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### Pro-Constitutional Engagement: Judicial Review, Legislative Avoidance and Institutional Interdependence in National Security, 12 Harv. Nat'l Sec. J. 1 (2021)

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## ARTICLE

### Pro-Constitutional Engagement: Judicial Review, Legislative Avoidance and Institutional Interdependence in National Security

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### Abstract

This paper examines the role of legislatures and how judicial review can prompt legislative activity. In the national security arena, more emphasis tends to be placed on the dangers of judicial activity—understood as judicial activism—without adequate acknowledgement of the fact that judicial avoidance can be equally “activist” and can have an impact on the political process.

Post 9/11, facing a similar challenge, and relying on similar constitutional, institutional, and normative principles, the courts in the United States and United Kingdom made different choices, in large part due to distinct conclusions about appropriate institutional roles. Where the courts remained inactive, the U.S., the legislature made no changes to the legal framework authorizing executive power. Where the courts exercised some scrutiny and pointed out constitutional flaws, the U.K., the legislature made some attempts to remedy those faults and make more constitutionally conscious choices. Judicial timidity can encourage legislative disengagement, especially when the challenged action arises in a constitutionally fraught area where the impacted population has no political voice.

Ultimately, such judicial and legislative disengagement significantly compromises the proper functioning of the separation of powers. On June 10, 2019, the U.S. Supreme Court denied cert in the case of *Moath al-Alwi*, a man detained at Guantanamo since 2002, continuing a decade-long trend of disengagement. As we near the twenty-year anniversary of 9/11, it may be time to consider what form of judicial engagement may prompt better legislative engagement, thereby revitalizing the proper functioning of the separation of powers, in the service of constitutional governance.

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## I. Introduction

There is a common refrain in U.S. legal scholarship that an assertive exercise of judicial power in matters of national security jeopardizes established institutional arrangements. In war and national security, the executive takes the lead, with some legislative oversight.<sup>1</sup> The legislative branch is constitutionally empowered and institutionally suited to check executive excesses in war and national security. The argument tends to go something like this: robust judicial review that thoroughly engages with the substance of executive power and decision making in national security is likely to impose unworkable limits on executive power, thereby compromising security and legitimate exercises of executive power.<sup>2</sup> What is more, when courts take the reins, the legislature is pushed out, or loses the incentive to act and provide political checks on executive power.<sup>3</sup> Judicial

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<sup>1</sup> See Neal Katyal, *Stochastic Constraint*, 126 HARV. L. REV. 990, 1002 (2013) (reviewing JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012)) (“Because of their aforementioned competence limitations, they will often stay on the sidelines of national security disputes. But when they do get involved, they may overreact in ways that could last for generations due to stare decisis.”); Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 856 (2011) (“[L]egislative rulemaking as a general proposition is more easily revisited than rules derived through the habeas process . . . Judicially crafted rules are not so readily altered, however.”); Mark V. Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 245; Similar institutional claims can be found in U.K. jurisprudence and scholarship. Secretary of State for the Home Department v. Rehman [2003] 1 AC 153 [63] (Hoffmann LJ) (“I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.”); Lord Hoffmann, *The COMBAR Lecture 2001: Separation of Powers*, 7 JUD. REV. 137, 144 (2002) (“[A] degree of political awareness from judges, the ability to identify cases in which behind the formal structure of legal reasoning with which judges are so familiar, there lie questions of policy which are more appropriately decided by the democratically elected organs of the state. And it requires a degree of restraint on the part of the judges; a willingness to stand back from the thickets of the law and accept that judges are not appointed to set the world to rights.”).

<sup>2</sup> See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2051-52, 2086 (2005); John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 440 (2003); Robert Bork & David Rivkin Jr., *A War the Courts Shouldn't Manage*, WASH. POST A17 (Jan. 21, 2005).

<sup>3</sup> See Mark V. Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2680 (2005) (“Further, if courts purport to police the policymaking process but actually supervise it with an extremely loose hand, the negative case asserts that the judicial-review mechanism might *worsen* the political branches’ performance because their members might mistakenly believe that the courts will bail the people out of whatever trouble the political branches make.”); see also Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2666 (2005) (“[T]he AUMF is best taken, by its very nature, as an implicit delegation to the President to resolve ambiguities as he (reasonably) sees fit. This position tracks Congress’s likely expectations, to the extent that they exist; it also imposes exactly the right incentives on Congress, by requiring it to limit the President’s authority through plain text if that is what it wishes to do.”).

engagement leads to legislative disengagement. Political checks, provided by the legislative branch, are constitutionally and institutionally appropriate for this context, where our knowledge of what is possible, both practically and legally, is evolving constantly and rapidly.<sup>4</sup> Where the law needs to be responsive to the demands of unstable and varying circumstances, reliance on the judicial branch—the institution least able to change its rules quickly in the face of multi-dimensional problems of security and intelligence—is misguided and dangerous. This line of reasoning is concerned with the consequences of judicial activity and willing to forgo searching scrutiny by appealing to and relying on legislative checks. It has come to dominate U.S. jurisprudence.<sup>5</sup> Even scholars arguing for a robust application of judicial review and an extension of substantive legal limits and protections in the national security arena place little emphasis on institutional interplay.<sup>6</sup>

This Article argues for a more nuanced understanding of institutional competence and interplay in national security. A more nuanced understanding would ensure overlap of institutional authorities is not confused with conflation of those authorities. An either/or approach to checking executive power and dominance in national security, rooted in either extension of judicial supremacy or popular constitutionalism,<sup>7</sup> fails to adequately consider and value institutional interplay. There is value in substantive judicial review of executive decision-making in national security beyond the judicial protection of individual rights. If judicial review can prompt more substantive legislative engagement, then there is a systemic value to substantive judicial engagement.

The focus in this Article is two-fold. First, this Article addresses the role of the legislature and the importance of legislative engagement for effective checks

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<sup>4</sup> See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring) (“[T]he circumstances that frustrate the judicial process are the same ones that make this situation particularly ripe for Congress to intervene pursuant to its policy expertise, democratic legitimacy, and oath to uphold and defend the Constitution. These cases present hard questions and hard choices, ones best faced directly.”).

<sup>5</sup> See *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring) (“The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 603–610, 635 (1952); *Al-Bihani*, 590 F.3d at 871 (deferring to Congress and the President to establish the substantive laws of war that inform detention authority); *Al-Aulaqi v. Panetta*, 35 F.Supp.3d 56, 78–79 (D.D.C. 2014); *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1860 (2017); *Trump v. Hawaii*, 138 S.Ct. 2392, 2408–2410 (2018).

<sup>6</sup> See David Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, CATO SUP. CT. REV. 2007–2008, at 47, 56–61; see generally, DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006) (focusing on substantive bill of rights protections rather than institutional benefits); see generally Ryan Goodman and Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653 (2005) (focusing on the substantive limits provided by Laws of Armed Conflict on executive power authorized through congressional authorization, rather than the institutional benefits of robust judicial review).

<sup>7</sup> For a discussion of judicial supremacy and popular constitutionalism, see generally Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. (2018).

on executive discretion and the proper functioning of separation of powers. Second, it consider how judicial review can prompt legislative activity.<sup>8</sup> In the national security arena, the dangers of judicial activity, understood as judicial activism, are often emphasized without adequate acknowledgement of the fact that judicial avoidance can be equally activist and impact the political process.<sup>9</sup> Judicial timidity can facilitate legislative disengagement, especially when the challenged action arises in a constitutionally fraught area where the impacted population has no political voice. Ultimately, such judicial and legislative disengagement significantly compromises the proper functioning of the separation of powers.<sup>10</sup>

This Article focuses on U.S. and U.K. experiences in order to challenge, through specific examples, the stated or assumed claim that judicial review of matters of national security is undesirable and inadvisable. Judicial review can prompt better legislative oversight of executive action. U.S. and U.K. experiences present two different examples of judicial and legislative behavior. Facing a similar challenge, and relying on similar constitutional, institutional, and normative principles, the courts in these jurisdictions made different choices. Correspondingly, the legislatures in these two jurisdictions made different choices. In the United States, where the courts remained inactive/deferential, the legislature made no changes to the legal framework authorizing executive power. As this Article will show, U.S. courts deferred, adopting substantive, procedural, and evidentiary standards that rendered judicial review little more than a rubber stamp of executive policy. In turn, Congress could, and did, fail to set any real standards for executive detention authority. In contrast, in the United Kingdom, where the courts exercised some scrutiny, pointing out constitutional flaws, the legislature made some attempts to remedy those faults and make more constitutionally conscious choices. Given the fundamental nature of the right at stake, the right to liberty and security,<sup>11</sup> U.K. courts understood themselves to be constitutionally and institutionally responsible for exercising real scrutiny of executive judgement. In their case, a proper exercise of judicial power prompted legislative engagement and produced a more effective functioning of the separation of powers, one in which the legislature engaged with the substantive standards and issues at stake.

First, this Article will lay out the initial legislative authorization of executive power in each jurisdiction and the judicial scrutiny that followed. Then, it will explain why focusing on these jurisdictions is fitting and how the difference in judicial review presents an opportunity to examine the relationship between

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<sup>8</sup> See Tushnet, *supra* note 1, at 246–7. See generally J MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004).

<sup>9</sup> Stephen Sedley, *The Sound of Silence: Constitutional Law without a Constitution* 110 L.Q. REV. 270, 284 (1994).

<sup>10</sup> See Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 144 (2009) (“Once a duty shared by Congress and the President, the task of concluding international agreements has come to be borne almost entirely by the President alone.”); see also Curtis A. Bradley and Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1272–9 (2018).

<sup>11</sup> See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention].

judicial review and subsequent legislative engagement. The Article will turn to the question of legislative development of the legal framework and what that development, or lack thereof, means for separation of powers in national security. As the examination of these two jurisdictions will show, the assumption that judicial activity is dangerous to proper functioning of separation of powers, in national security, is faulty, rooted in broad generalizations about institutional roles and a simplistic understanding of institutional dynamics.

## II. Legislative Activity, Judicial Review and Institutional Interdependence: U.S. and U.K. Responses to 9/11

Soon after taking office, then-President Obama issued an executive order to close the detention center at Guantanamo Bay.<sup>12</sup> “Instead of building a durable framework for the struggle against al Qaeda that drew upon our deeply held values and traditions,” he said, “our government was defending positions that undermined the rule of law.”<sup>13</sup> While confronted with the threat of international terrorism and eager to safeguard national security, the new president pointed out that the government had erected a framework of executive powers and policies that “failed to use our values as a compass.”<sup>14</sup> Chief among these choices was the indefinite, preventive detention of enemy combatants at Guantanamo Bay.<sup>15</sup> This detention was subject to modified, evolving, and ad hoc legal standards and processes.<sup>16</sup> It raised serious constitutional concerns about the safeguarding of liberty, checks and balances, and the rule of law.<sup>17</sup> The courts would have to confront these constitutional concerns in conducting judicial review of preventive detention.

Across the pond, the U.K. courts faced a similar challenge. Following the attacks of 9/11 and responding to the threat from international terrorism, Parliament authorized a series of discretionary executive powers aimed at safeguarding national security.<sup>18</sup> However, significant questions were raised about the enacted

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<sup>12</sup> See Executive Order 13492, Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities (Jan. 22, 2009).

<sup>13</sup> President Barack Obama, Remarks by the President on National Security, 5-21-09 (May 21, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09> [www.perma.cc/2EZX-Y4GN].

<sup>14</sup> *Id.*

<sup>15</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>16</sup> Because the legal categorization of detainees from the ‘war on terror’, especially the detainees brought to Guantanamo Bay, raised significant questions of fit with existing categories under international and domestic law (e.g., enemy soldier, civilians directly participating in hostilities), the legal standards were evolving and continue to be unsettled. See, e.g., Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 770-71 (2011) (noting the lack of ongoing clarity on the definition of the category of individuals subject to preventive military detention); Eric Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2007-2008 CATO SUP. CT. REV. 23, 25 (2008) (arguing the Court in *Boumediene* changed the law applicable to military detention of aliens).

<sup>17</sup> See sources cited *infra* note 22.

<sup>18</sup> See Anti-terrorism, Crime and Security Act 2001, c. 24 (UK) (authorizing detention of enemy aliens); Prevention of Terrorism Act 2005, c. 2 (UK) (authorizing control orders); Terrorism

legal regime's compliance with core constitutional principles.<sup>19</sup> Detention of aliens and significant restraints on personal freedom implicated liberty, the rule of law, and due respect for separate institutional competencies in matters of national security.<sup>20</sup> Like the U.S. courts, the U.K. courts had to conduct review of executive powers with these constitutional principles at stake.

The courts in the United States and United Kingdom relied on similar institutional and substantive constitutional principles when conducting such review.<sup>21</sup> It is that similarity that makes the comparison between the two systems possible, relevant, and revealing.<sup>22</sup> The liberty interests of the detainees and the separation of powers principles are central to the highest courts' deliberations in both jurisdictions.<sup>23</sup> In the context of national security, these constitutional principles possess similar qualities.<sup>24</sup> For example, both jurisdictions have a history

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Prevention and Investigation Measures Act of 2011, c. 23 (UK) (reauthorizing but limiting control measures).

<sup>19</sup> See generally Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?* 65 MOD. L. REV. 724 (2002); Adam Tomkins, *Legislating against Terror: The Anti-Terrorism, Crime and Security Act 2001* PUB. L. 205 (2002).

<sup>20</sup> Before the enactment of the control order regime, the United Kingdom used indefinite detention of aliens as a counterterrorism tool. The practice was found incompatible with the ECHR by the House of Lords. See *A and others v. Sec'y of State for the Home Dep't* [2004] UKHL 56, [2005] 2 AC 68.

<sup>21</sup> See AILEEN KAVANAGH, *CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT* 404–6 (2009); COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION* 756–772 (7th ed. 2011).

<sup>22</sup> See RAN HIRSCHTEL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 19 (2014); Vicki Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN. ST. INT'L L. REV. 319, 324 (2010).

