HUMAN RIGHTS AND COUNTERTERRORISM: A CONTRADICTION OR NECESSARY BEDFELLOWS?

Amos N. Guiora[*]

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[*] Professor of Law, S.J. Quinney College of Law, University of Utah. I would like to thank the editors of the *Georgia Law Review* for the gracious invitation to participate in this Symposium on the momentous occasion of the Fiftieth Anniversary of Desegregation at the University of Georgia. I would also like to thank Jacqueline Esty (J.D. expected 2012, S.J. Quinney College of Law, University of Utah) for her invaluable research assistance.

I. INTRODUCTION

It is disturbing that ten years after September 11, 2001, (9/11) questions remain about the relationship between human rights and counterterrorism. One would have thought a simple declarative sentence that human rights are an essential aspect of counterterrorism would be possible. Unfortunately, that is not the case; if we are candid with ourselves, it is far from possible.

Throughout U.S. history, executive responses to national security crises have been uniformly discouraging with respect to protecting human rights.[1] Regardless of the intensity or acuteness of the threat to national security, individual rights are abandoned with a casualness that is breathtaking. The repeating pattern involves two disturbing components: the Executive Branch assumes broad powers[2] and the Congress and Courts largely acquiesce in the face of executive power.[3] The "unitary executive theory,"[4] promoted by John

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[1] As will be discussed further, here I refer to—among other events—the internment of Japanese-Americans during World War II, President Wilson's efforts to limit the free speech of dissenters opposed to the draft, and President Lincoln's decision to suspend the writ of habeas corpus during the Civil War. For more information on these topics, see PETER IRONS, JUSTICE AT WAR (1983) (discussing internment during World War II); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 137, 146 (2004) (discussing President Wilson's efforts to curb speech during World War I); and Justin Ewers, *Revoking Civil Liberties: Lincoln's Constitutional Dilemma*, U.S. NEWS, Feb. 10, 2009, http://www.usnews.com/news/history/articles/2009/02/10/revoking-civil-liberties-lincolns-constitutional-dilemma (discussing President Lincoln's suspension of habeas corpus).

[2] *See* JOHN P. MACKENZIE, ABSOLUTE POWER: HOW THE UNITARY EXECUTIVE THEORY IS UNDERMINING THE CONSTITUTION 1 (2008) (describing the breadth of executive power in the area of national security).

[3] *See id.* at 1–2 (describing the difficulty of checking executive power).

[4] *See* Robert D. Sloane, *The Scope of Executive Power in the Twenty-First Century: An Introduction*, 88 B.U. L. REV. 341, 343 n.16 (2008) (explaining that "[t]he Unitary Executive theory draws its name from a passage in *The Federalist No. 70*, in which Alexander Hamilton defended the need for a vigorous, energetic, and therefore unified executive" and that the "theory's first sustained defense . . . is to be found in an executive memorandum entitled 'Separation of Powers: Legislative-Executive Relations,' dated April 30, 1986, which former Attorney General Edwin Meese commissioned during the Reagan administration"); *see also* Charlie Savage, *Unitary Executive Theory in Action*, BOSTON GLOBE (Mar. 14, 2008, 11:34 AM), http://www.boston.com/news/politics/politicalintelligence/2008/03/unitary_executi.html (tracing the unitary executive theory from its beginnings in the Reagan Administration through its recent use by the George W. Bush Administration).

Yoo[5] and David Addington,[6] is not a new concept. Unfortunately, this view of executive power during times of national conflict has been a pervasive theme throughout American history.[7] Although the Bush and Obama Administrations naturally are the focus of most current analyses and critiques, other presidents—Lincoln, Wilson, and Roosevelt, for example—faced crises regarding the appropriate balancing of human rights and national security.[8] The records of these Presidents and the decisions they made offer useful historical perspectives on the relationship between human rights and national security, as well as the extent to which the Supreme Court and Congress have truly exercised checks and balances in accordance with separation of powers.

Unlike an action thriller where the reader is left guessing until the last page, I offer my conclusion here: The track records of the Executive Branch, Supreme Court, and Congress in the balancing paradigm are disheartening. The obvious contradiction suggested in the title need not be the case; it is, however, the persistent reality in American history.

The checks and balances model may work well on paper, but a reality check shows that all three branches of government fail to thoroughly and demonstratively protect the civil and political rights of the American people at the times when such protection is most necessary.[9] Some will take objection to this. Still, some

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[5] Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel during the Bush Administration.

[6] Legal Counsel and Chief of Staff to Vice President Richard Cheney.

[7] *See* MACKENZIE, *supra* note 2, at 2 (explaining that presidents "have always tried to project executive power, usually at the expense of the other branches" of government); Sloane, *supra* note 4, at 342 (describing the Bush Administration's efforts to promote executive dominance and "restore . . . the scope of the President's constitutional executive powers relative to the other branches of the federal government" (footnote omitted)).

[8] *See* IRONS, *supra* note 1, at vii (describing President Roosevelt's decisions); STONE, *supra* note 1, at 137, 146 (describing President Wilson's decisions); Ewers, *supra* note 1 (describing President Lincoln's decisions).

