be segregated neatly from the law. On the contrary, it will often coalesce around a distinctly legal challenge, objecting to departures from specific legal norms, often but not always heard in a court case, as with civil society’s challenge to the treatment of detainees at Guantánamo. Congress’s actions on that subject make clear that had Guantánamo been left to the majoritarian political process, there would have been few if any advances. The litigation generated and concentrated pressure on claims for a restoration of the values of legality, and, as discussed above, that pressure then played a critical role in the litigation’s outcome, which in turn contributed to a broader impetus for reform.

The separation of powers and human rights are designed to discipline and constrain politics, out of a concern that majoritarian politics, focused on the short term, is likely to discount these long-term values. Yet without a critical mass of active support for constitutional principles, they are unlikely to be effective. The critical mass, however, need not be a majority. In the wake of 9/11, civil society organizations helped achieve results that almost certainly would have been impossible through a strictly majoritarian political process. The answer, then, is not to abandon legal for political constraints, as Posner and Vermeule would, but to promote a culture that values constitutional and human rights as legal constraints.

Civil society organizations devoted to such values, such as Human Rights Watch, the Center for Constitutional Rights, and the American Civil Liberties Union, play a central role in facilitating, informing, and generating a culture of respect for liberty and legality. Unlike governmental institutions, civil society groups have no formal authority to impose the limits of law themselves. Their recourse to the law is necessarily indirect: they can file lawsuits seeking judicial enforcement, lobby Congress for statutory reform or other legislative responses, or seek to influence the executive branch. But while they advance legal claims, they simultaneously pursue these goals through discursive means peculiar to civil society—by appealing to the public and elite opinion, through public advocacy, education, demonstrations, email and petition campaigns, and the like.

As distinct from ordinary politics, which tend to focus on the preferences of the moment, these civil society organizations are

306. Id.
dedicated to a set of long-term commitments. Much like a constitution itself, civil society groups organized to promote constitutional and human rights are institutionally designed to emphasize and reinforce our long-term commitments to rights. When the ordinary political process is consumed by the heat of a crisis, organizations like the ACLU, Human Rights First, and the Center for Constitutional Rights, dedicated to preserving constitutional and human rights, can generally be counted on to stand up for these rights and to resist political pressures. At their best, civil society organizations help forge a culture of resilience about rights.

Kramer, Tushnet, Post and Siegel, Posner and Vermeule, and Margulies and Metcalf all recognize the importance of culture as a checking force on government power in the modern world. But none focuses on the particular role that civil society organizations committed to constitutional and human rights play in that checking mechanism. It is not that the “rule of politics” has replaced the “rule of law,” as Posner and Vermeule would have it, or that the Constitution needs to be taken from the courts and given to the people, as the popular constitutionalists advocate, but that a culture of resilience about rights, reinforced by civil society, is an essential element in ensuring that constitutional law is more than mere words.

**B. Law: The Checking Function of Political Freedom**

If a robust civil society is essential to healthy constitutionalism, then constitutional protections of civil society, in particular the First Amendment, may be as important as the formal separation of powers. In this sense, the post-September-11 decade can be read as a vindication of Vincent Blasi’s classic vision of the First Amendment’s “checking value.” Blasi argued that one of the central values of free speech is precisely its instrumental ability to hold official power in check by calling it to public account. But of course it is not the First Amendment itself that calls power to account. The First Amendment creates a safe space for civil society to act, but it is civil society itself that is the living embodiment of this “checking value.”

The First Amendment is the lifeblood of civil society. For civil society organizations to flourish, they must have the freedom to criticize

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309. *Id.* at 523.
310. *Id.* at 528.
the government; to organize themselves as associations; to appeal to the citizenry for support, both financial and ideological; and to collaborate with other groups as a means of furthering their ends. Maintaining those freedoms is an important value in itself, but also has substantial instrumental benefits, inasmuch as a free civil society may act as a critical check on executive abuses of other rights. Accordingly, an appreciation of the role of civil society in making the Constitution work should underscore the central importance of preserving First Amendment protection for such organizations’ speech and associational activities.