<sup>23</sup> For examples of similar doctrines/principles and ongoing contestation over the scope and interaction of those principles in the United States, see generally Robert Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J. L. & PUB. POL'Y. 487 (2002); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1 (2006); Owen Fiss, *Law Is Everywhere*, 117 YALE L.J. 257 (2007); For examples of the debate over executive power and judicial review in the United Kingdom, Hoffmann, *supra* note 1; K.D. Ewing, *The Futility of the Human Rights Act*, [2004] PL 829; Dyzenhaus, *supra* note 6; John Finnis, *Judicial Power: Past, Present and Future*, Speech for the Judicial Power Project at Gray's Inn Hall (Oct 20, 2015) at <http://judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-speech-20102015.pdf> [<https://perma.cc/GN2B-L3YS>].

<sup>24</sup> In the United States, justiciability traditionally refers to five requirements the case must meet before U.S. federal courts are empowered to hear it, including, “the prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 49–50 (3rd ed. 2006). In the United Kingdom, the doctrine of non-justiciability of national security was, before the passage of the Human Rights Act, a judicial hands-off approach to any matter concerned with national security. Aileen Kavanagh, *Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape* 9 INT'L J. CON. L. 172, 173–74 (2011) (“[T]here has been a ‘constitutional shift’ from a completely hands-off judicial approach (as embodied in the doctrine of nonjusticiability) to a more hands-on approach (as embodied in the idea of a variable intensity of review combined with a degree of deference).”).

of deploying various justiciability doctrines to limit or foreclose judicial review, but the scope of those doctrines or the application to the ‘war on terror’ context was unsettled when it came to reviewing post-9/11 detention questions.<sup>25</sup> Both jurisdictions have doctrines concerned with executive prerogatives in war and national security, and both measure the scope of judicial power by connecting the exercise of that power to structural and substantive interests.<sup>26</sup> The executive prerogatives in national security are similarly broad and powerful in U.S. and U.K. jurisprudence and practice.<sup>27</sup> Likewise, the doctrine of judicial review of executive powers in national security is informed by common principles, yet has been similarly unsettled in both jurisdictions, especially immediately following the attacks of 9/11.<sup>28</sup> As a result, when the highest courts in both jurisdictions came to review these powers, their reasoning was bound by comparable constitutional considerations, making the options available to the courts meaningfully similar.<sup>29</sup> Thus, the different choices the courts made are especially significant and allow us to consider how they led to a difference in impact on legislative behavior.

Beyond the question of constitutional context, the legislative authorizations of detention and control powers, and the particular measures provided in the legislative designs, differ. However, there are fundamental and significant commonalities between the specific legal frameworks of detention and control powers operating in these two jurisdictions: (i) the definition of offensive or

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

<sup>26</sup> See generally A.W. Brian Simpson, *Rhetoric, Reality, and Regulation 18B*, 3 DENNING L.J. 123, 152 (1988); Adam Tomkins, *The Struggle to Delimit Executive Power in Britain*, in PAUL CRAIG & ADAM TOMKINS, *THE EXECUTIVE AND PUBLIC LAW: POWER AND ACCOUNTABILITY IN COMPARATIVE PERSPECTIVE* 543, 547 (2006); Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, MODERN L. REV. 655, 655–7 (2005); Adam Tomkins, *National Security and the Role of the Court: A Changed Landscape?* 126 L.Q.R. 543, 550 (2010); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1 (2006); Owen Fiss, *Law Is Everywhere*, 117 YALE L.J. 257 (2007).

<sup>27</sup> See A.W. Brian Simpson, *Rhetoric, Reality, and Regulation 18B*, 3 DENNING L.J. 123, 152 (1988). See generally Robert Delahunty & John C. Yoo, *The President’s Constitutional Authority to Conduct Military Operations against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J. L. & PUB. POL’Y. 487 (2002); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Curtis Bradley & Martin Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. LE. REV. 545 (2004).

<sup>28</sup> See Richard Fallon & Daniel Melzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2050 (2007). See generally Aileen Kavanagh, *Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape* 9 INT’L J. CONST. L. 172 (2011).

<sup>29</sup> The shared heritage, especially when it comes to the writ of habeas corpus and the central importance of judicial review and due process, is on full view when the highest courts in both countries reference the case law of the other, in reasoning about judicial power to safeguard individual liberty. For an engaged examination of British jurisprudence on the reach and scope of the writ of habeas corpus see *Boumediene v. Bush*, 553 U.S. 723, 766 (2008). For an example of U.K. House of Lords referencing U.S. Supreme Court reasoning on fundamental fair trial processes see *Secretary of State for the Home Department v. MB* [2007] UKHL 46 [30], [2008] 1 AC 440 (Bingham LJ); *Secretary of State for the Home Department v. AF* [2009] UKHL 28 [83] (Hope LJ).

suspicious conduct is extremely broad, reaching across the globe and affecting citizens and foreigners alike;<sup>30</sup> (ii) the kind of evidence under consideration is often secret, second-hand, partial, circumstantial, or contradictory, and the executive has superior institutional access to, and control and understanding of, this evidence;<sup>31</sup> (iii) neither system justifies this authority on the grounds of punishment, but both contemplate conduct that overlaps with the jurisdiction of the state's criminal justice system and impacts the fundamental right to physical freedom;<sup>32</sup> and (iv) for both systems, the preventive measures under review can be distinguished from the detention authority operating in the physical battlefield connected to international counterterrorism operations (i.e., the detention of captured combatants/suspected combatants in detention facilities in Afghanistan, Iraq, etc.).<sup>33</sup>

At the heart of the legal challenge presented by post-9/11 counterterrorism detention and control powers is a problem of separating institutional powers.<sup>34</sup> Where, as in this context, the separation of powers is particularly concerned with (and connected to) safeguarding executive prerogatives and the individual right to physical liberty, the proper functioning of institutional powers is vital. There are profound institutional and individual interests at stake. The more engaged the

<sup>30</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001).

<sup>31</sup> See, e.g., Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1405–06 (2009); David Cole, *Confronting the Wizard of Oz: National Security, Expertise, and Secrecy*, 44 CONN. L. REV. 1617, 1619–21 (2012); K.D. Ewing & Joo-Cheong Tham, *The Continuing Futility of the Human Rights Act*, PUB. L. 668, 673–74, 685 (2008); Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 124, 146–153 (2013); Jeffrey Jowell, *Judicial Deference: Servility, Civility or Institutional Capacity?* PUB. L. 592, 598–99 (2003); A.W. Brian Simpson, *Rhetoric, Reality, and Regulation 18B*, 3 DENNING L.J. 123, 152 (1988); Adam Tomkins, *The Struggle to Delimit Executive Power in Britain*, in PAUL CRAIG & ADAM TOMKINS, *THE EXECUTIVE AND PUBLIC LAW: POWER AND ACCOUNTABILITY IN COMPARATIVE PERSPECTIVE* 543, 547 (2006).

<sup>32</sup> See Ed Bates, *Anti-Terrorism Control Orders: Liberty and Security Still in the Balance*, 29 LEGAL STUD. 99, 100 (2009); Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008); Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, MODERN L. REV. 655, 655–7 (2005); Adam Tomkins, *National Security and the Role of the Court: A Changed Landscape?* 126 L.Q.R. 543, 550 (2010); Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 968–69 (2015).

<sup>33</sup> See, e.g., *Maqaleh v. Gates*, 605 F.3d 84, 96–99 (D.C. Cir. 2010); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMAN. L. 3, 11–14 (2010); Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 EUR. J. INT'L L. 121, 129–133 (2012); Alberto Gonzales, *Drones: The Power to Kill*, 82 GEO. WASH. L. REV. 1, 17–19 (2013); Stephen I. Vladeck, *Response: Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. 11, 19–23 (2014).

<sup>34</sup> Questions of legality, in both jurisdictions, are concerned with both identifying proper legislative sanction, and then the conformity of that statutory grant (or the executive's use of it) with constitutional principles/limits on the political power of the state. See Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 55 (2012) (“[J]udges provide habeas process when reviewing whether a detention is authorized, which includes examining whether the detention has adequate factual and legal support.”); Dawn Oliver, *Is the Ultra Vires Rule the Basis of Judicial Review?* 1987 PUB. L. 543, 544 (1987) (“[A]n authority will be regarded as acting *ultra vires* if in the course of doing or deciding to do something that is *intra vires* in the strict or narrow sense, it acts improperly or ‘unreasonably’ in various ways[.]”).

legislature is in providing a useful and constitutional framework for the exercise of executive discretion, the more smoothly the separation of powers can operate. This engagement may not always lead to contraction of executive power. Depending on the context, executive power may easily be reasonably and defensibly expanded by legislative act.<sup>35</sup> The constitutional problem arises because the executive's discretion is wide, raising concerns over the absence of clear parameters by reference to which legality can be judged.<sup>36</sup> Given the profound interests at stake, the judiciary is compelled to engage with executive decision-making. Simultaneously, given the lack of clear articulable definitions available in this context<sup>37</sup>, the judiciary is particularly in danger of treading on executive or legislative ground without clear and defensible doctrine to guide (and justify) the exercise of the judicial power.<sup>38</sup>

This next section lays out the initial legislative authorizations in each jurisdiction and explains what the courts were confronted with when they came to conduct judicial review. It also points out the effect institutional powers principles have had on how the executive interprets legislative grants of authority and on judicial interpretation of executive practice and legislative policy.

Legislation gives scant guidance in both jurisdictions as to what conduct brings the individual within the executive's power.<sup>39</sup> A great deal is open to executive judgement. When the power being exercised impacts the most fundamental rights of the individual, clear and justifiable parameters are required. Confronted with the challenge of wading into an area of overlapping powers, expertise and competencies, where profound institutional interests are at stake, the courts have two options: they can either step into the muddle and begin to articulate the legal/constitutional standards, or step back, for fear of overreaching, and leave the problem to the political branches. As the analysis below will show, U.S. courts have adopted the latter approach. The D.C. Circuit, with some help from the minimalist holdings and inactivity of the Supreme Court, has conducted review

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<sup>35</sup> For example, the War Power Resolution, 50 U.S.C. 1541–1548 (1973), allows Congress to authorize a conflict and grant the President significant wartime powers. But Congress must explicitly make the substantive decision to do so. In the U.K. context, following rising concerns of ISIS threats and the fear of returning fighters or new networks within the U.K., Parliament gave the executive some additional powers, in the Counter-Terrorism and Security Act 2015 c. 6. (UK), through control measures, which had earlier been removed for being too oppressive. *See* KENT ROACH, *COMPARATIVE COUNTER-TERRORISM LAW* 752 (2015) (“The Counter-Terrorism and Security Act, 2015, however, strengthened TPIMs to include residence relocation and travel restrictions in an attempt to deal with threats associated with people in the UK leaving to fight for the Islamic State or returning after such foreign terrorist fights.”).

<sup>36</sup> *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001); Terrorism Act 2000, c. 11, § 1(2)–(4) (UK).

<sup>37</sup> *See id.*

<sup>38</sup> For variations on the argument that that tactical, policy and legal decisions involved in national security are inextricably entangled and should be left to the executive branch, *see* sources cited *supra* note 31.

<sup>39</sup> *See supra* note 35. Both the AUMF and the Terrorism Act in the UK fail to provide clear definitions of what conduct can result in detention of the individual, failing to set clear geographical, temporal, and nexus limits on the authority.

based on a hollow separation-of-powers argument, that asserts the virtue of checks and balances, but has forgone the responsibility of articulating the substantive principles driving those checks.<sup>40</sup> U.K. courts, on the other hand, have entered the fray, identifying the elements of the legal framework susceptible to refinement or definition according to the constitutional and conventional principles involved.<sup>41</sup>

#### A. *A Hollow Separation of Powers and the AUMF*

Following the attacks of September 11<sup>th</sup>, 2001, Congress passed the Authorization for the Use of Military Force (AUMF).<sup>42</sup> The authorization reads:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>43</sup>

Due to the constitutional function of this legislative act—authorization of the executive’s military powers—and the real-world circumstances in which it was enacted, the act is to the point. It is as broad and permissive as it can be. It does not provide clear details of how the powers are limited, what acts are authorized, where the power can be used, or which decisions are immune from judicial review. Given the lack of guidance within the text of the authorization, the constitutional arguments that dominate the debate are ones of broad principles of institutional domains, the commander-in-chief’s powers, and fundamental principles of constitutionalism, the separation of powers and the writ of habeas corpus.<sup>44</sup>

The AUMF is an authorization to use force, to deploy troops, and to engage in kinetic conflict with enemy forces.<sup>45</sup> The text makes no mention of detention.<sup>46</sup> Yet, the Supreme Court, in its decision in *Hamdi v. Rumsfeld*, held detention a necessary incident to military operations and therefore as implicitly authorized by

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<sup>40</sup> See, e.g., *Al Hela v. Trump*, 972 F.3d 120 (D.C. Cir. 2020) (explicitly severing the suspension clause and the due process clause when it comes to the rights of aliens detained extraterritorially by the executive in the war on terror).

<sup>41</sup> See *infra* Sections I(D)–(E).

<sup>42</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); see also Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>43</sup> Authorization for Use of Military Force § 2(a).

<sup>44</sup> See ERIC POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE 4–5 (2007) (arguing for the special competence of the executive in matters of war and national security); Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 253–63, 292–98 (2014); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 4–5 (2004) (identifying three different approaches to the tension between security and individual liberties).

<sup>45</sup> See Authorization for Use of Military Force § 2(a).