[9] *See Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the S. Judiciary Comm.*, 110th Cong. 1–2 (Sept. 16, 2008) (statement of Harold Hongju Koh, Professor, Yale Law School), *available at* http://www.fas.org/irp/congress/2008_hr/091608koh.pdf (noting damage to America's reputation because of "Abu Ghraib; Guantanamo; torture and cruel treatment of detainees; indefinite dentition of 'enemy combatants;' military commissions; warrantless government wiretapping and datamining; evasion of the Geneva Conventions and international human rights treaties; excessive government secrecy

argue that sweeping executive actions during a national security crisis are essential—arguing that President Bush had no choice but to act decisively after the events of 9/11 and that his decisions were necessary to save lives.[10] Others suggest that President Roosevelt's decision to order the internment of 110,000 Japanese-Americans was necessary following Pearl Harbor.[11] Looking farther back in history, we find President Wilson's efforts to limit the free speech of dissenters opposed to the draft[12] and President Lincoln's decision to suspend the writ of habeas corpus during the Civil War.[13] Each of these presidents undoubtedly felt compelled at the time to minimize rights. However, their decisions remain problematic for modern proponents of human rights in *all* contexts. Two unanswered questions are essential to analyzing the relationship between human rights and national security: First, were these executive measures *truly* necessary? Second, why are rights dispensed with such alacrity? I pose these questions not rhetorically but with deep concerns regarding the dangers of unrestrained executive power.

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and assertions of executive privilege; attacks on the United Nations and its human rights bodies, including the International Criminal Court; misleading of Congress; and the denial of habeas corpus (recently rejected by the U.S. Supreme Court) for suspected terrorist detainees of Guantanamo").

[10] *See* Dan Eggen, *Bush Says His Post-9/11 Actions Prevented Further Terrorism*, WASH. POST, Dec. 18, 2008, at A3 (referencing President Bush's comments that his Administration's actions were vital in the protection of Americans and "such a result should outweigh any second-guessing of his methods"); Charles Krauthammer, *Don't Blame America's Problems on the War on Terror*, NAT'L POST, Sept. 11, 2011, http://fullcomment.nationalpost.com/2011/09/11/Charles-krauthammer-don't-blame-americas-problems-on-the-war-on-terror (defending the Bush Administration's actions after 9/11 and claiming that those actions prevented additional terrorist attacks).

[11] *See* IRONS, *supra* note 1, at 26–27 (describing the "Pearl Harbor panic" that facilitated the internment of Japanese-Americans).

[12] *See* STONE, *supra* note 1, at 146 (discussing the "fever pitch of patriotism" the nation experienced during World War I which contributed to President Wilson's successful efforts to stifle opposition and characterize dissent as disloyalty).

[13] *See* Ewers, *supra* note 1 (describing the extreme fears of insurrection President Lincoln faced that helped him legitimize his decision to suspend the writ of habeas corpus and compare his actions to "the bitter medicine a patient takes when sick").

II. EXECUTIVE OVERREACH

President Reagan's popular reference to the United States as a "shining city on a hill"[14] was catchy and made the public feel good about American values and principles. Those words came back to haunt, however, in the face of the conduct of U.S. military personnel two decades later.[15] Bold and eloquent presidential rhetoric is one thing; criminal misconduct is another. In any discussion regarding human rights, examining the conduct rather than the verbiage is ultimately far more important.

Examples of actions undermining verbiage can be seen in the Executive's actions after 9/11. President Bush's predictable response that the abuses of Iraqi detainees by U.S. troops at Abu Ghraib prison were the fault of "a few bad apples"[16] was disingenuous, misleading, and false. United States Attorney General Alberto Gonzales referred to the Geneva Conventions as "quaint,"[17] and Vice President Richard Cheney called the interrogation technique of water boarding[18] a mere "dunk in the

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[14] Ronald Reagan, President, Remarks Accepting the Presidential Nomination at the Republican National Convention in Dallas, Texas (Aug. 23, 1984), *available at* http://www.reagan.utexas.edu/archives/speeches/1984/82384f.htm.

[15] The events at the Abu Ghraib detention facility in 2003 and the conduct of U.S. soldiers in the Army's 5th Stryker Brigade in 2010 are examples of reprehensible conduct recently committed by U.S. military personnel overseas. *See* Seymour M. Hersh, *Annals of National Security: Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, 42–43 (detailing the inhumane treatment of Abu Ghraib prisoners by U.S. troops); Adam Zagorin, *The Abu Ghraib Scandal You Don't Know*, TIME, Feb. 14, 2005 (detailing the 2003 abuse scandal); George Tibbits, *Stryker Brigade Murder Charges: Five Soldiers Killed Three Civilians in Afghanistan, Military Says*, HUFFINGTON POST, June 16, 2010 9:03 PM, http://www.huffingtonpost.com/2010/06/16/stryker-brigade-murder-ch_n_614841.html (detailing the 2010 charges against several soldiers in the Army's 5th Stryker Brigade stemming from civilian deaths).

[16] *See Civil Liberties: Just a Few Bad Apples?*, ECONOMIST, Jan. 22, 2005, at 29, 29 (portraying President Bush's insistence that the events at Abu Ghraib were isolated and those responsible would be punished).