In this light, three developments since September 11 should be of concern. First, while direct attacks on speech have not been a central feature of the “war on terror,” free speech remains vulnerable, especially for some. By and large, since 9/11, we have not seen the sort of direct punishment of speech that characterized the government’s response to anti-war activists during World War I or Communist sympathizers in the McCarthy era. However, the government’s aggressive targeting of Muslim communities in the United States, including the use of pretextual immigration charges, informants, and undercover provocateurs, has had a profound chilling effect on that community’s freedom to engage in criticism of the government. While this targeting does not directly affect the ability of non-Muslim and non-Arab individuals and organizations to criticize government overreaching, the Arab and Muslim community, as the target of virtually all of the overreaching, is the most important source of information. Immigrants are especially vulnerable because the byzantine immigration code affords wide discretion for selective enforcement and the Supreme Court has ruled that even selective enforcement based on otherwise protected associations is no bar to deportation proceedings. While investigating potential terrorists is indisputably important, the heavy-handed way in which the federal government has gone about it has undermined the freedom of members of Arab and Muslim communities to speak out and be heard—and that in turn increases the likelihood of executive overreaching.

Second, Congress and the President have criminalized speech and association when engaged in with or on behalf of organizations that the government has designated as “terrorist”—regardless of the otherwise peaceful and lawful character of the individual’s speech or association.

311. Id. at 536.
313. Id. at 222, 246.
314. Id. at 234-37.
Federal law broadly empowers the executive to designate domestic as well as foreign groups as “terrorist,” and makes it a crime to provide such groups with any “material support,” or to engage in any “transaction” with them, including offering them any service. Both “material support” and “service” are defined sufficiently broadly as to include pure speech, and neither requires any nexus between the content of the speech and any terrorist conduct. Thus, these laws make it a crime to engage in speech advocating only human rights and the peaceful resolution of conflict, when done for or with designated groups. In Holder v. Humanitarian Law Project, the Obama administration successfully established that speech advocating only “political ideas and lawful means of achieving political ends” could be made criminal without transgressing the First Amendment.

For all practical purposes, these laws resurrect the principle of “guilt by association” that was so widely employed during the McCarthy era. As the McCarthy era waned, the Supreme Court ruled that the Constitution precludes the imposition of guilt for association with a proscribed group absent proof that an individual had the specific purpose of furthering its illegal ends. The “material support” law does not criminalize membership or association as such, but it effectively does just that by making it a crime to do anything that one would do as a member or associate of a group. Under current law, one has a constitutional right to be a member of a group the government has designated “terrorist,” but has no right to pay dues, volunteer services, or advocate even for peaceful, lawful reform on the group’s behalf. The “material support” laws have effectively rendered the right of association a meaningless formality. The fact that this restriction on political freedom is selectively targeted at groups officially disfavored by the government makes the law even more suspect from a First Amendment standpoint. The views of such groups, and of their supporters, could well

319. Humanitarian Law Project, 130 S. Ct. at 2732 (Breyer, J., dissenting).
320. COLE & DEMSEY, supra note 312, at 136.
be particularly relevant from a checking standpoint, as they are most likely to be the victims of the government’s overreach. The “material support” law’s sweeping criminalization of virtually any speech or associational activity in coordination with officially disfavored groups has its most chilling effects on those groups and individuals from whom we most need to hear.

Third, and more generally, the doctrinal approach the Supreme Court employed in Holder v. Humanitarian Law Project, the Court’s first post-9/11 case pitting free speech and association against national security claims, appears to dilute substantially constitutional protection for precisely the speech that is most important to checking government abuse in this sphere. The Court in Humanitarian Law Project acknowledged that, as applied to plaintiffs’ speech advocating human rights and peace, the “material support” ban was a content-based prohibition triggering the First Amendment’s heightened scrutiny.323 Exceedingly few laws survive such scrutiny, which ordinarily requires the government to establish that prohibiting the specific speech at issue is necessary to further a compelling state interest.324 The government must substantiate its assertions with evidence, and show that there are no more narrowly tailored means to achieve its ends.325 Yet in Humanitarian Law Project, the Court hypothesized justifications for the statute that the government itself had never even advanced, and then upheld the statute on that basis without any evidence to substantiate its speculations.326 Thus, it reasoned that teaching a group how to advocate for human rights might permit it to engage in harassment by filing such claims; that advising a group on paths toward peace might allow the group to use peace negotiations as a cover to re-arm itself; and that even if none of these immediate negative results arose, assisting the group in lawful activities might burnish its legitimacy, which it could then use to raise support for more terrorist activities.327 The Court never demanded any evidence that advocacy of peace and human rights had ever had such effects, or that criminalizing such speech was necessary or narrowly tailored to fight terrorism. Instead, the Court stressed that in the area of national security and foreign relations, it had to defer to the political branches.328 Yet as the government itself had not even advanced many of these purported justifications, the Court in essence deferred to its own

323. Humanitarian Law Project, 130 S. Ct. at 2724.
324. Id.
325. Id. at 2735 (Breyer, J., dissenting).
326. Id. at 2728-29.
327. Id. at 2726-28.
328. Id. at 2728-29.
speculation. If such “deferential strict scrutiny” is to be the standard for judging future restrictions on speech defended in the name of national security or foreign relations, the First Amendment is unlikely to be much of a bulwark against censorship in times of crisis.