<sup>46</sup> See *id.* at § 2.

the AUMF.<sup>47</sup> The Court did not, however, determine the scope of the detention authority granted to the executive through the AUMF<sup>48</sup>, and it has been left to the D.C. Circuit to work out the exact content of the authorization.<sup>49</sup>

For over a decade, the AUMF was all Congress had to say about the substance of the detention authority it granted to the executive. Congress did pass related legislation, the Detainee Treatment Act of 2005 and the Military Commissions Acts of 2006 and 2009, which addressed issues of Article III courts' power to review military decisions of detention and the substantive laws applicable to the military commission's prosecutions for the violations of the Laws of Armed Conflict.<sup>50</sup> This legislation, and the Supreme Court's decision in *Hamdan v. Rumsfeld*,<sup>51</sup> showcase the institutional interplay and how institutional considerations divorced from substantive rights can hollow out judicial review, and by extension, pro-constitutional engagement by the legislature. In *Hamdan*, the case addressing the prosecution of detainees by the Military Commissions, the Court initially imposed some substantive law—drawing on IHL and the UCMJ—thereby prompting Congress to engage and produce a statutory framework for the commissions.<sup>52</sup> On the detention authority, there was an exchange between the Court and Congress over whether the jurisdiction of the courts could reach the detainees at Guantanamo.<sup>53</sup> When the Court asserted its institutional power, Congress responded by trying to limit it.<sup>54</sup> On the institutional point, the Court held its ground.<sup>55</sup> At this point, Congress did not respond by placing the executive's

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<sup>47</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (O'Connor, J.). This case dealt with the detention of a U.S. citizen, which infused the Court's reasoning significantly; the majority of justices recognized some right to due process in the case of a U.S. citizen. See *id.*

<sup>48</sup> See *id.* at 516.

<sup>49</sup> For more on the role of the D.C. Circuit, see *infra* Section II.B.

<sup>50</sup> See *Al-Bihani v. Obama*, 590 F.3d at 872 (“The provisions of the 2006 and 2009 MCAs are illuminating in this case because the government’s detention authority logically covers a category of persons no narrower than is covered by its military commission authority.”); Military Commissions Act 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (“(A) The term ‘unlawful enemy combatant’ means— “(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or “(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.”).

<sup>51</sup> See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>52</sup> See *id.*

<sup>53</sup> See Military Commissions Act 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>54</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 572 (2006) (the court declined to apply the provisions of the DTA stripping the courts habeas jurisdiction); Military Commissions Act 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) §7 (amending 28 U.S.C. § 2241 in response to the Court’s holding in *Hamdan*).

<sup>55</sup> See *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (“Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, that provides certain procedures for review of the detainee’s status. We hold that those procedures are not an adequate and effective

substantive authority on clear statutory ground. The institutional ground the Court had staked out had no substantive requirements; it placed no substantive limits or parameters on executive power to detain indefinitely.

In the Detainee Treatment Act of 2005, Congress responded to the Court's decision in *Rasul v. Bush* extending statutory habeas review to detainees at Guantanamo by attempting to remove the courts' jurisdiction.<sup>56</sup> When the Supreme Court came to consider a related challenge to the military commissions, the Court pushed back against this removal of jurisdiction, asserting the institutional value and importance of judicial oversight.<sup>57</sup> Congress responded by enacting the Military Commissions Act of 2006 (MCA 2006) and expressly eliminated court jurisdiction over pending and future cases.<sup>58</sup> The Supreme Court again, in *Boumediene*, offered resistance.<sup>59</sup> But the Court's resistance was limited to asserting the judicial interests at stake, as discussed below.<sup>60</sup> It did not set out any substantive standards for detention authority.<sup>61</sup> It is illuminating to note that in the context of criminal prosecutions carried out by the Military Commissions at Guantanamo, where the Court briefly provided slightly more by way of substantive standards (relying on Common Article 3 of the Geneva Conventions), Congress responded by enacting legislation to empower the Commissions.<sup>62</sup> But in the context of pure detention authority, the Court provided no clear holding on what rights the detainees enjoyed or the breadth of the executive's detention power, and the legislature had no need to be more precise with the definition of detainable conduct or to set clear limits on the scope of its broad authorization.<sup>63</sup>

Meanwhile, the executive branch conducted detention operations and, in the process, developed its own framework for interpreting the AUMF and the scope of

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substitute for habeas corpus. Therefore §7 of the Military Commissions Act of 2006(MCA), 28 U.S.C. §2241(e), operates as an unconstitutional suspension of the writ.”).

<sup>56</sup> See Detainee Treatment Act (2005) P.L. 109-148, Title X; P.L. 109-163, Title XIV (responding to the Supreme Court's decision in *Rasul v. Bush*, 543 U.S. 466 (2004)).

<sup>57</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 572 (2006).

<sup>58</sup> See Military Commissions Act (2006) P.L. 109-366.

<sup>59</sup> See *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008).

<sup>60</sup> For discussion of *Boumediene*, see *infra* Section II.B.

<sup>61</sup> See *Boumediene*, 553 U.S. at 798 (“[O]ur opinion does not address the content of the law that governs petitioners’ detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus.”).

<sup>62</sup> The Supreme Court also abandoned reviewing challenges to the military commissions, leaving it to the D.C. Circuit to handle oversight. The initial legislative establishment of the military commissions (MCA 2006) did result from judicial review and engagement with the substantive issues raised by the executive order establishing the military commissions. The Military Commissions Act of 2009, which made substantive changes to the jurisdiction and procedures of the commissions, was largely driven by the election of President Barack Obama. The changes were not due to judicial holdings. See Jennifer K. Elsea, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, Congressional Research Service (Aug. 4, 2014), <https://fas.org/sgp/crs/natsec/R41163.pdf> [<https://perma.cc/FA84-54E7>].

<sup>63</sup> While National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, §1021 (2012), did codify the detention authority asserted by the executive, it did not further specify or clarify the limits of that broad authority.

the President's power.<sup>64</sup> In defending its detention policies at Guantanamo Bay,<sup>65</sup> the Bush administration argued that war powers, displaced regular institutional relationships. Congress has no authority to "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response."<sup>66</sup> This conclusion is derived from institutional claims that "the constitutional structure requires that any ambiguities in the allocation of a power that is executive in nature—such as the power to conduct military hostilities—*must* be resolved in favor of the executive branch,"<sup>67</sup> and that "the Constitution makes clear that the process used for conducting military hostilities is different from other government decision-making."<sup>68</sup> The need for effective and unified action means one branch decides. The Obama Administration maintained a similar approach, stressing the need to maintain flexibility in defining who is detainable. In 2009, the Obama Administration provided the following definition of its own authority to detain pursuant to the AUMF:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.<sup>69</sup>

The Administration followed up on the definitional framework with a familiar explanation: "It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of 'substantial support,' or the precise characteristics of 'associated forces,' that are or would be sufficient to bring person and organizations within the foregoing framework."<sup>70</sup> Since the authorization is connected to a vested power that operates in an arena traditionally and still conceptually entrusted to the executive, national security and international relations, as provided by the Commander-in-Chief Clause, the executive has

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<sup>64</sup> See THE CONSTITUTION PROJECT, THE REPORT OF THE CONSTITUTION PROJECT'S TASK FORCE ON DETAINEE TREATMENT, 57–84 (2013), <http://detaineetaskforce.org/report> [<https://perma.cc/JWX2-V8RE>].

<sup>65</sup> Guantanamo Bay houses third-state detainees who were captured either by U.S. forces in Afghanistan or handed over to the United States by allied powers, most notably the Northern Alliance in Afghanistan and Pakistani officials, in the early days of the invasion.

<sup>66</sup> The President's Const. Auth. to Conduct Mil. Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 214 (2001).

<sup>67</sup> *Id.* at 194.

<sup>68</sup> *Id.* at 193.

<sup>69</sup> Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1–2, In re Guantanamo Bay Detainee Litigation, No. 08-0442 (D.D.C. Mar. 13, 2009) <https://www.justice.gov/archive/opa/documents/memo-re-det-auth.pdf> [<https://perma.cc/4ZVX-6Y4F>].

<sup>70</sup> *Id.* at 2.

claimed space to use expert judgement and institutional competence to decide how this broad definition applies to individuals.<sup>71</sup> The government further argued that when the particular conflict fits imperfectly with the existing rules and examples of executive war powers, the courts must recognize that “the particular facts and circumstances justifying detention will vary from case to case, and may require the identification and analysis of various analogues from traditional international armed conflicts.”<sup>72</sup> In other words, the executive argued that as existing definitions and the Laws of Armed Conflict (“LOAC”) have no easy fit with the conflict against international terrorism, the lack of clear answers requires executive discretion. The same definition was offered by the Obama Administration in 2016 in a document outlining the legal framework guiding executive national security operations.<sup>73</sup>

There is no straightforward legal precedent on the distinction between combatants, civilians, ‘civilians directly involved in hostilities,’ and individuals ‘part of enemy organizations in the *War on Terror*. Therefore, there is no straightforward legal precedent from which the courts can reliably claim authority to consistently and legitimately limit executive judgement.<sup>74</sup> The executive claimed the sole authority to write the law, to determine who is detainable.<sup>75</sup> But even without clear existing rules setting the terms of who is detainable in a conflict like this one, there are governing principles that inform what these rules should try to achieve, i.e., preventing the detention of individuals with insufficient connection to the conflict.<sup>76</sup> The executive essentially claimed the sole authority to apply those principles, and the courts have largely accepted that claim.

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<sup>71</sup> See *id.* See also The President’s Const. Auth. to Conduct Mil. Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 189–90 (2001).

<sup>72</sup> *Id.*

<sup>73</sup> See THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS, 28–29 (2016) [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal\\_Policy\\_Report.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf) [<https://perma.cc/XWJ4-MWS7>].

<sup>74</sup> See *Hamdi*, 542 U.S. at 526–27 (O’Connor, J.) (“[T]he circumstances surrounding Hamdi’s seizure cannot in any way be characterized as ‘undisputed,’ as ‘those circumstances are neither conceded in fact, nor susceptible to concession in law.’”); *The D.C. Circuit eschewed the need to develop a clear standard to define detainable conduct. Al-Bihani v. Obama*, 590 F.3d at 875 (Brown, J.) (“A clear statement requirement is at odds with the wide deference the judiciary is obliged to give to the democratic branches with regard to questions concerning national security.”); see also *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009) (Bates, J.) (“Detention based on substantial or direct support of the Taliban, al Qaeda or associated forces, without more, is simply not warranted by domestic law or the law of war.”).

<sup>75</sup> See Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 1–2, *In re Guantanamo Bay Detainee Litigation*, No. 08-0442 (D.D.C. Mar. 13, 2009) <https://www.justice.gov/archive/opa/documents/memo-re-det-auth.pdf> [<https://perma.cc/4ZVX-6Y4F>].

<sup>76</sup> Those principles are drawn from international humanitarian law, as well U.S. constitutional law, such as the principle of distinction and the right of substantive due process (i.e., the right to freedom from arbitrary detention). See generally Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC (2009); Jenny S. Martinez, *Process and Substance in the War on Terror*, 108 COLUMBIA L. REV. 1013 (2008).

It is the subject matter context that links the broad authorization to the doctrine of interpretation that the government advanced: “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum” and any action he takes pursuant to that authorization “would be supported by the strongest of presumptions and the widest of latitude of judicial interpretation.”<sup>77</sup> In these instances, presidential war power at its maximum. The broad claim of authority over the domain of military affairs showcases the interpretive doctrines, presumptions, and inferences that accompany the constitutional reasoning on war powers. Separation-of-powers reasoning in this context is full of generalizations about institutional competencies that assume the complex and variable interactions of political, legal and expert judgements involved require judicial abdication.<sup>78</sup> It is a separation-of-powers principle with a single institution in its sights, the executive. When the courts came to review post-9/11 executive powers, they adopted a similar institutional powers approach.

### B. *Judicial Review without Judicial Scrutiny*

How would a clear ruling by the courts on presidential war authorization have impacted Congress, as it drafted its next statute on the authority to detain? To fully appreciate how little changed from the 2001 AUMF to the 2012 National Defense Authorization Act (NDAA),<sup>79</sup> this Article considers how the courts conducted review of executive detentions during that time.<sup>80</sup> Did the courts identify or develop rules, e.g., geographic limits, nexus requirements, or standards, e.g., necessity of detention, evidence of direct participation in hostilities, to clarify the boundaries of executive discretion? Did they set procedural standards designed to ensure unsubstantiated judgements of the executive would not lead to indefinite detentions? Part III of this Article grapples with the reality that engagement may not mean better substantive definition of detainable conduct—a key aim of institutional interplay identified at the outset of this section.<sup>81</sup> The analysis of U.K.

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<sup>77</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636–37 (1952) (Jackson, J., concurring); Bradley & Goldsmith, *supra* note 23, at 2052.

<sup>78</sup> See generally Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1 (2006); Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827 (2013) (identifying wide deference courts show the executive in national security and arguing that review alone, however deferential, shapes the executive’s choices); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L. J. 441, 445 (2005).

<sup>79</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2012).

<sup>80</sup> Not much has changed since 2012, in terms of either judicial or legislative development of the legal framework. It is worth highlighting that Congress did act on other related issues up to 2008, including prohibitions on cruel, inhuman, or degrading treatment or punishment of prisoners in the war on terror and setting limits on interrogations and setting out the legislative framework for the military commissions. See Detainee Treatment Act (2005) Pub. L. 109-148; Military Commissions Act 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); Military Commissions Act 2009, Pub. L. No. 111-84, 123 Stat. 2574 (2009).

<sup>81</sup> See *infra* Part III.

institutional engagement shows that the legal framework for detention and coercion can be improved through other means.<sup>82</sup>

Let us begin with the Supreme Court's analysis in *Hamdi* and *Boumediene*. The judicial reasoning in these cases provides a good example of how separation-of-powers arguments became the main justification for the exercise of review without the articulation of the substantive principles that review is meant to serve. In the end, all that the Court's assertion of institutional checks accomplished was to proclaim the importance of judicial power; it did not articulate the purpose of having the judiciary hold the power to safeguard substantive rights beyond institutional grandstanding. Substantive limits or rights include both the incorporation of individual rights involved or the articulation of substantive legal limits beyond mere institutional authority, i.e., strict and engaged interpretation and application of statutory language or imposition of standards set by international laws of armed conflict.