[17] *See Bush Appoints Texas Ally to Key Post*, BBC NEWS, Nov. 10, 2004, 9:41 PM GMT, http://news.bbc.co.uk/2/hi/4000679.stm (describing the criticism Mr. Gonzales faced from human rights groups after his comments on the Geneva Conventions).

[18] *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 789, 790 (9th Cir. 1996) (describing an incident of "water torture": "[A]ll of his limbs were shackled to a cot and a towel was placed over his nose and mouth; his interrogators then poured water down his nostrils so that he felt as though he were drowning.").

water."[19] Despite this caustic language, the Bush Administration went much further than words. In the immediate aftermath of 9/11, Yoo wrote, Jay Bybee signed, and President Bush authorized interrogations of detainees[20] that were in clear violation of the 1984 United Nations Convention Against Torture,[21] the Geneva Conventions,[22] and domestic law. Although these actions faced criticism from various sources,[23] the lack of congressional oversight of the policies of the Bush Administration directly facilitated an atmosphere of little, if any, checks and balances.[24]

The media also failed to grasp the true significance of this illegal interrogation regime. By referring to water-boarding as "simulated drowning" rather than as torture,[25] the media

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[19] *See* Dan Eggen, *Cheney Defends 'Dunk in the Water' Remark,* WASH. POST, Oct. 28, 2006, at A2 (detailing the interview where the Vice President made the controversial reference to the interrogation technique).

[20] *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen. to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) (outlining the Bush Administration's view of standards of conduct for interrogation under 18 U.S.C. §§ 2340–2340A) [hereinafter Bybee Memo].

[21] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984); *see also* Jordon J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1555–57 (2009) (noting that "the Committee Against Torture declared in 2006 that the United States should rescind any interrogation technique . . . that constitute[s] torture, cruel, inhuman or degrading treatment").

[22] *E.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[23] *See* Marc Ambinder, *"Poor Judgment" – Yoo, Bybee, and the Torture Memos*, ATLANTIC, Feb. 19, 2010, http://www.theatlantic.com/politics/archive/2010/02/-poor-judgment-yoo-bybee-and-the-torture-memos/36276/ (describing the Justice Department's Office of Professional Review report regarding the torture memos); Johnny Dwyer, *Bush Torture Memo Slapped Down by Court*, TIME, Nov. 3, 2008, http://www.time.com/time/nation/article/0,8599,1855910,00.html (describing the judicial and bureaucratic criticism of the Bybee Memo that resulted in its eventual rejection); David Luban, *David Margolis Is Wrong: The Justice Department's Ethics Investigation Shouldn't Leave John Yoo and Jay Bybee Home Free*, SLATE, Feb. 22, 2010, 11:49 AM, http://www.slate.com/id/2245531/ (detailing the critical reactions of the legal community to the torture memos and the ethics investigation of the lawyers who wrote them).

[24] *See, e.g.*, Toby Wamick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, WASH. POST, Dec. 9, 2007, at A1 (detailing bipartisan discussions of the Bush Administration's interrogation techniques that provoked approval—not rejection—from participants).

[25] *See, e.g.*, *Waterboarding, Which Obama Campaigned Against, Led to Bin Laden Kill*, FOX NEWS, May 3, 2011, http://nation.foxnews.com/politics/2011/05/03/waterboarding-which-obama-campaigned-against-led-bin-laden-kill (demonstrating the neutral terms the media chose to use to describe controversial interrogation techniques).

mischaracterized and minimized actions supposedly done in our collective name. The results were both tragic and predictable.

The interrogation regime was illegal, immoral, and a clear example of executive overreach in the name of national security. Furthermore, a viable argument can be made that the Bush Administration's coercive interrogation regime directly endangered American military personnel.[26] This risk was, *somehow*, overlooked by the public, media, Congress, and Court—all of whom largely agreed with the Administration that 9/11 justified a "by whatever means necessary" approach.[27] But, it certainly was not overlooked by a distinguished group of U.S. flag officers (generals) at a small gathering I was honored to attend.[28] "Outraged" would be the sanitized version of their comments regarding the Bush Administration's torture policy.

With a distinguished history of military leadership, this group itself—responsible for putting soldiers in harm's way—felt the Bush Administration's tactics exposed U.S. military personnel to unwarranted risk. A brief conversation with a retired three star general who stated emphatically that the actions of the Bush Administration were endangering his men made this crystal clear. The fact that the Bush Administration not only violated international law agreements and exhibited contempt for human rights but also endangered U.S. soldiers produced a particular irony: the "by all means necessary" attitude potentially harmed U.S. soldiers. As a side-note, the seeming ease with which the Administration adopted this policy reinforces the impression that only those who have been in combat or whose children are in harm's way should have the right to place someone else's child in harm's way.

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[26] *See* Mark A. Costanzo & Ellen Gerrity, *The Effects and Effectiveness of Using Torture as an Interrogation Device: Using Research to Inform the Policy Debate*, 3 SOC. ISSUES & POL'Y REV. 179, 202 (2009) (discussing the potential for interrogation abuses to provide a basis for retaliation against U.S. troops).

[27] *See* Bybee Memo, *supra* note 20, at 46 (describing the arguments that certain national security circumstances like self-defense provide an excuse to suspend torture laws).

[28] Off the Record Meeting of Retired U.S. Flag Officers in Washington D.C., Dec. 2005.