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

C. Practice: Civic Engagement

Our survival as a constitutional democracy turns not only on a written constitution and the separation of powers, but on a vibrant civil society dedicated to reinforcing and defending constitutional values. Perhaps the most important implication of this observation is not theoretical or doctrinal, but practical. As citizens, it is our obligation to get engaged in the struggle for constitutional and human rights. Without such engagement, the Constitution is unlikely to fulfill its promise. In a sense, the Constitution is not “self-executing.” It can, of course, be invoked directly in court without congressional adoption. But in a more fundamental sense, the sense referred to by Learned Hand, there will not be much left to invoke unless there is a culture of respect for constitutional principles. And that culture is of our own making. It cannot be “guaranteed” by a document, nor by the commitments of framers long dead, nor by the formal separation of powers, but only by the active civic engagement of human beings.

We typically think of civic obligations as consisting of quasi-official actions directly related to governance: voting, serving on juries, paying taxes, and in extreme situations, serving in the military. More broadly speaking, an ethic of volunteering and civic engagement celebrates involvement in parent-teacher associations, neighborhood groups, religious communities, and charitable organizations. As Robert Putnam
and others have shown, all such engagement is important to the vibrancy and health of a society.\textsuperscript{329}

But the engagement that “civil society constitutionalism” identifies as essential has a more particular focus, on constitutionalism itself. Groups like the ACLU, the Center for Constitutional Rights, and the Bill of Rights Defense Committee are defined by their commitment to such rights. But they are only the most obvious opportunities for engagement. Civil society offers a broad range of ways in which individuals may become involved in constitutional discourse—by attending lectures or demonstrations; participating in ad hoc groups focused on issues of rights; writing letters to the editor, blogs, or op-eds; teaching one’s children; or debating with one’s neighbors. There are an almost infinite variety of ways to engage with constitutionalism. But organized collective endeavors, with existing rights groups or through the creation of new ones, are probably the most effective. Joining a group defined by its commitment to constitutional and human rights is itself a check on one’s own temptations to short-circuit rights, or to waver in one’s attention or commitment to rights. The collective not only magnifies the impact that an individual might have, but also helps to hold individuals to their commitments. Thus, “civil society constitutionalism” is not just a direction for scholarship, or a justification for constitutional doctrine, but a pragmatic directive to citizens: get involved in the defense of your Constitution, or you may find it wanting when it is needed most.

V. CONCLUSION

Learned Hand’s assertion that as long as “liberty lies in the hearts of men and women . . . it needs no constitution, no law, no court to save it,” simultaneously captures an essential truth and overstates its case.\textsuperscript{330} It is true that without a culture that values constitutional rights, formal legal protections are likely to be largely unavailing. But it is not quite true that when such a culture exists, “it needs no constitution, no law, no court to save it.” The Constitution and the courts play a critical role in inculcating, reinforcing, and implementing the culture of the rule of law. They remind us of the values we hold in highest esteem. Court cases can serve as focal points for debating the application of these enduring constitutional values to current conditions. And courts can and often do enforce constitutional rights where the political branches would not.

\textsuperscript{330} Learned Hand, supra note 13.
Left out of Judge Hand’s equation altogether, however, and largely ignored by constitutional theorists before and since, is the role of civil society. Like government officials, the people at large will often fall short of constitutional ideals; that is one of the principal reasons that we have a Constitution in the first place. But, as the decade since September 11 suggests, civil society organizations dedicated to defending constitutional rights can play a critical role in checking abuse, reinforcing and developing constitutional meaning, and ensuring that “liberty lies in the hearts of men and women.” Where the executive, the legislature, and the judiciary often compromised rights after September 11, civil society organizations stood up to defend those rights. They helped to inculcate and reinforce a culture of legality, and provided a critically important voice for rule-of-law values. Absent that voice, it is far from clear that legality would have been restored to the extent that it was, or that the Supreme Court’s opinions in the military detention and trial cases would have been as strong as they were. Liberty must lie in the hearts of the people, but civil society can play an especially important part in keeping it alive there. In the end, Hand is correct that the responsibility lies with us, but an important mechanism for fulfilling that responsibility is political association, or civil society, in defense of constitutional rights. The past decade suggests that a political culture attuned to the values of constitutional and human rights, fostered by a robust civil society, can effectively check official abuse, even of the most powerful government in the world.