Justice O'Connor's opinion in *Hamdi* focuses on the issue of legality and procedural due process. The AUMF makes no mention of detention, raising significant rule of law concerns.<sup>83</sup> The Court found that Congress had implicitly authorized the executive to detain individuals through the AUMF. Justice O'Connor's analysis focuses on statutory barriers, 18 U.S.C. § 4001(a), and authorizations, the AUMF, to avoid the constitutional stakes of the case. However, by focusing on the statutory prohibition of unauthorized detention, the Court's analysis skirts the question of whether constitutional due process of law—a substantive protection—itself prohibits executive detention under these circumstances, for citizens and aliens alike.<sup>84</sup>

18 U.S.C. § 4001(a) states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”<sup>85</sup> The prohibition was enacted to require Congress to define, and hopefully to limit, the power of detention, thereby ensuring nothing like the World War II Japanese internment would happen again.<sup>86</sup> The logic of the statute, requiring congressional authorization and definition, is a favored tool of legal reasoning in national security

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<sup>82</sup> See *infra* Section II.D.

<sup>83</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001).

<sup>84</sup> See *Galvan v. Press*, 347 U.S. 522, 530 (1954) (Frankfurter, J.) (“[C]onsidering. . . the extent to which, since he is a ‘person,’ an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party’s advocacy of violence strikes one with a sense of harsh incongruity.”). The Supreme Court’s avoidance of the substantive constitutional issues has allowed the D.C. Circuit to implicitly sever the institutional and substantive claims for the past ten years, and to do so explicitly in *Al Hela v. Trump*, 972 F.3d 120 (D.C. Cir. 2020).

<sup>85</sup> 18 U.S.C. § 4001 (1948).

<sup>86</sup> See Stephen Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law after the Bush Administration*, in *WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION* 183, 196 (Austin Sarat & Nasser Hussain eds., 2010).

cases.<sup>87</sup> Underlying the preference for legality-based approaches to national security judicial review is a compromise that “requiring clear congressional authorization helps ‘provid[e] a check on unjustified intrusions on liberty’ without stopping Congress from providing such authorization ‘when there is a good argument for it.’ Clear statement rules thus tend to ‘promote liberty without compromising legitimate security interests.’”<sup>88</sup> Justice O’Connor’s analysis coasts on this assumption, that so long as there is authority, and so long as this instance of detention is obviously within the scope of that authority, all that remains is determining due process.<sup>89</sup>

As the AUMF provides no explicit authorization for detention, relying on it as a legitimate source of broad detention authority raises serious questions about principles of legality and due process. Usually, statutes, especially laws, that take away freedom must be general, prospective, and ascertainable.<sup>90</sup> Parts of Justice O’Connor’s opinion in *Hamdi* give indirect clues as to what the legal answer may be for interpreting the AUMF so that it complies with due process, but the lack of any direct consideration of the matter has produced one of the greatest legal disputes among American legal scholars over post-9/11 national security law.<sup>91</sup>

The writ of habeas corpus and the separation of powers occupied the Court’s focus in *Boumediene v. Bush*.<sup>92</sup> The Court explained that the writ’s historic and fundamental role was as a safeguard against unlawful and arbitrary exercises of executive power.<sup>93</sup> The court reasoned this justified extending the protections of the Suspension Clause to those facing just such a risk: “[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.”<sup>94</sup> Justice Kennedy’s opinion in *Boumediene* says a great deal about the importance of the judicial role. The reasoning places significant emphasis on the separation-of-powers values in the writ, and largely collapses the individual rights protective

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<sup>87</sup> See *Youngstown*, 343 U.S. at 636–37 (articulating a taxonomy of executive power that places congressionally authorized powers at the zenith).

<sup>88</sup> Trevor W. Morrison, *The Middle Ground in Judicial Review of Enemy Combatant Detentions*, 45 WILLAMETTE L. REV. 453, 468 (2009).

<sup>89</sup> See *Hamdi*, 543 U.S. at 524–533.

<sup>90</sup> See Robert Chesney, *Who May Be Held? Military Detention through the Habeas Lens* (2011) 52 B. C. L. REV. 769, 813 (“[Due process] generally precludes detention other than pursuant to criminal conviction . . . .”); Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 235 (2006) (pulling together various constitutional provisions to identify the principle of freedom).

<sup>91</sup> See generally Trevor Morrison, *The Middle Ground in Judicial Review of Enemy Combatant Detentions*, 45 WILLAMETTE L. REV. 453 (2009); Stephen Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009); Robert M Chesney, ‘Who May Be Held? Military Detention through the Habeas Lens’ 52 B. C. L. REV. 769 (2011); Eric Posner, *Deference to the Executive in the United States after September 11: Congress, The Courts, and the Office of Legal Counsel*, 35 HARV. J. L. PUB. POL’Y 213, 224–25 (2012).

<sup>92</sup> See *Boumediene*, 553 U.S. at 743–46.

<sup>93</sup> See *id.* at 739–747.

<sup>94</sup> *Id.* at 739.

principles in the writ into institutional principles.<sup>95</sup> Ultimately, the Court makes clear it will not determine the substance of the rights these detainees enjoy. Justice Kennedy wrote: “This design [of separated powers and judicial review] serves not only to make Government accountable but also to secure individual liberty.”<sup>96</sup> This language calls attention to the importance of the courts as watchdogs, so that the political branches do not overstep their constitutional limitations. But the opinion never offers a substantive definition of what the judiciary is meant to be protecting.<sup>97</sup> The great writ protects a person from being detained illegally, without clear legal authority. But whether detention is lawful depends on what law governs. None of the Supreme Court decisions thus far have given clear guidance as to the substantive scope of the executive power in question, whether it is informed by international laws of war, federal common law, or necessity. At various points in the several opinions, the Court seems to imply some involvement of all three, but it gives no clear articulation of which, how or in what order. For example, the Supreme Court hinted at but did not hold that the extension of the writ to Guantanamo meant the detainees would be protected by the Due Process Clause and thereby be able to test the substantive grounds of detention.<sup>98</sup>

When the D.C. District courts took up the Guantanamo habeas cases, they considered several avenues for developing a legal test that would consider the liberty interests of the detainees as core interests. Ultimately, the D.C. Circuit rejected all such avenues. Instead, their judicial review came to rest on broad and functional doctrines of institutional powers, driven by the executive’s operational needs. The court’s analysis did not consider the liberty interests of the detainees or any other substantive constitutional principles. As the analysis below will show, the D.C. Circuit has, in effect, yielded the field to the executive by avoiding both case-specific balancing of constitutional interests, i.e., evaluating and scrutinizing the necessity of the measures of the sufficiency of the evidence, and the development of categorical rules, i.e., arriving at fixed rules or categories through balancing. There has been no judicial development of substantive standards and no judicial balancing of interests.

In the beginning, a number of scholars and jurists proposed IHL as potentially valuable in conducting substantive review, setting substantive limits on executive discretion.<sup>99</sup> For a few district court judges, it proved an appealing

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<sup>95</sup> See *id.* at 745 (“It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”).

<sup>96</sup> *Id.* at 742.

<sup>97</sup> See Stephen Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2144–46 (2009).

<sup>98</sup> See *Boumediene*, 553 U.S. at 798 (“[O]ur opinion does not address the content of the law that governs petitioners’ detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus.”).

<sup>99</sup> See Goodman & Jinks, *supra* note 6, at 2653–54; see also Ryan Goodman and Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654 (2005).

source.<sup>100</sup> Judge Bates, writing for the D.C. District court, pushed back against the executive's use of "substantial support" as a ground for detention, finding a lack of any positive authority in IHL for this category of individuals.<sup>101</sup> This lack of positive authority in international law, coupled with the real risk that such a permissive standard would result in erroneous and unjustified decisions to detain, was a sufficiently compelling reason to limit the executive's discretion.<sup>102</sup> Soldiers, i.e., members of enemy armed forces, can be detained until the "cessation of active hostilities."<sup>103</sup> The emphasis on status rather than individual conduct is the product of the war context, where dangerousness is determined and justified broadly. Soldiers of enemy forces, by definition, are a danger to our combat forces.<sup>104</sup> It is that status that permits their legal detention.<sup>105</sup> The parties in *Hamlily v. Obama* drew connections and analogies between the current conflict and the kinds of conflicts that are the subject of international laws of war.<sup>106</sup> However, while navigating several sources of law and evidence of practice, the court acknowledged that "the government's position cannot be said to reflect customary international law because, candidly, none exists on this issue."<sup>107</sup>

Once the D.C. Circuit Court of Appeals considered these cases, the lack of clear authority within IHL, specifically for the realities of the "Global War on Terror," came to mean lack of judicial authority to impose substantive limits on executive determinations of detainable conduct.<sup>108</sup> Not long thereafter, the D.C. Circuit abandoned the use of international law, generally, as a limit on the President's commander in chief powers:

There is no indication in the AUMF . . . that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF. The international laws of war as a whole

<sup>100</sup> See *Hamlily*, 616 F. Supp. 2d at 77–78.

<sup>101</sup> *Id.*

<sup>102</sup> See *id.*

<sup>103</sup> *Al-Bihani*, 590 F.3d at 874 (D.C. Cir. 2010); see also *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) ("Al-Bihani makes plain that the United States' authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities."); *Authorization For Use Of Military Force After Iraq And Afghanistan, Before the S. Comm. on Foreign Relations*, 113th Cong. 2 (2014) (Statement of Harold Hongju Koh, Sterling Professor of International Law, Yale Law School, former State Department Legal Adviser).

<sup>104</sup> The D.C. Circuit does not address what impact the Supreme Court's determination that battlefield captures are excluded from this process should have on the justification of continued detention. See *Hamdi*, 542 U.S. at 534.

<sup>105</sup> See, e.g., *Hamdi*, 543 U.S. at 519 ("Because detention to prevent the combatant's return to the battlefield is a fundamental incident of waging war"); *Ex parte Quirin*, 317 U.S. 1, 31 (1942) ("Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces.").

<sup>106</sup> See *Hamlily*, 616 F. Supp. 2d at 72–77.

<sup>107</sup> *Id.* at 74.

<sup>108</sup> The U.K. Courts have thus far taken the opposite approach, interpreting the lack of clear legal standards in the Laws of Armed Conflict to mean the end of executive power. See *Mohammed & others v. Secretary of State for Defence* [2015] EWCA Civ. 843 [9], [2016] 2 WLR 247.

have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.<sup>109</sup>

The court never considered whether the logic underlying the soldier/civilian distinction, so integral to armed conflict, ought to guide judicial assessment of the justification offered by the executive in the current conflict.

With no clear existing rules to apply, the courts had the option of devising the standards themselves and fixing limits on executive power. To set limits, the courts would be compelled to provide some standards to satisfy the substantive due process requirement. The D.C. District Court in *Salahi v. Obama* did just this, carefully examining the substantive standard for detention.<sup>110</sup> The district court took on the responsibility of extending the logic of war-powers detention to the current conflict and attempted to articulate a standard for justifiable detention that could provide guidance for the executive and the courts.<sup>111</sup>

The district court made a reasoned distinction between providing some support to al Qaeda or the Taliban and being an involved member who is part of a larger plan and the command structure of a terrorist organization.<sup>112</sup> They found the latter sufficient to merit detention and the former too imprecise to justify detention as the risk of detaining people with insufficient links to the organization was too high.<sup>113</sup> In this case, the district court found the detainee may well have been a “sympathizer—perhaps a ‘fellow traveler’; that he was in touch with al-Qaida members; and that from time to time, before his capture, he provided sporadic support to members of al-Qaida,” but none of this proved that he was sufficiently “part of” the organization to justify detention.<sup>114</sup> This was an instance of the district court taking it upon itself to provide a definition of detainable conduct/status, which the courts could articulate, justify, and implement. Once more, when the D.C. Circuit came to review the case, the legal standard was overturned.<sup>115</sup>

The D.C. Circuit found the district court’s searching analysis to have overstepped into the executive and legislative domain. Given the imperfect fit between the existing IHL and the current conflict, the D.C. Circuit reasoned, it was up to the executive to determine whether the detention was justified. The district

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<sup>109</sup> *Al-Bihani*, 590 F.3d at 871; *see also* *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (denying en banc rehearing) (Sentelle, C.J.) (“We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel’s discussion of that question is not necessary to the disposition of the merits.”).

<sup>110</sup> *See* *Salahi v. Obama*, 710 F. Supp. 2d 1, 4–5 (D.D.C. 2010).

<sup>111</sup> *See id.* at 4–6.

<sup>112</sup> *See id.* at 15–16.

<sup>113</sup> *See id.* at 12 (“The government has not credibly shown *Salahi* to have been a ‘recruiter.’ What its evidence shows is that *Salahi* remained in contact with people he knew to be al-Qaida members”).

<sup>114</sup> *Id.* at 16.