It is clear, in retrospect, what should have been obvious at the time: Yoo and Addington's belief in the unitary executive theory[29] should have been kept in a drawer far away from the Oval Office or discussed abstractly and quickly dismissed. The litany reads like dirty laundry: a torture-based interrogation regime,[30] indefinite detention,[31] denial of habeas corpus,[32] and the failure to establish a workable judicial model for trying suspected terrorists.[33] For four primary reasons, the Bush Administration's application of the unitary executive theory should never even have been raised: (1) it led to illegal policies; (2) the application of the theory lacked sufficient restraints; (3) the theory was ineffective; and (4) it endangered U.S. soldiers. The efforts of Yoo, Addington, and Bybee helped create a counterterrorism regime premised exclusively on *their* theories of executive power.[34] Indeed, Addington's contemptuous testimony before the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties suggests that he believed not only in executive power but in absolute executive power.[35]

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[29] *See* Sloane, *supra* note 4; *see also* JOHN YOO, THE POWER OF WAR AND PEACE 18–19 (2005) (describing sources of executive power).

[30] *See* Paust, *supra* note 21, at 1553–57 (detailing the torture techniques used by the Bush Administration during interrogation sessions, including water-boarding, suffocation, dogs to create fear, inducing hypothermia, and threatening the detainee's life).

[31] *See* Andrew Rosenthal, Op-Ed., *Ten Years Later: Indefinite Detention, Military Tribunals*, N.Y. TIMES, Feb. 7, 2012, http://loyalopposition.blogs.nytimes.com/2012/02/07/ten-years-later-torture-indefinite-detention-military-tribunals/?pagemode=print.

[32] *See* Editorial, *Reneging on Justice at Guantánamo*, N.Y. TIMES, Nov. 19, 2011, at SR10 ("In 2008, the Supreme Court ruled that Guantánamo Bay prisoners who are not American citizens have the right of habeas corpus, allowing them to challenge the legality of their detention in federal court and seek release. The power of the ruling, however, has been eviscerated by the Court of Appeals for the District of Columbia Circuit [and has] reduced to zero the number of habeas petitions granted in the past year and a half.").

[33] *See* Jack Goldsmith, *The Shadow of Nuremberg*, N.Y. TIMES, Jan. 22, 2012, at BR8 (noting the Obama Administrations indecision regarding how to prosecute the 9/11 co-conspirators).

[34] *See* Bybee Memo, *supra* note 20, at 2 (finding that the Executive may conduct illegal interrogations of enemy combatants pursuant to his powers as Commander in Chief); YOO, *supra* note 29, at 18–19 (classifying "the conduct and control of foreign policy as inherently 'executive' in nature" and downplaying the role of the other two branches in this context).

[35] *See* James Joyner, *Addington Displays Contempt for Congress*, OUTSIDE THE BELTWAY, June 27, 2008, http://www.outsidethebeltway.com/addington-displays-contempt-for-congress/ (describing Addington as having the "grace of Gollum as he quarreled with his questioners"

The irony is that checks and balances should be at their highest level precisely when the nation is under attack. An Executive whose country has been attacked and sustained thousands of casualties, who feels the absolute requirement to respond, and who is subjected to pressure from the media and public to "do something" is at the zenith of his powers and, therefore, most dangerous.[36]

Although President Barack Obama promised to undo the Bush Administration's policies on this front, the first three years of President Obama's Administration speak for themselves through the failure to close Guantanamo Bay, the inability to end indefinite detention, and the failure to conclusively determine where to try suspected terrorists.[37] When discussing the Administration's resounding failure to protect human rights, the "pat" response is that Congress has failed to support the President. To which my only answer is one word: "leadership." The extraordinary tensions between human rights and national security do not give the Executive the privilege of standing above the fray like a college football coach watching practice from a tower twenty feet in the air.[38]

In a response that both baffled Obama Administration supporters and fueled its critics, U.S. Attorney General Eric Holder recommended that suspected terrorists be denied *Miranda*

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and dodged issues concerning limitations on executive discretion); *see also* MacKenzie, *supra* note 2, at 1 (discussing the unitary executive theory's principle that "absolute power" is reserved for the Executive Branch).

[36] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal advisor to a President in time of transition and public anxiety.").

[37] *See* Elyse Siegel, *Ten Promises Broken or Unfulfilled by President Barack Obama*, HUFFINGTON POST, http://www.huffingtonpost.com/2009/11/03/ten-promises-broken-or-un_n_344633.html (last updated May 25, 2011, 3:35 PM) (recalling President Obama's "bold promises to undo the damage caused by the Bush Administration" and detailing ones that are incomplete regarding human rights and national security issues).

[38] *See* Amos Guiora, Op-Ed., *Teaching Morality: Haditha and the Future of the US Military*, JURIST LEGAL NEWS & RES., Feb. 3, 2012, http://jurist.org/forum/2012/02/amos-guiora-haditha.php ("Commanders must establish strict guidelines and criteria in accordance with the rule of law and morality in armed conflict; the responsibility on commanders is thus constant, difficult and burdensome. Imposing on commanders the responsibility to both train and discipline their forces in accordance with rule of law principles predicated on morality in armed conflict is the reality of contemporary warfare.").

rights on the heels of both the failed Time Square bombing and the failed Northwest Airlines Flight 253 bombing.[39] This demonstrated the callousness with which the Obama Administration willingly casts aside individual rights. Perhaps Mr. Holder forgot that the Supreme Court had already carved out a "public-safety" exception in *New York v. Quarles*,[40] or perhaps he simply wanted to prove the Administration's "toughness." Whichever spin the Administration chooses, the result is best captured in the classic T-shirt: "Same old, same old."