<sup>115</sup> *See* *Salahi v. Obama*, 625 F.3d 745, 746 (D.C. Cir. 2010); *see also* *Al Hela v. Trump*, 972 F.3d 120, 130–35 (D.C. Cir. 2020) (rejecting a limited view of “part of” enemy forces and accepting substantial support to satisfy the 2012 NDAA authority for detention).

court had acted improperly, the Circuit court argued, by taking it upon itself to provide or examine the justification. The D.C. Circuit not only stressed the authority of the executive branch in war, but bolstered executive power by drawing in the authority of the legislature to set the terms of conflict.<sup>116</sup> The D.C. Circuit opinion in *Al-Bihani* stated that part of the legislative power to make law for the United States meant that “Congress had the power to authorize the President in the AUMF and other later statutes to exceed [the] bounds [of customary international law of armed conflict].”<sup>117</sup> While Congress had not done this in any clear or explicit language, the court interpreted the possibility of legislative action to mean the inappropriateness of judicial review.<sup>118</sup> “Therefore, while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks . . . their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President’s war powers.”<sup>119</sup> The D.C. Circuit helped itself to the permissions of international law while forgoing its prescriptions.<sup>120</sup>

With no body of law to define the substantive scope of the preventative detention powers of the President, the courts have chosen to defer. The D.C. Circuit court did not work to adapt the existing rules of war, which would have developed the legal standard with the aim of safeguarding the liberty interests of those at risk of being subject to this power. The court also did not adopt an ad-hoc standard that would permit judicial scrutiny on a case-by-case basis. Ultimately, the D.C. Circuit accepted a flexible definition of membership (with the flexibility of judgment permitted to the executive, not the judiciary), which in effect widened executive discretion.<sup>121</sup> If an individual can be said to be a “part of” or to have provided substantial support to Al-Qaeda, the Taliban, or associated forces, then they are detainable until the end of the conflict pursuant to the President’s war powers.<sup>122</sup> To ascertain membership, courts do not require formal proof of membership or evidence of service within the organization’s command structure. What amounts to substantial support has no clear definition.<sup>123</sup> The standard is flexible, and the

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<sup>116</sup> See *Salahi*, 625 F.3d at 751 (“[T]he district court’s use of the ‘command structure’ test—a standard that district judges in this circuit, operating without any meaningful guidance from Congress, developed to determine whether a Guantanamo habeas petitioner was ‘part of’ al-Qaida.”).

<sup>117</sup> *Al-Bihani*, 590 F.3d at 871.

<sup>118</sup> See *id.* at 878 (“[P]lacing a lower burden on the government defending a wartime detention—where national security interests are at their zenith and the rights of the alien petitioner at their nadir—is also permissible.”).

<sup>119</sup> *Id.* at 871.

<sup>120</sup> In *Al-Hela*, the D.C. Circuit court failed to even mention or grapple with the question of the limits imposed by international humanitarian law on Congressional authorization to detain. See generally 972 F.3d 120.

<sup>121</sup> See *Salahi*, 625 F.3d at 752; *Al-Bihani*, 590 F.3d at 872.

<sup>122</sup> *Al-Bihani*, 590 F.3d at 874 (“The determination of when hostilities have ceased is a political decision, and we defer to the Executive’s opinion on the matter.”).

<sup>123</sup> See *Al-Hela*, 972 F.3d at 132 (“[A] person may be found to substantially support enemy forces without directly supporting them.”).

executive decides.<sup>124</sup> In fact, in a recent decision, the D.C. Circuit held “[i]nvolvement in hostilities has never been a prerequisite for detention under the AUMF”.<sup>125</sup>

Rhetorically, the separation of powers, as upheld by the Suspension Clause, is lauded as the constitutional principle that is the true guardian of liberty, or the main check against tyranny.<sup>126</sup> However, in practice the emphasis on institutional powers has led the judiciary to sever the normative value of liberty from the institutional one.<sup>127</sup> The institutional arguments permitted the Supreme Court to avoid deciding the difficult questions of what rights and protections of liberty the accused enemy combatant ought to enjoy by virtue of the values contained in the writ and Bill of Rights. Ultimately, that avoidance led the D.C. Circuit, in the words of David Dyzenhaus, to forget “the fundamental values [of constitutionalism] which [judicial review] is supposed to serve.”<sup>128</sup>

The Supreme Court has not taken up the question of what substantive law or what standards of review apply in reviewing Combatant Status Review Tribunals (CSRT) findings since *Boumediene*.<sup>129</sup> The Guantanamo detainees filed certiorari petitions, challenging almost every aspect of the D.C. Circuit’s jurisprudence. For example, in *Al-Bihani v. Obama*, the detainees’ certiorari petition raised the question “whether the laws of armed conflict apply to determine the scope of who may be indefinitely detained under the [AUMF].”<sup>130</sup> The Supreme Court denied

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<sup>124</sup> For example, the D.C. Circuit adopted the executive’s own definition of what amounts to detainable conduct. *See* *Bensayah v. Obama*, 610 F.3d 718, 721 (D.C. Cir. 2010) (“[A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy forces.”); Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantanamo Bay Detainee Litigation*, No. 08-0442 (D.D.C. Mar. 13, 2009) <https://www.justice.gov/archive/opa/documents/memo-re-det-auth.pdf> [<https://perma.cc/4ZVX-6Y4F>] (“[T]o detain any persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.”). The D.C. Circuit then proceeded to relax significant procedural/evidentiary requirements, making the government’s task of meeting the case easier. *See, e.g., Al-Bihani*, 590 F.3d at 879 (“[T]he question ... when presented with hearsay is not whether it is admissible—it is always admissible—but what probative weight to ascribe to whatever indicia of reliability it exhibits.”); *Latif v Obama*, 666 F.3d 746, 747 (D.C. Cir. 2011) (adopting the ‘Mosaic Theory’ of evidence and a ‘presumption of regularity’ for the government’s documentary evidence).

<sup>125</sup> *Al Hela*, 972 F.3d at 132.

<sup>126</sup> *See, e.g., Boumediene*, 553 U.S. at 745.

<sup>127</sup> *See* Stephen Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1466–68 (2011) (explaining the difference in philosophy between the D.C. District and D.C. Circuit courts).

<sup>128</sup> Dyzenhaus, *supra* note 6, at 86.

<sup>129</sup> *See Al Hela*, 972 F.3d at 143 (“The Supreme Court has not revisited the extraterritorial application of the Due Process Clause.”).

<sup>130</sup> Brief for Petitioner at i, *Al-Bihani v. Obama*, 563 U.S. 929 (2011) (No. 10-7814) <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/03/GTMO-10-1383-Al-Bihani-pet-app.pdf> [<https://perma.cc/34VR-5NAT>].

certiorari in this and many other cases, in effect making the D.C. Circuit the final court for all Guantanamo habeas litigation.<sup>131</sup> On August 28, 2020, the D.C. Circuit, following over a decade of silence from the Supreme Court, issued a decision denying detainees at Guantanamo any substantive rights, holding “the Due Process Clause [substantive or procedural] may not be invoked by aliens without property or presence in the sovereign territory of the United States.”<sup>132</sup> The D.C. Circuit has deferred to the executive on assessments of membership, divorced from elements of dangerousness, international law of armed conflict, or national and territorial links to the battlefield.

### C. *Judicial Disengagement and an Absent Legislature*

The lack of substantive engagement or activity by the courts has been accompanied by legislative disengagement. Where judicial review has produced no tangible or principled limits on executive power, Congress has done nothing to develop the law. While judicial activity cannot alone account for legislative inaction, judicial pronouncements on constitutional rights and values matter in a constitutional order.<sup>133</sup> Acting against, or ignoring, a forceful and frank statement on legality or constitutionality is much more difficult than avoiding stepping into a fraught area of law. This section begins by considering the arguments for judicial disengagement and political checks and then considers what principled judicial reasoning could mean for legislative engagement.

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<sup>131</sup> See Brief for Petitioner at i, *Al-Madhwani v. Obama*, 567 U.S. 907 (2012) (No. 11-7020) (“Whether the Court of Appeals’ expansive detention standard, approving detention based on peripheral association with others now suspected of being associated with al Qaeda or on mere presence at a guesthouse or training camp, is inconsistent with this Court’s rulings on the permissible scope of executive detention under the [AUMF]. Whether the Court of Appeals’ denial of due process protections to Guantanamo Bay detainees is inconsistent with the law and this Court’s decision in *Boumediene v. Bush*.”); Brief for Petitioner at i, *Almerfed v. Obama*, 567 U.S. 905 (2012) (No. 11-683) (“Whether the [AUMF] or *Boumediene v. Bush*, 553 U.S. 723 (2008), permits detention on the basis of three facts that are themselves not incriminating.”); Brief for Petitioner at i, *Latif v. Obama*, 567 U.S. 913 (2012) (“[w]hether the court of appeals’ manifest unwillingness to allow Guantanamo detainees to prevail in their habeas corpus cases calls for the exercise of this Court’s supervisory power.”) Brief for Petitioner at i, *Uthman v. Obama*, 567 U.S. 905 (2012) (No. 11-413) (“Whether the [AUMF] authorizes the President to detain, indefinitely and possibly for the rest of his life, an individual who was not shown to have fought for al Qaeda, trained to fight for al Qaeda, or received or executed orders from al Qaeda, and was not claimed to have provided material support to al Qaeda.”); see also Lyle Denniston, *Court Bypasses All New Detainee Cases*, SCOTUSBLOG (June 11, 2012), <http://www.scotusblog.com/2012/06/court-bypasses-all-new-detainee-cases/> [<https://perma.cc/2LFA-89DD>] (“[T]he Supreme Court confirmed emphatically on Monday that it is not now inclined to further second-guess the government’s detention policy. Without one noted dissent, the Court turned down seven separate appeals by Guantanamo Bay prisoners.”).

<sup>132</sup> *Al Hela*, 972 F.3d at 143 (“The Supreme Court has not revisited the extraterritorial application of the Due Process Clause. Accordingly, we have taken the Supreme Court at its word that *Boumediene* concerned only the availability of the writ of habeas corpus.”).

<sup>133</sup> Legislative shortcoming when it comes to setting concrete limits on authorizations for the use of military powers is nothing new. See e.g., John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told U.S. About*, 42 STAN. L. REV. 877, 878 (1989).

Much of the D.C. Circuit's language and reasoning takes an all or nothing view on institutional powers. Either the Bill of Rights protects these detainees, putting their rights within judicial power and competence, or this domain belongs to the executive, and the courts are ill-equipped to second guess the executive's assessment of what is necessary. In the United States, too often the emphasis is on the institutional shortcomings of the judiciary and the dangers of a judicially run war.<sup>134</sup> However, complete deference or judicial supremacy are not the only two options.<sup>135</sup> Multiple institutional, constitutional, and substantive aims can be accommodated, each to varying degrees, subject to principled reasoning.<sup>136</sup> The U.S. Supreme Court is well aware of this reality and often deploys in its separation-of-powers cases.<sup>137</sup>

The argument that the judicial branch, as an institution, is not well-suited for checking executive power is persistent.<sup>138</sup> Part of the reason is an awareness that the kinds of decisions involved in determining who should be detained in war or to prevent future acts of terrorism in this AUMF-authorized conflict are not the same kinds of decisions that courts make.<sup>139</sup> Without a clear definition of who is part of the conflict and poses the kind of danger that justifies detention, the courts have to muddle through prediction, organizational arrangements and meaning, and limited evidence. Political processes are better suited, so the reasoning continues, to put limits on executive power and to check the executive when or if it goes too far.<sup>140</sup> However, this argument fails to notice the interdependence of institutional roles for a proper exercise of the separation of powers doctrine. Court pronouncements about

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<sup>134</sup> See *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

<sup>135</sup> See generally Samuel Issacharoff & Richard Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN L. 1 (2004); Julian Rivers, *Proportionality and Variable Intensity of Review*, 65(1) CAMBRIDGE L.J. 174 (2006).

<sup>136</sup> See sources cited *supra* note 2.

<sup>137</sup> See *United States v. Nixon*, 418 U.S. 683, 707 (1974) ("Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch."); *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

<sup>138</sup> See, e.g., sources cited *supra* note 2.

<sup>139</sup> Even this conclusion that the courts have no competence to evaluate executive judgment is overly simplistic and fails to account for ways executive expertise and judicial scrutiny can, and do, work together. See generally Christina E. Wells, "National Security" *Information and the Freedom of Information Act*, 56 ADMINISTRATIVE ADMIN. L. REV. 1195 (2004); Note, *Keeping Secrets: Congress, The Courts, and National Security Information*, 103 HARV. L. REV. 906 (1990); Justin Florence & Matthew Gerke, *National Security Issues in Civil Litigation: A Blueprint for Reform*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 252 (Benjamin Wittes ed., 2010).

<sup>140</sup> See Saikrishna Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs* 111 YALE L.J. 231, 233, 242 (2001); Issacharoff & Pildes, *supra* note 135, at 5–6; Bradley & Goldsmith, *supra* note 23, at 2078; Eric Posner & Cass Sunstein, *Chevronizing Foreign Relations Law* 116 YALE L.J. 1170, 2000 (2007); Morrison, *supra* at note 88, at 455–56.

what constitutional principles require or prohibit are highly relevant and consequential for guiding legislative exercise of power.<sup>141</sup>

Importantly, the courts discharge the judicial function by directly confronting the constitutional stakes. A common criticism calls attention to the courts' repeated failure to check executive decision-making in the war and national security context, counseling instead a greater reliance on the political process.<sup>142</sup> This argument often overlooks how and why courts have failed in the past, and underestimates the impact principled judicial scrutiny can have on the political process. As Jeremy Waldron points out, in the United States:

[T]he courts have proved reluctant to oppose reductions in civil liberties in times of war or war-like emergency. This makes it something of a mystery why legal scholars continue to defend the counter-majoritarian powers of the judiciary on the ground that such a power will prevent panic-stricken attacks on basic rights by popular majorities.<sup>143</sup>

According to this line of thought, the courts are not likely to step up and challenge executive power. This judicial failure raises concerns over the potential compromise of judicial authority, a concern that Justice Jackson memorably voiced in the infamous case of *Korematsu*—a case upholding the constitutionality of an executive order that placed Japanese Americans into internment camps. Justice Jackson dissented, with a plea to avoid judicial involvement. He argued that courts were not good at making these decisions and if they were to try, the law itself would be corrupted. “But a judicial construction of the due process clause that will sustain this order,” he warned, “is a far more subtle blow to liberty than the promulgation of the order itself.”<sup>144</sup> These concerns over the corruption of law or the ineffectiveness of law assume both that judicial acquiescence, meekness, is the only outcome and that political means of checking executive power are more effective because they are independent of judicial decision-making.<sup>145</sup> Given the reality of congressional inaction in this area of the law,<sup>146</sup> especially in the post-9/11 detention context, there is real reason to doubt the assumptions these criticisms are

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<sup>141</sup> See J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* 42 (2004) (“Congress has frequently responded to judicial review by amending the old legislation or passing new legislation to replace it.”).