There seems to be a consistent failure to recognize and internalize George Santayana's timeless words of wisdom: "Those who cannot remember the past are condemned to repeat it."[41] Presidents Lincoln, Wilson, Roosevelt, Bush, and Obama all doubtlessly had the Nation's best interests at heart when they acted. To accuse them otherwise is a gratuitous cheap shot that mocks the gravity of the crises they faced and the consequences of their actions. Nevertheless, all five—at critical moments in their Administrations—cast their die with the raw exercise of power at the clear expense of human rights. In doing so, all five were surely aware that Congress and the Court would exercise deference and, therefore, facilitate unrestrained executive power.

The Late Chief Justice Rehnquist's disturbing theory that the Court should adopt a position of reticence in times of crisis[42] serves neither the Executive nor the American people. Rather, the

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[39] *See* Charlie Savage, *Holder Backing Law to Restrict Miranda Rules*, N.Y. TIMES, May 10, 2010, at A1 ("Mr. Holder proposed carving out a broad new exception to the Miranda rights . . . . He said interrogators needed greater flexibility to question terrorism suspects than is provided by existing exceptions."); *see also* Nico Pitney, *Eric Holder: Miranda Rights Should be Modified for Terrorism Suspects*, HUFFINGTON POST, http://www.huffingtonpost.com/2010/05/09/eric-holder-miranda-right_n_569244.html (last updated May 25, 2011, 5:25 PM) (describing Mr. Holder's suggestion to extend *Miranda*'s public-safety exception to the interrogation of suspected terrorists).

[40] 467 U.S. 649, 651 (1984) (holding that "overriding considerations of public safety justif[ied an] officer's failure to provide *Miranda* warnings before he asked questions devoted to locating [an] abandoned weapon").

[41] GEORGE SANTAYANA, THE LIFE OF REASON 82 (1998).

[42] *See* Amos N. Guiora & Erin M. Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. L. REV. 51, 56 (2005) ("In those rare instances where the judiciary does review the legality of executive actions related to armed conflict, Chief Justice Rehnquist believed the examination should wait until the time of crisis has passed.").

opposite seems to be the case: unrestrained executive power, not subject to robust review, facilitates decision making at its very worst because the decision maker fully understands that there are no checks, no balances, and no review.

With respect to the two questions posed at the beginning of this Essay, two points are clear: the historical record does not show that the measures Presidents Lincoln, Wilson, Roosevelt, Bush, and Obama enacted were *truly* necessary, but it does show that rights were dispensed with alacrity—primarily due to the lack of checks on the Executive. To understand the "necessity" issue, two questions are key. First, what facts were available to assist in the decision to significantly violate human rights? Second, did the Executive aggressively seek additional information that justified the decision?

Upon an examination of the historical record, President Lincoln's decision is the most justified—albeit nonetheless problematic and controversial—given the information available to him and the circumstances confronting him.[43] It is also important to recall that the decision to deny the Great Writ was limited geographically and temporally alike,[44] which does not justify his decision but merely emphasizes the scope of its limited parameters. By comparison, President Wilson's aggressive efforts to silence dissent and limit free speech during World War I[45] were wholly unjustified. As many commentators have correctly suggested, free speech is particularly important when national

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[43] MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 7–10, 91–92 (1991) (describing the circumstances surrounding President Lincoln's decision to suspend the writ of habeas corpus and noting that "the orders and proclamations were usually provoked by problems of military mobilization—first by obstructions of the routes to the unprotected capital and later by draft resistance"); *see* David Greenberg, *Lincoln's Crackdown: Suspects Jailed. No Charges Filed. Sound Familiar?*, SLATE, Nov. 30, 2001, 11:58 AM, http://www.slate.com/articles/news_and_politics/history_lesson/2001/11/Lincolns_crackdown.html (detailing the extreme circumstances of the Civil War that justified President Lincoln's decision to suspend the writ).

[44] *See* NEELY, *supra* note 43, at 90 (discussing the expansion of the Court's suspension and noting that "the [A]dministration lurched from problem to problem drafting hasty proclamations and orders").

[45] *See* STONE, *supra* note 1, at 226–27 ("When individuals raised concerns about the suppression of civil liberties, the Wilson [A]dministration resorted to invocations of patriotism and accusations of disloyalty to stifle those concerns.").

security issues are at the forefront of the national debate.[46] Although President Wilson clearly disagreed, his efforts to limit the free speech of draft dissenters were overreaching and largely rejected by Congress because they were unwarranted and unnecessary.[47] Even under those circumstances, the Supreme Court under Chief Justice White upheld the restrictions on free speech.[48] Although the Court in the 1910s favored an approach to the First Amendment reflecting President Wilson's limited-rights approach,[49] subsequent Supreme Court decisions—in particular *Brandenburg v. Ohio*[50] and the decision regarding the Pentagon Papers[51]—reflect distinctly different understandings of free speech.