<sup>142</sup> See generally ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

<sup>143</sup> Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11(2) J. POL. PHIL. 191, 191 (2003).

<sup>144</sup> *Korematsu v. United States*, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting) (“In the very nature of things military decisions are not susceptible of intelligent judicial appraisal.”).

<sup>145</sup> *But see* Tushnet, *supra* note 3, at 2674 (“[N]either the separation-of-powers nor the judicial-review mechanism of control is adequate to the task of structuring the exercise of national power under modern conditions, and that we would benefit from creative thinking about good constitutional design.”).

<sup>146</sup> See generally CONGRESS AND THE POLITICS OF NATIONAL SECURITY 3–18 (COLON CAMPBELL & DAVID AUERSWALD EDS., 2012); *THE WAR ON TERROR AND THE GROWTH OF EXECUTIVE POWER? A COMPARATIVE ANALYSIS* 33–86 (JOHN E. OWENS & RICCARDO PELIZZO EDS., 2012).

rooted in and to consider what principled judicial action could do for congressional engagement.

There were several dissenting opinions in *Korematsu*. Justice Jackson's dissent, cited above, made central the danger to the judiciary and the Constitution if the courts compromised the strength and quality of rights review, in order to accommodate the demands of security in a time of war. Justice Murphy's dissent on the other hand took issue with how the majority had deployed the strict scrutiny standard, especially given the fundamental rights at stake.<sup>147</sup> The solution, he stressed, is to focus even more carefully on fundamental rights, not to avoid them altogether.<sup>148</sup> Murphy wrote, "[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflict with other interests reconciled."<sup>149</sup> The solution, according to Justice Murphy's reasoning, is not to give up on judicial review but to put greater emphasis on the unique judicial mandate to enforce individual rights and to provide principled reasoning. Some decades later, when a congressionally established commission of senior leaders from each branch of the U.S. government reviewed the executive order and internment practices, they concluded that the forces driving those policies "were race prejudice, war hysteria and a failure of political leadership."<sup>150</sup> It is hard not to wonder what would have occurred had the judiciary demanded a better demonstration of necessity rather than deferred to the highly general, and obviously flawed, claims of the executive.

In post-9/11 cases, the courts have not learned their lesson. Courts have not rethought their institutional role, especially in relation to the legislature as a partner rather than an overlord in checking executive discretion. The D.C. Circuit has failed to articulate the substantive constitutional principle driving judicial review. In fact, by focusing on institutional power principles divorced from substantive values, the courts in the United States have contributed to legislative disengagement. The D.C. Circuit has engaged in a systemic process of removing all substantive principles tied to the exercise of judicial review.<sup>151</sup> If there is no problem, there is no need for a solution. As the following sections will outline, the courts in the United Kingdom

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<sup>147</sup> See *Korematsu*, 323 U.S. at 233–42 (Murphy, J., dissenting).

<sup>148</sup> See *id.*

<sup>149</sup> *Id.* at 234.

<sup>150</sup> *Personal Justice Denied*, REP. OF THE COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS 8 (1982), cited in Geoffrey Stone, *National Security v Civil Liberties*, 95 CAL. L. REV. 2203, 2206 (2007); In 2011, the acting Solicitor General made a formal apology for the role his office had played in this case, bringing to the public attention that, when the government argued the case before the Supreme Court and made representations of the necessity of such broad racially discriminatory policies, the military had already concluded that the policies were not necessary. Neal Katyal, *Confession of Error: The Solicitor General's Mistake During the Japanese-American Internment Cases*, U.S. DEP'T JUST. ARCHIVES (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [<https://perma.cc/9BKE-H8BA>].

<sup>151</sup> See, e.g., *Al-Bihani*, 590 F.3d at 871, 878 (setting aside IHL as an implied limit on executive power); *Al Hela*, 972 F.3d at 150–51 (holding detainees lack due process rights).

have provided more substantive review, thereby prompting Parliament to develop a legislative response to the threat from terrorism. U.K. courts have clarified what constitutional and European Convention on Human Rights (“Convention”) rights the detainees or controlees enjoy, and the scope of those rights in a national security context. U.K. courts have identified procedural and evidentiary flaws. The U.K. Parliament, in turn, has addressed these flaws in each legislative iteration.

The U.S. Congress has done nothing to check executive preventive detention power. It has passed no new authorization amending the vagueness of the AUMF. In fact, Congress has incorporated executive standards into legislative text. Section 1021(b) of the National Defense Authorization Act of 2012 (NDAA) incorporated the flexible framework already used by the executive.<sup>152</sup> The NDAA even went as far as to make clear that Congress does not seek to limit the President’s authority: “Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.”<sup>153</sup> It is worth wondering what would have happened had the courts made some changes to the definition of detainable person/conduct the executive used, i.e., requiring that detention be necessary to prevent future risk, and then exercised judicial scrutiny to ensure rigorous enforcement of legal standards, by carefully examining the standards of proof and rules of evidence.<sup>154</sup> Would Congress have been compelled to incorporate such a standard, however half-heartedly, into a revised statutory framework?<sup>155</sup> Or would Congress have pushed back, offering an alternative standard of its own, thereby providing some substantive parameters for the courts to evaluate and enforce? For the prosecution of “alien unprivileged enemy belligerents,” there was some constitutionally valuable legislative engagement. When the courts found faults in the system set up by the executive for the prosecutions of belligerents in the “War on Terror,”<sup>156</sup> Congress enacted a statute that provided the scope of the commissions jurisdictions and procedures to be used.<sup>157</sup> Even though the MCA 2006 did not take away the military prosecution authority of the executive, it established legal standards that could be evaluated for compliance with the Constitution, as well as standards by which the legality of executive action could be measured.<sup>158</sup> For facilitating institutional engagement, some standards are better than undefined and undifferentiated discretion.

Any broad claims about causes and effects of institutional action or collaboration confront significant challenges. There are many factors that influence the political processes, including reasons beyond the law and the legal subject

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<sup>152</sup> See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b), 125 Stat. 1298 (2011).

<sup>153</sup> *Id.* § 1021(d).

<sup>154</sup> *But see*, *Al Hela*, 972 F.3d at 134 (further loosening the evidentiary and procedural safeguards to allow multiple layers of hearsay evidence and secret evidence).

<sup>155</sup> As Congress did by enacting the Military Commissions Act of 2006, following the Supreme Court’s decision in *Hamdan*. Elsea, *supra* note 62.

<sup>156</sup> See generally *Hamdan*, 548 U.S. 557.

<sup>157</sup> See Military Commissions Act 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

<sup>158</sup> See Elsea, *supra* note 62.

matter that dictate legislative action or inaction. When considering the institutional roles of the courts and legislatures, we should be aware of how one branch's exercise, or misuse, of power can shape another branch's actions. Judicial reasoning can guide and direct the development of a statutory framework, ensuring that constitutional principles of liberty and the separation of powers inform the relevant text.<sup>159</sup> Judicial articulations of limits and standards rooted in fundamental principles can spur legislative engagement and guide statutory developments while alleviating the institutional tensions between the executive and the courts.

#### D. *U.K. Courts as Cautious and Imperfect Guardians of Convention Rights*

While U.S. courts refused to issue any substantive holdings, U.K. courts engaged in constitutional analysis and decision-making, identifying violations and flaws for the legislature to remedy. The next two sections identify the legal landscape in the United Kingdom following 9/11 and the judicial and legislative engagement with issues surrounding executive powers. The article then categorizes judicial engagement and identifies the kinds of limits the courts established. As that Part will show, the U.K. courts did not narrow the definition of detainable or controllable conduct but instead focused on articulating the reach and scope of the Convention rights at stake and identifying ways in which the existing legislative framework could or should be amended to cure those constitutional ills.

The initial post-9/11 detention power used in the United Kingdom, granted through the Anti-Terrorism, Crime and Security Act of 2001 (ATCSA), explicitly authorized the detention of suspected international terrorists.<sup>160</sup> Referring back to the definition of terrorism provided in the Terrorism Act of 2000, the ATCSA granted new powers of indefinite detention to the Secretary of State.<sup>161</sup> Section 23 explicitly authorized the detention of suspected international terrorists whose removal or departure from the United Kingdom was prevented by law or practical impediments.<sup>162</sup> The Terrorism Act of 2000 defines terrorism as an act that:

involves serious violence against a person, . . . involves serious damage to property, . . . endangers a person's life, . . . creates a serious risk to the health or safety of the public or a section of the public, or . . . is designed seriously to interfere with or seriously to disrupt an electronic system.<sup>163</sup>

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<sup>159</sup> See David Feldman, *The Limits of Law: Can Laws Regulate Public Administration?*, in THE SAGE HANDBOOK OF PUB. ADMIN. 346, 356 (B. GUY PETER & JON PIERRE eds., Sage Publications Ltd. 2d ed. 2012); Mark Elliott, *United Kingdom: The 'War on Terror,' UK-Style—The Detention and Deportation of Suspected Terrorists*, INT'L J. CON. L. 131, 133–6 (2010); Fiona De Londras & Fergal Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 OX. J. LEG. STUD. 19, 20 (2010); T.R.S. Allan, *Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory*, 127 L.Q. REV. 96, 96 (2011).

<sup>160</sup> See Anti-Terrorism, Crime and Security Act 2001, c. 24 (UK).

<sup>161</sup> See *id.*

<sup>162</sup> See *id.* at § 23.

<sup>163</sup> Terrorism Act 2000, c. 11, § 1(2) (UK).

The Act goes on to clarify that these actions include “action[s] outside the United Kingdom, [and apply to] any person, or to property, wherever situated, [and includes the public or the government] of the United Kingdom, of a Part of the United Kingdom, or of a country other than the United Kingdom.”<sup>164</sup> As is evident from the text, given the broad definition, a great deal is left open to executive judgment, in terms of how the power is to be exercised, and provides no real definition of what conduct makes someone subject to the executive’s powers.

The events of 9/11, and all that followed, coincided with a key moment in the constitutional history of the United Kingdom. The constitutional moment played a key role in how differently the U.K. courts understood their institutional responsibility when they come to review executive conduct.<sup>165</sup> In 1998, the U.K. Parliament enacted the Human Rights Act (HRA) which came into effect on October 2, 2000.<sup>166</sup> When Parliament enacted the HRA, the rights enshrined in the European Convention of Human Rights fell for the first time unambiguously within the purview of the British judiciary.<sup>167</sup> U.K. judges were given the power to review Parliamentary legislation for compliance with the Convention and to either interpret the text to make it compatible, section 3, or if that was not possible, to issue a declaration of incompatibility, section 4.<sup>168</sup> The incorporation of the Convention has significantly transformed the courts’ powers. With the courts empowered to enforce the Convention, the national security doctrine of non-justiciability, which governed all national security matters before the enactment of the HRA, gave way to judicial scrutiny.<sup>169</sup> The HRA did not upend fundamental institutional principles. The courts developed new doctrinal tools to accommodate existing institutional competency considerations in national security: the doctrines of deference.<sup>170</sup> As

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<sup>164</sup> *Id.* § 1(4).

<sup>165</sup> See generally T.R.S. Allan, *Parliament’s Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective*, 59 CURRENT LEGAL PROBS. 27 (2006) (analyzing section 3 of the Human Rights Act and how it impacts existing common law constitutional principles); David Feldman, *The Nature and Significance of ‘Constitutional’ Legislation*, 129 L.Q. REV. 343 (2013)(discussing the concept of constitutional legislation and the Human Rights Act 1998 as constitutional legislation); Tom Hickman, *Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998*, PUB. L. 306 (2005)(describing a dialogic approach to judicial review embodied by the Human Rights Act that promotes exchange between the courts and the other branches to produce better rights compliant laws); Kavanagh, *supra* note 24; Steyn, *Guantanamo Bat: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1 (2004).

<sup>166</sup> See Human Rights Act 1998, c. 42 (UK).

<sup>167</sup> See *id.* §§ 3–4.

<sup>168</sup> See *id.*

<sup>169</sup> Kavanagh, *supra* at note 24, at 173–74 (“[W]hen reviewing counterterrorist legislation for compliance with fundamental rights in the UK, there has been a ‘constitutional shift’ from a completely hands-off approach (as embodied in the doctrine of nonjusticiability) to a more hands-on approach (as embodied in the idea of a variable intensity of review combined with a degree of deference)”).

<sup>170</sup> Lord Steyn, writing extra-judicially, called the Human Rights Act a constitutional statute. “Like the Representation of the People Act 1983 it could be repealed by Parliament but that is surely fantasy. It is a constitutional measure ranking in importance with other milestones in the evolution of our country towards becoming a fully-fledged constitutional state.” Lord Steyn, *Deference: A Tangled Story*, 2005 PUB. L. 346, 349 (2005); see also *R (Carlile) v. Sec’y State for Home Dep’t* [2014] UKSC 60, [31] (Sumption, L.J.) (“None of this means that in human rights cases a court of

Mark Elliott notes, doctrines of deference maintain institutional distinctions by safeguarding substantive rights; it makes “the tests which comprise the proportionality doctrine less hard-edged, blunting them such that the [government’s] decision may pass muster without precisely mirroring the court’s view.”<sup>171</sup> This *blunting* leaves some room for differences in institutional competence to shape how substantive rights are protected.

These changes raised new questions of exactly how the institutional dynamics rooted in principles of the U.K. Constitution—supremacy of Parliament and executive prerogatives in war and national security—would accommodate the demands of the HRA. As a result, when Parliament enacted the ATCSA, the judiciary’s role had been significantly strengthened by the incorporation of Convention rights into domestic law and when a great deal remained open, legally, in terms of institutional dynamics.