President Roosevelt's decision and the Supreme Court's subsequent acquiescence regarding the internment of Japanese-Americans in the aftermath of the attack on Pearl Harbor[52] is a

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[46] *See, e.g.*, AMOS N. GUIORA, FREEDOM FROM RELIGION: RIGHTS AND NATIONAL SECURITY (2009); Robert D. Epstein, Comment, *Balancing National Security and Free-Speech Rights: Why Congress Should Revise the Espionage Act*, 15 COMMLAW CONSPECTUS 483, 483–84 (2007) (citing free speech issues with the Espionage Act and noting the importance of freedom of speech during moments of national security conflict); Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939, 939–40 (2009) (discussing the paradox of restricting speech in the context of national security and urging that "[d]issent that questions the conduct and morality of a war is . . . the very essence of responsible and courageous citizenship").

[47] *See* STONE, *supra* note 1, at 146 (explaining that, although the Wilson Administration eventually "distorted the Espionage Act in order to suppress a broad range of political dissent," the Legislature that passed the bill "intended the act to have a much more limited focus" and "expressly rejected several key provisions proposed by the Wilson [A]dministration").

[48] *See* Schenck v. United States, 249 U.S. 47, 49 (1919) (detailing the Court's dispensing of the defendant's First Amendment claims); Debs v. United States, 249 U.S. 211, 212, 215–16 (1919) (sustaining a conviction under the Espionage Act despite the defendant's free speech claim).

[49] *See Schenck*, 249 U.S. at 52 ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.").

[50] 395 U.S. 444 (1969).

[51] *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (citing the "heavy presumption" against the constitutionality of free speech restrictions (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963))); *Brandenburg*, 395 U.S. at 447 (tracing the developments of precedent that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force . . . except where such advocacy is directed to inciting or producing imminent lawless action").

[52] *See* Korematsu v. United States, 323 U.S. 214, 215–19 (1944) (upholding the Executive's decision to exclude a Japanese-American citizen from his home due to national security interests).

permanent stain on both the Executive and the Court. The internment was an inherently unconstitutional approach of collective punishment devoid of person-specific analysis as to whether a given individual—not an ethnic group—represented a threat.[53] Particular individuals may well have posed a threat to national security, but both the Wilson Administration and Court cut the broadest swath possible by singling out, *en masse*, a particular ethnic group.[54] In the human rights, national security discussion, the decisions of both the Executive and the Judiciary of this period stand out as extraordinary failures to respect individual rights.

Even in more recent times, both the Bush and Obama Administrations have failed to consistently elevate human rights over national security. Unlike the Bush Administration—which chose to respond to the events of 9/11 by enacting deeply disturbing policies[55]—the Obama Administration has had the opportunity, yet has refused, to undo many of its predecessors' failures.[56] Cast in that light, the Obama Administration—promises notwithstanding[57]—has committed an even more extraordinary failure to correct the path of the American human rights ship.

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[53] *See id.* at 243 (Jackson, J., dissenting) ("A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.").

[54] *See id.* (Jackson, J., dissenting) (explaining that "guilt is personal and not inevitable" and arguing that a law that targets an entire category of people for no other reason than their parents' nationality should not be enforced).

[55] *See, e.g.*, Jonathan Krim & Robert O'Harrow, Jr., *Bush Signs into Law New Enforcement Era*, WASH. POST, Oct. 27, 2011, at A6 (describing the "broad" anti-terrorism bill President Bush signed into law on October 26, 2001, as an attempt to "hand[ ] law enforcement broad new investigative and surveillance powers [to help] authorities track and disrupt the operations of suspected terrorists in the United States"); *see also* Robert A. Levy, *USA PATRIOT Act and Domestic Detention Policy*, *in* CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 108TH CONGRESS 117, 117–24 (Cato Inst. ed., 2003) (analyzing threats to civil liberties presented by the PATRIOT Act).

[56] *See* Siegel, *supra* note 37 (discussing President Obama's failure to drastically change the alarming policies put in place by the Bush Administration).

[57] *See id.* (describing President Obama's promise to change the executive approach to national security).

III. THE ESSENTIAL ROLE OF JUDICIAL REVIEW

I speak from experience. As legal advisor to Israel Defense Forces (IDF) commanders, one of my responsibilities was to interpret Israel's High Court of Justice (HCJ)[58] holdings relevant to the tension between human rights and national security. The robust judicial review that characterizes the relationship between the Israeli judiciary and the Israeli executive[59] has profoundly shaped my outlook. As a senior officer in the IDF Judge Advocate General (JAG) Corps, I provided real-time legal advice on operational counterterrorism to commanders. The question—correctly from the commander's perspective—was what a decision means in terms of what they can do. Re-articulated: what are the limits of power that can be exercised? A clearly articulated decision with firm parameters was far preferable; the commander understood the boundaries of his power.

The understood and well-documented willingness of the Israeli HCJ, particularly under Israeli Presidents Meir Shamgar and Aharon Barak,[60] to intervene—or interfere, depending on one's perspective—with executive decisions was of extraordinary importance, especially when recommending against implementing a particular operational decision.[61] I based such assessments on the concern that the planned measure would not pass judicial muster, and, as a result, the HCJ would order the commander to desist from the planned action. While an argument can be made that I "used" the HCJ in my recommendations, I felt it was far better for the commander to reconsider on the basis of my advice than to have the HCJ issue an order against the commander. Nothing would be gained by forcing the HCJ to issue such a ruling. My considered professional judgment was that long-term national security interests were much better served by refraining from action rather than having the HCJ later overturn the operational decision. The risk of "negative" precedent justified this approach, in my opinion.

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[58] In Israel, the HCJ is equivalent to the U.S. Supreme Court.

[59] *See* Eli Salzberger, *Judicial Activism in Israel*, *in* JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 217, 250 (Brice Dickson ed., 2007) ("[T]he [Israeli] Supreme Court from the very beginning of its operation, has not hesitated to employ judicial review.").

[60] Under the Israeli model, presidents of the HCJ serve as chief justices.

[61] *See* AMOS N. GUIORA, GLOBAL PERSPECTIVES ON COUNTERTERRORISM 112–24 (2011).

It was, borrowing a phrase from President Theodore Roosevelt, a "bully pulpit"—but surely not the Executive Branch bully pulpit that President Theodore Roosevelt envisioned.[62] Instead of enabling an aggressive executive, the HCJ utilized its version of the bully pulpit to influence the executive *not* to act.

Needless to say, the Israeli model of robust judicial review has its critics. Thoughtful voices argue that the role of the judiciary must be a limited one—particularly when the issue before the HCJ is directly related to national security.[63] Be that as it may—and the criticism is legitimate—judicial review as exercised by the HCJ is best described as "robust."

Four seminal cases addressing national security issues reflect President Barak's emphasis regarding the requirement to ensure protection of human rights: (1) the decision to not allocate gas masks to Palestinian residents of the West Bank on the eve of the first Gulf War;[64] (2) the separation barrier Israel built between the West Bank and Israel to prevent infiltration of Palestinian terrorists into Israel;[65] (3) Israel's targeted killing policy;[66] and (4) the length of time a Palestinian can be detained before a judicial hearing.[67] These cases demonstrate the depth of inquiry regarding

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[62] *See* Brian Gilmore et al., *The Nightmare on Main Street for African-Americans: A Call for a New National Policy Focus on Homeownership*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 262, 275 (2008) (tracing the idea of the "bully pulpit" to President Theodore Roosevelt and describing it as a "tactic . . . involv[ing] the President making speeches and engaging the press in an effort to advance government policy" (citation omitted)).

[63] *See* Salzberger, *supra* note 59, at 250 (describing the lack of Israeli public support for judicial intervention in matters of national security and defense as "damaging the ability of the State to defend itself and its citizens against security threats"). *See generally* Ruth Gavison, Mordechai Kremnitzer & Yoav Dotan, JUDICIAL ACTIVISM, FOR AND AGAINST: THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY (2000) (Isr.).

[64] *See* MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL 63 (2011) (describing the Israeli Supreme Court's order to deliver—not deny—gas masks to Palestinians after masks were delivered to Jews living in the same area (citing HCJ 168/91 Morcos v. Minister of Defense 45(1) PD 467 [1991])).

[65] *See* HCJ 2056/04 Beit Sourik Village Council v. Gov't of Israel 58(5) PD 807 [2004] (approving the construction of the security barrier to minimize terrorist threats).

[66] *See* HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel [2005] (mandating that, despite threatening circumstances that led Israel to develop a "policy of preventative strikes" designed to kill terrorists, the government must continue to abide by international law).

[67] *See* HCJ 3239/02 Marab v. IDF Commander in the West Bank, [2002] 57(2) PD 349 (striking down provisions that created an eight-day waiting period before a detainee's hearing).

both whether all viable alternatives have been sufficiently exhausted and whether the impact of the counterterrorism measures on the civilian Palestinian population has been significantly minimized.

Despite the benefits of this type of careful judicial action, legitimate questions regarding the limits of judicial review when the nation-state is under attack must be addressed. Simply put, one primary criticism is that the court actively limits the executive branch by emphasizing human rights rather than legitimate national security considerations. However, the essence of separation of powers and checks and balances in a democracy is that the executive branch be held accountable by legislative oversight and judicial review.[68] If executive power remains unchecked, as history has repeatedly demonstrated, the executive will instinctively prefer national security considerations and minimize human rights.[69] It is a self-fulfilling prophecy.

Justice Jackson's warning in his *Youngstown Sheet and Tube Co. v. Sawyer*[70] concurrence regarding the unfettered Executive[71] should serve as the guiding light in this discussion. At the other end of the spectrum, the Supreme Court's unconscionable opinion in *Korematsu v. United States*[72] must serve as a lesson never to be forgotten. The manner in which Congress recently enacted the PATRIOT ACT[73]—after only a small handful of Members *actually*

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[68] *See* Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 610 (2009) ("The constitution reflects different forms of accountability that correspond to different constitutional actors who check and balance one another. Underlying all forms of accountability is the need for transparency and procedural regularity sufficient to enable public and inter-branch assessment of—and responses to—government actions." (footnote omitted)).

[69] *See supra* notes 10, 21–22, 37 and accompanying text.