After the passage of the ATCSA, the government’s first move was to turn to an escape clause in order to maintain a maximum amount of discretion in the hands of the executive. Given the potentially wide sweeping reach of Convention rights, there is an emergency get out-clause that permits states to jettison some of the limitations imposed. Article 15(1) of the European Convention for Human Rights reads, “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation.”<sup>172</sup> Stating the need to derogate from the article 5, right to liberty, in order to confront the serious threat posed by Al-Qaeda, the government issued the Human Rights Act 1998 (Designated Derogation) Order 2001.<sup>173</sup>

Tom Hickman, writing about post-9/11 jurisprudence, summarized the rationale behind derogation as follows: the need to derogate is born out of a belief that any legal limits on emergency powers are “*futile and counterproductive*.”<sup>174</sup> It is:

never possible to expunge the need and scope for uncontrolled executive action within a legal constitutional system; and the argument that seeking to do so is counterproductive asserts that accommodating exceptional measures within a

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review is entitled to substitute its own decision for that of the constitutional decision-maker.”). For a fuller understanding of the standards of review prior to the Human Rights Act and how the doctrines have evolved, *see generally*, Lord Irvine, *Judges and Decision Makers: The Theory and Practice of Wednesbury Review*, PUB. L. 59 (1996); Michael Taggart, *Proportionality, Deference, Wednesbury*, N.Z. L. REV. 423 (2008); Alison L. Young, *Will You, Won’t You, Will You Join the Deference Dance?*, 34 OX. J. LEGAL STUD. 375 (2014).

<sup>171</sup> Mark Elliott, *Proportionality and Deference: The Importance of a Structured Approach*, Paper No. 32, UNIV. OF CAMBRIDGE LEGAL STUD. RES. PAPER SERIES 1, 5 (2013).

<sup>172</sup> Convention, *supra* note 11, art. 15 § 1.

<sup>173</sup> *See* Human Rights Act 1998 (Designated Derogation) Order 2001, No. 3644 (UK), <https://www.legislation.gov.uk/ukxi/2001/3644/schedule/1/made> [<https://perma.cc/LNM7-DCAA>].

<sup>174</sup> Hickman, *supra* note 32, at 658.

normative frame hampers the exercise of executive power when it is most important not to do so.<sup>175</sup>

What the doctrine of non-justiciability accomplished in the common law—providing a space for executive prerogative to respond to the demands of necessity with a free hand—is achieved through article 15(1) of the Convention.<sup>176</sup> It allows for derogation in times of “war or public emergency,” and for the government to decide when such a measure is necessary.<sup>177</sup> But as the suspension of human rights is undertaken through legal means, it is subject to judicial supervision. The suspension of the rights regime requires judicial review to ensure the decision to suspend is legally justified. “Understood in this way,” writes Hickman, “derogation creates a double-layered constitutional system: both layers exist within a regime of legality, but only one exists within the human rights regime.”<sup>178</sup> But this double layer leaves the question of the proper level of judicial scrutiny of derogation open. Should it resemble the kind of review conducted by the courts in the pre-HRA cases where the doctrine of non-justiciability governed?<sup>179</sup> Should the courts defer to the judgement of the executive about the need to derogate and the scope of the derogation? If not, then how should the judiciary review the decision to derogate? The Law Lords’ decision in *Belmarsh* answered these questions.

The case of *A v Secretary of State for the Home Department (Belmarsh)* was the most significant U.K. case to tackle the question of government’s emergency powers post-9/11.<sup>180</sup> The case arose from the detention of nine non-nationals who were being indefinitely detained at the Belmarsh prison because they were designated a risk to national security but could not be deported.<sup>181</sup> Lord Bingham’s opinion in *Belmarsh*, while significantly deferring to the government’s judgment on whether a state of emergency existed, reasserted the courts’ role of review in assessing whether the measures employed to confront the threat were necessary for the task at hand. Lord Bingham accepted that the judgment involved in determining whether a state of emergency truly exists is “a pre-eminently political” one.<sup>182</sup> The decision involved an assessment best suited for the executive branch.<sup>183</sup> But the

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<sup>175</sup> *Id.*

<sup>176</sup> See Susan Marks, *Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights*, 15 OXFORD J. LEGAL STUD. 69, 84–87 (1995).

<sup>177</sup> *Id.* at 72.

<sup>178</sup> Hickman, *supra* note 32, at 659.

<sup>179</sup> See, e.g., *Council of Civil Service Unions v. Minister for Civil Service* [1984] UKHL 9, [1985] 1 AC 374 (HL).

<sup>180</sup> See *A v. Sec’y of State for the Home Dep’t* [2004] UKHL 56, [2005] 2 AC 68.

<sup>181</sup> There are those who challenge the very framing of the kind of detention that occurred in this case, and whether the Law Lords ignored the government’s ongoing efforts to deport these detainees. See Finnis, *supra* at note 23.

<sup>182</sup> *A v. Sec’y of State for the Home Dep’t* [2004] UKHL 56 [29], [2005] 2 AC 68. *Id.* at [207] quoting *Ireland v. United Kingdom* (1978) 2 EHRR 25 [212] (“[T]he national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.”).

<sup>183</sup> See *id.* at [29] (“It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did.”).

nature of that derogation, Lord Bingham reasoned, was a different matter. The Court held the derogation was disproportionate because it relied on a distinction between foreigners and citizens that bore no significant relationship to the threat.<sup>184</sup> Given the consequences for the people subject to these powers, the Court asked itself whether derogation on these terms was strictly required. The answer was no. The exercise of the judicial power and the level of scrutiny was explained and defended by the substantive rights and interests at stake:

Where the rights of the individual are in issue, the nature of the emergency must first be identified, and then compared with the effects on the individual of depriving him of those rights. In my opinion it is the proper function of the judiciary to subject the government's reasoning on these matters in this case to very close analysis.<sup>185</sup>

Here, the court relied on article 14, discrimination, to give structure and shape to the necessity prong of the proportionality test and to exercise heightened scrutiny.<sup>186</sup> Unlike the courts in the U.S., the U.K. court explicitly identified the individual rights at stake and grappled with how the existing authority infringed on those rights.

When the House of Lords made a declaration of incompatibility, Parliament had the option of redrafting the authorization, expanding the power to include British citizens suspected of terrorism.<sup>187</sup> Instead, Parliament passed the Prevention of Terrorism Act 2005 (PTA), repealing the detention provisions in the 2001 Act, and granted government the authority to use control orders in order to deal with the individuals who had been detained and were still considered a threat.<sup>188</sup> A control order could be issued against both citizens and aliens with no distinction. In authorizing the discretionary powers of the executive, Parliament designed the control order scheme with the Convention in mind. This Parliamentary decision was made both out of moral and political pressure to fulfill the United Kingdom's international obligation and as a way of preempting or complying with decisions of U.K. courts and the European Court of Human Rights in Strasbourg.<sup>189</sup> Consider the language of the PTA outlining how the Secretary of State should make her decision to impose a control order: she may do so when she "considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism to make a control order imposing obligations on that individual."<sup>190</sup> This language echoes language of proportionality.

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<sup>184</sup> *See id.* at [33] ("Yet the threat from UK nationals, if quantitatively smaller, is not said to be qualitatively different from that from foreign nationals.").

<sup>185</sup> *Id.* at [116].

<sup>186</sup> *See id.* at [51].

<sup>187</sup> *See* HC Deb. (26 Oct. 2005) (438) cols. 323–413; *see also* HL-HC JOINT COMMITTEE ON HUMAN RIGHTS, PREVENTION OF TERRORISM BILL, 2004-05 (Mar. 4, 2005) HL 68, HC 334 (UK).

<sup>188</sup> *See* Prevention of Terrorism Act 2005, c. 2, § 2(1) (UK).

<sup>189</sup> The decisions of the Strasbourg court placed pressure on Parliament even before the Human Rights Act was enacted. *See* *Chahal v. United Kingdom*, Eur. Ct. H.R. (ser. A) (1996).

<sup>190</sup> Prevention of Terrorism Act 2005, c. 2, § 2(1)(b) (UK).

Under section 3(2)(a) of the Act, the Secretary of State could apply to the court for permission to make a non-derogating order, which the court could grant or quash after considering “whether the Secretary of State’s decision that there are grounds to make that order is obviously flawed.”<sup>191</sup> This “obviously flawed standard,” with its permissive language, seems to require a rather light touch review, leaving the executive decision undisturbed unless it betrays an unreasonable exercise of power. While control measures do not usually deprive an individual of their liberty, they do still violate other qualified rights, such as the article 8 interest in liberty and private life.<sup>192</sup> Even if these rights are qualified, the aspects of human life and dignity they seek to protect are significant. The very real and profound impact on the lives they control can be deep and disturbing.<sup>193</sup> If the importance of liberty to the ordering of a just society justifies judicial guardianship and vigilance, its classification as a qualified right would presumably not render the level of judicial scrutiny unrecognizably diminished.<sup>194</sup> If the *obviously flawed* standard is an attempt to diminish judicial review, then the courts’ unwillingness to surrender review is a significant defense of both the values the Convention seeks to protect and of a system committed to institutional checks. An Administrative Court decision, in one of the most important control measure cases, made just that observation when it considered the consequences of a literal interpretation of the statutory language. If the “obviously flawed” standard is applied as the language reads, then the “controlees’ rights under the Convention are being determined not by an independent court in compliance with article 6, but by executive decision-making, untrammelled by any prospect of effective judicial supervisions.”<sup>195</sup> Finding such a level of deference insufficient to protect individual rights, the court pushed back. It interpreted the standard to require searching judicial scrutiny enough to provide independent review.<sup>196</sup>

After much public debate and judicial prodding, the next legislative change came when Parliament revised and replaced the control order regime with the Terrorism Prevention and Investigation Measures Act 2011 (TPIM).<sup>197</sup> Under the

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<sup>191</sup> *Id.* at § 3(2)(a); *see also* § 3(10) (“In pursuance of directions under subsection (2)(c) or (6)(b) or (c), the function of the court is to determine whether any of the following decisions of the Secretary of State was flawed.”).

<sup>192</sup> *See, e.g.,* Sec’y of State for the Home Dep’t v. MB [2006] EWCA (Civ) 1140, [2007] QB 415 [41].

<sup>193</sup> *See* Ewing & Tham, *supra* note 31, at 675 (“The submissions tell extraordinary tales of ill-treatment, isolation and illness, as well as the humiliation and indignity of controlled persons and their families, shown contempt at all levels by public authorities.”).

<sup>194</sup> The same considerations arise when considering the detention authority, which the President exercised at Guantanamo, and whether categorizing the power as one exercised extraterritorially against non-citizens should render the individual interest wholly different and unrecognizable from the protections against arbitrary detention provided to individuals detained domestically.

<sup>195</sup> Sec’y of State for the Home Dep’t v. MB [2006] EWCA (Civ) 1149 [30].

<sup>196</sup> *See id.*

<sup>197</sup> *See* Terrorism Prevention and Investigation Measures Act 2011, c. 23 (UK); Alexander Horne & Clive Walker, *Lessons Learned From Political Constitutionalism? Comparing the Enactment of Control Orders and Terrorism Prevention and Investigation Measures by the UK Parliament*, PUB. L. 267, 267–68 (2014); Clive Walker & Alexander Horne, *The Terrorism Prevention and*

TPIM statute, the standard set for the Secretary of State was raised to “reasonable belief” rather than “reasonable suspicion.”<sup>198</sup> The TPIM statute was amended again by the Counter-Terrorism and Security Act of 2015, most notably raising the standard from “reasonable belief” to “balance of probabilities.”<sup>199</sup> The measures themselves were altered; outright bans on internet and phone use were curtailed, as were some of the more extreme restrictions on association.<sup>200</sup>

#### E. Institutional Interaction/Influence: Judicial Review and Parliamentary Engagement

When comparing the strength and effectiveness of separation of powers principles between the U.S. and U.K. constitutions, it is somewhat surprising to discover that the U.K. courts have made a more robust and effective use of institutional principles.<sup>201</sup> In the cases we are concerned with, greater judicial scrutiny has prompted legislative action. Jurisprudence that articulates judicial competence with substantive principles, specifically human rights, has provided a more consistent and principled case law, one that is capable of guiding legislative engagement by identifying the constitutional principles at stake. As the U.K. courts worked to articulate the limits imposed by human rights on executive powers of detention and control, their pronouncements informed the legislative text.<sup>202</sup> As a result, the legislature has developed the legal framework to better comply with constitutional law by, for example, changing burdens of proof or reconsidering the proportionality of excessive curfews or relocation orders. The changes to statutory grants of power alleviate some of the constitutional tensions that result from broad discretionary powers of the executive and searching scrutiny of the exercises of that power by the judiciary.<sup>203</sup>

The judicial role of supervising the space between Parliamentary enactments and the executive’s powers is quintessentially about separating the

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*Investigations Measures Act 2011: One Thing but Not Much the Other?*, CRIM. L. REV. 421, 422 (2012).

<sup>198</sup> Terrorism Prevention and Investigation Measures Act 2011, c. 23 § 3(1) (UK).

<sup>199</sup> Counter-Terrorism and Security Act 2015, c. 6, § 20(1), § 52(5) (UK).

<sup>200</sup> See DAVID ANDERSON, TERRORISM PREVENTION AND INVESTIGATION MATTERS IN 2013: SECOND REPORT OF THE INDEPENDENT REVIEWER ON THE OPERATION OF THE TERRORISM PREVENTION AND INVESTIGATION MEASURES ACT 2011, 2014 at p.2 executive summary; *id.* at ¶ 6.39.

<sup>201</sup> See generally Mark Elliott, *The ‘War on Terror’ and the United Kingdom’s Constitution*, Eur. J.L. Stud. (2007); Cheryl Saunders, *Separation of Powers and the Judicial Branch*, JUD. REV. 337 (2006).

<sup>202</sup> See, e.g., DAVID ANDERSON, CONTROL ORDERS IN 2011: FINAL REPORT OF THE INDEPENDENT REVIEWER ON THE PREVENTION OF TERRORISM ACT 2005, 1.4, 4.29, 5.11 (2012) (identifying decisions by the courts and the changes to the control regime brought about through the TPIM).