[70] 343 U.S. 579 (1952).

[71] *See id.* at 635–38 (Jackson, J., concurring) (explaining that the Court should exercise the most caution when a president "takes measures incompatible with the expressed or implied will of Congress" since this "claim to . . . power [is] at once so conclusive and preclusive" as to be dangerous to the established constitutional system of checks and balances).

[72] 323 U.S. 214 (1944).

[73] *See* Robin Toner & Neil A. Lewis, *House Passes Terrorism Bill Much Like Senate's, but with 5-Year Limit*, N.Y. TIMES, Oct. 13, 2001, at B6 (explaining the circumstances of the bill's passage, including little debate, an "atmosphere of edgy alarm" and civil liberties activists pleading with Congress to "slow down and consider the legislation's impact" on American privacy rights).

read the legislation[74]—speaks volumes for how fragile the system of checks and balances truly is. The argument that "tough times require tough decisions" may work well in Hollywood or on the gridiron, but it does not—and must not—relieve the Court and Congress from exercising the responsibility imposed on them by the U.S. Constitution.[75]

Deference to the Executive Branch in times of crisis has not served the public well. The failure to aggressively protect individual rights has both short- and long-term ramifications. In both cases the rights of innocent individuals may be violated based solely on race, ethnicity, or gender. An approach predicated on the "round up the usual suspects" mentality undermines democratic values and principles, particularly when the Executive Branch is confident that review and oversight happen in principle only.[76] On this note, the U.S. Supreme Court has consistently failed.[77] In the national security paradigm, the Court, at critical moments, has ducked the issue and left the unprotected vulnerable.[78] That, perhaps more than anything else, is the reason that the title of this Essay ends with a question mark.

With respect to the Congress, shameful is both an appropriate and disturbing adjective. Members of Congress—whether serving in the House of Representatives or the Senate, Republican or Democrat—have overwhelmingly failed to impose a balancing paradigm in the national security discussion on successive administrations.[79] Congress's oversight responsibilities in accordance with checks and balances and separation of powers have largely dissolved into irresponsible partisanship. The lack of discourse in Congress affords any administration extraordinary wiggle room. As history has repeatedly shown, U.S. presidents—

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[74] *See id.* ("Many lawmakers said it had been impossible to truly debate, or even read, the legislation that passed today.").

[75] *See* Kitrosser, *supra* note 68, at 610 (discussing the constitutionally-mandated system of checks and balances).

[76] *See supra* notes 3, 7 and accompanying text.

[77] *See supra* notes 48, 52 and accompanying text.

[78] *See, e.g.*, Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 353–59 (2010) (describing recent Supreme Court decisions that have left unanswered questions concerning global terrorism issues).

[79] *See supra* note 24 and accompanying text.

when granted wiggle room—have largely failed to protect human rights.

IV. CONCLUSION

So where does this leave us? The easy answer is that a U.S. president must learn from history and carefully consider the short- and long-term ramifications of limiting human rights in the name of national security. The more complete answer is that the Supreme Court and Congress must endeavor to "step up to the plate" and understand that limiting human rights—as successive administrations have done—has not proven itself as an effective measure. Both branches of government must therefore openly, consistently, and robustly engage the Executive Branch. Comparative examples are always controversial and open to criticism, but as I have suggested elsewhere in previous writings, the U.S. Supreme Court—and perhaps Congress—would enormously benefit from the robust and rigorous judicial review model of the Israeli HCJ.[80]

It is not a perfect solution. Those on the political right accuse the HCJ of overinterference,[81] those on the political left bemoan what they see as a failure to impose more stringent limits on the executive.[82] Both criticisms deserve attention and merit analysis. What is clear, however, is the continuing failure of the U.S.

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[80] *See* Amos N. Guiora, *Commentary: What U.S. Can Learn from Israel's Judicial Review for Detainees*, MCCLATCHY NEWSPAPERS, Mar. 28, 2011, http://www.mcclatchydc.com/2011/03/28/111078/commentary-what-us-can-learn-from.html (commenting on the Israeli law that guarantees all detainees—regardless of nationality or circumstances of seizure—access to counsel and arguing that "[t]he United States, with vastly greater resources than Israel and the same obligation to reconcile liberty and security, can surely give the far fewer detainees . . . their day in court too"); Amos Guiora, Op-Ed., *Judicial Review and the Executive: Lessons from Israel*, JURIST LEGAL NEWS & RES., July 13, 2009, http://jurist.law.pitt.edu/forum/2009/07/judicial-review-and-executive-lessons.php (suggesting U.S. Courts adopt the lesson from the Israeli Supreme Court that "the executive cannot operate outside the boundaries of the law, especially when it involves the use of military force" and urging an end to the U.S. Judiciary's "near automatic deference to executive determinations regarding the use and application of force").

[81] *See* Guiora & Page, *supra* note 42, at 52 (citing the belief of some that "the executive be allowed to make critical command decisions while enclosed in a bubble").

[82] *See id.* (citing the opposing belief that allowing executives to make decisions without judicial review is "inherently dangerous").

Executive, Supreme Court, and Congress to consistently preserve and protect human rights. The question mark in the headline is long overdue to be replaced by a firm statement of legal and moral purpose.