<sup>203</sup> See Sec’y of State for the Home Dep’t v. JJ [2007] UKHL 45, [2007] 3 W.L.R. 642 (finding an 18-hour curfew a violation of article 5); Sec’y of State for the Home Dep’t v. MB (FC) [2007] UKHL 46, [2008] 1 AC 44 (strengthening fair trial standards under article 6); Sec’y of State for the Home Dep’t v. MB [2006] EWCA (Civ) 1140, [2007] QB 415 (calling for intense scrutiny of executive proportionality analysis); Sec’y of State for the Home Dep’t v. AR [2008] EWHC (Admin) 3164 [18] (Mitting, J.) (referring to a balance of probabilities as the burden of proof).

different functions of governance with the aim of checking improper, self-interested, or careless exercises of state power.<sup>204</sup> This arrangement requires Parliament to set down general rules while creating a space for judicial oversight of both legislative enactment and executive action. As Jeremy Waldron put it, “separation of powers is . . . a matter of articulated governance (as contrasted with compressed undifferentiated exercises of power).”<sup>205</sup> The constitutional challenge arises because of how much is left open in the space between legislative enactment and executive action. Prompting greater legislative involvement in shaping and limiting that open space helps lessen the constitutional tensions.

If we want legislatures to take better account of these constitutional principles in drafting any future authorizations, then there is value in having the courts taking action. Courts should try to provide legal tools for establishing reasoned and articulated limits on discretion, or at the very least say when the existing framework or a particular exercise of power has violated constitutional limits. The control order cases do present an example of how “enforcement of Convention rights . . . under the HRA [can be a] collaborative enterprise between all three branches.”<sup>206</sup> In these cases overlap of institutional competencies does not lead to complete conflation of institutional roles. The HRA has truly changed the institutional relationship among the branches, especially in national security: “the courts are [no longer] just servants of Parliament’s will—they are also partners in a constitutional collaboration, who are charged with the (often creative) task of furthering, determining, applying and sometimes modifying that will in order to achieve a Convention-compatible result.”<sup>207</sup> By exercising the judicial power to decide what constitutional principles and fundamental rights demand, the court makes it harder for Parliament to forget or undervalue individual rights when drafting primary legislation.

Section 3 of the HRA provides a means of justifying and expanding the interpretive methods open to the courts when encountering statutory language that fails to provide clear guidance or which fails to adequately protect Convention rights.<sup>208</sup> Rather than automatically finding such language a reason for deference, the courts incorporate the normative weight of Convention rights to shape that discretion, at times through case-specific balancing of interests.<sup>209</sup>

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<sup>204</sup> See J.W.F. ALLISON, *The English Historical Constitution: Continuity, Change and European Effects* 88 (2007).

<sup>205</sup> Jeremy Waldron, *Separation of Powers in Thought and in Practice*, 54 B.C. L. REV. 433, 433 (2013).

<sup>206</sup> Kavanagh, *supra* note 21, at 406.

<sup>207</sup> *Id.* at 407.

<sup>208</sup> See Human Rights Act 1998, c. 42, § 3 (UK) (“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”).

<sup>209</sup> See generally Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015) (outlining the benefits of the proportionality standard in allowing for structure and principles reasoning that promotes deliberation that gives proper weight to constitutional values).

The legal limits, first defended by the courts, have found their way into legislative text throughout the evolution of the legal framework, with Parliament actively engaging with the courts' reasoning. It was the court's declaration of incompatibility in *Belmarsh* that led to Parliament abandoning detention powers, authorized by the ATCSA, and turning to the less severe control measures, authorized by PTA and TPIM.<sup>210</sup> Since then, as courts identified aspects of the practice that raise problems, e.g., 18-hour curfew, low burden of proof, relocation orders,<sup>211</sup> Parliament incorporated those determinations when drafting the next statute, shaping the legal framework to ensure better compliance with Convention rights.

In *Secretary of State for the Home Department v. JJ*, the House of Lords considered whether a particularly severe control order, with an 18-hour curfew, violated a controlee's article 5 right to liberty, and which Secretary of State did not have the power to derogate, or whether the formal difference between placing an individual in prison and imposing control measures outside of prison meant that it was instead the article 8 interest in liberty that was engaged.<sup>212</sup> Carrying the majority of the court, Lord Bingham's analysis weighed the circumstances on the ground to determine whether the imposed measures had deprived six individuals of liberty, regardless of whether their situation fitted into the classic definition of imprisonment.<sup>213</sup> The case involved six Iraqi and Iranian nationals who had been placed under particularly stringent control orders by the Secretary of State pursuant to powers conferred by section 1(2)(a) of the Prevention of Terrorism Act 2005.<sup>214</sup> Each person was confined to a one-bedroom residence for 18-hours; they were also electronically tagged and monitored, with police permitted to enter and search their premises at any time.<sup>215</sup> Visitors were not permitted to come without prior Home Office permission, and controlees were not permitted to meet anyone outside of their residence without Home Office permission.<sup>216</sup>

The majority held that the level of restraint constituted a loss of liberty. In interpreting the scope of article 5, Lord Bingham reasoned that the Convention called on judges to evaluate the circumstances of the case in determining whether a deprivation had occurred in practice.<sup>217</sup> It became "the task of a court . . . to assess the impact of the measures in question on a person in the situation of the person

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<sup>210</sup> See Alexander Horne & Clive Walker, *Lessons Learned From Political Constitutionalism? Comparing the Enactment of Control Orders and Terrorism Prevention and Investigation Measures by the UK Parliament*, PUB. L. 267, 267 (2014).

<sup>211</sup> See *Sec'y of State for the Home Dep't v. JJ* [2007] UKHL 45, [2007] 3 W.L.R. 642.

<sup>212</sup> See *id.* at [20], [30]; see also Adam Wagner, *Control Order Breached Human Rights Say Supreme Court*, UK HUM. RTS. BLOG (Jun. 16, 2010), <https://ukhumanrightsblog.com/2010/06/16/control-order-breached-human-rights-say-supreme-court/> [https://perma.cc/GYK9-ZE3E].

<sup>213</sup> See *JJ* [2007] at [35]–[45].

<sup>214</sup> See *id.* at [3]–[6].

<sup>215</sup> See *id.* at [24].

<sup>216</sup> See *id.*

<sup>217</sup> See *id.* at [15].

subject to them.”<sup>218</sup> Even if detention in a prison is a paradigmatic example of a deprivation of liberty, “account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution or implementation of the penalty or measure in question.”<sup>219</sup> The next time Parliament came to legislate control measures, it placed stricter limits on the use of curfews.

The TPIM reduced the amount of time a controlee could be made to stay in their home by setting an overnight residency requirement of 10 hours.<sup>220</sup> David Anderson, the independent reviewer of terrorism legislation, described these changes as “an appreciable (and welcome) liberalization of the regime.”<sup>221</sup> Lawmakers responding to the legal reality have created a statutory framework that better complies with Convention rights. By relying on principled, flexible, and contextual interpretation, the courts have avoided making decisions that would upend or undo the legislative framework altogether. Instead, courts have pushed the legislative framework to be more aware of and responsive to the demands of human rights. For example, instead of finding the “reasonable suspicion” standard and the language of “obviously flawed” in the PTA incompatible with article 8 and article 6, the courts read into the statute a requirement that courts exercise “intense scrutiny.”<sup>222</sup> When Parliament drafted the TPIM Bill, it first raised the standard to “reasonable belief” and then to “balance of probabilities.”<sup>223</sup> The determination by the court that a higher standard was legally required given the rights at stake came to be reflected in statutory language.<sup>224</sup>

Parliament has amended statutory powers, limiting executive discretion. The limits have focused on the exact powers granted to the executive and procedural requirements for exercising those powers, rather than on clearer definitions or limitations of detainable conduct. The changes help the legislative text to better reflect both institutional and rule of law principles. Legislative support for raising burdens of proof and standards of scrutiny also lessened some of the concerns particular to the U.K. context that resulted from overlapping competencies of the courts and the executive in the exercise of proportionality review of executive decision-making. Where the courts set clear rules for what violates or raises especially strong concerns about Convention rights, e.g., long curfews, Parliament took those judicial conclusions about rights into account in drafting statutory text. Where the legal matter was not directly about defining a right or an interest but about institutional mechanisms for enforcing those interests, as in the case of burdens of proof and level of scrutiny, the court exercised more demanding

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<sup>218</sup> *Id.* at [15].

<sup>219</sup> *See id.* at [16].

<sup>220</sup> *See* Terrorism Prevention and Investigation Measures Act 2011, c. 23, § 1, schedule 1 (UK).

<sup>221</sup> Anderson, *supra* note 200, at ¶ 6.39.

<sup>222</sup> Prevention of Terrorism Act 2005 c. 2 (repealed) (Eng.); Secretary of State for the Home Department v. MB [2007] QB 415 [65].

<sup>223</sup> Counter-Terrorism and Security Act 2015 c. 6, § 20 (UK).

<sup>224</sup> *See* Counter-Terrorism and Security Act 2015 c. 6 (UK); For criticism of the law, *see UK: New Counterterrorism Bill Curbs Rights*, HUMAN RIGHTS WATCH (Dec. 1, 2014), <https://www.hrw.org/news/2014/12/01/uk-new-counterterrorism-bill-curbs-rights> [<https://perma.cc/VSY8-MPLC>].

scrutiny. This impacted the political debate over what was feasible and ultimately garnered legislative support for raising the standard of scrutiny.

Before concluding this section, it is worth noting that in these control measure cases there are nuances to how the courts approach review, and a responsiveness to practical realities of judicial and legislative activity. For example, one of the powers provided for in the PTA 2005 was the power to impose a relocation order to make the suspected individual move away from the city or town where the officials suspect he or she has concerning contacts.<sup>225</sup> When the courts came to review the cases involving relocation orders, they did not find the practice incompatible or unjustified writ large but did note how onerous the requirement was on the individual, that it amounted to a severe interference, and that it would require strong justification to be upheld in individual cases.<sup>226</sup> In the TPIM Act of 2011, Parliament removed the power from the list of measures authorized. The power was added back into the Counter-Terrorism and Security Act of 2015 because, the Government argued, the rise in numbers of U.K. nationals going to Iraq and Syria to fight for ISIS, and then returning to the United Kingdom, raised the threat level and the current measures—such as check-ins, and surveillance of individuals under control measures—put serious strains on resources.<sup>227</sup>

Even as the definition of terrorism remained broad and imprecise, the legislative framework evolved. Judicial decisions prompted legislative action while leaving the legislature relatively free to select different options to develop the statutory framework, incorporate judicial judgments, or provide additional rationales to push back against judicial assessment of the balance of interests.

As this section has shown, in the United Kingdom, where judicial review has been more substantive and rigorous, and informed by a substantive understanding of the individual rights involved, the legislature has engaged with developing limits on executive discretion. Judicial decisions and principles have engaged Parliament and the executive in the process of establishing parameters for the exercise of these national security powers. By deciding substantive questions, the courts have provided both guidance and an impetus for amending primary legislation. Judicial scrutiny prompted Parliamentary action and shaped the statutory changes we have seen develop from the ATCSA to the Counter-Terrorism and Security Act 2015. By contrast, the lack of substantive engagement or activity by the courts in the United States has been accompanied by legislative disengagement. After the enactment of the AUMF in 2001, Congress has largely

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<sup>225</sup> See Prevention of Terrorism Act 2005, c. 2, § 1(4)(5) (UK).

<sup>226</sup> See, e.g., *BM v. Secretary of State for the Home Department* [2009] EWHC 1572 (Admin) [14]–[15]; *CD v. Secretary of State for the Home Department* [2011] EWHC 1273 (Admin) [46].

<sup>227</sup> See e.g. HC Deb (9 Dec. 2014) (589) col. 799 (“The changes are being introduced in the light of changing threat picture: the ongoing conflict in Syria and Iraq; the fact that 500 subjects of interest have travelled to that region; the risk that they may pose on their return; and the risk of more people seeking to travel out.”); see also HELEN FENWICK, *FENWICK ON CIVIL LIBERTIES & HUMAN RIGHTS* 1102 (2016) (“TPIMs came to be seen as ineffective: their role in providing security came under question when two suspects absconded in 2012 and 2013 while subject to TPIM orders.”); KENT ROACH, *COMPARATIVE COUNTER-TERRORISM LAW* 752 (2015).

remained silent, allowing the executive to run the show.<sup>228</sup> The examination of judicial and legislative action in these two jurisdictions shows how judicial activity opens the door for constitutionally valuable legislative activity.

The lack of judicial pronouncement on constitutional principles makes it, at the very least, easier for the legislature to stay out of this constitutionally fraught area.<sup>229</sup> Unsurprisingly then, without judicial holdings on legal standards or shortcomings of the existing framework, Congress has not had to confront the constitutional problems resulting from the broad power it granted to the executive.

There is a persistent and profound difficulty with counterterrorism law of providing clear definitions within legislative grants of authority. This difficulty frustrates traditional means of both prospectively limiting discretion through clear standards and providing courts with a statutory basis for checking executive power. As this section shows, there is reason to believe that legislative involvement becomes more robust when the courts provide rights-based reasoning and means of limiting executive discretion. The U.K. courts' willingness to take a stand and make substantive decisions rooted in individual rights partially explains why Parliament abandoned the use of detention, made changes to burdens of proof and to the arsenal of available control measures, and imposed a two-year limit on the use of these measures against any one individual. As it turns out, "[t]he language of rights matters in politics, and we can expect people to be at a political disadvantage when their opponents are able to say 'Why do you want to take away the rights the courts have told us we have?'"<sup>230</sup> Meanwhile, the U.S. Congress has not been compelled by substantive, fundamental rights decisions by the courts to re-think, re-word, or re-consider the authority it granted to the executive in the AUMF.<sup>231</sup> More than fifteen years down the line, and the United States has little development in the law in this area, allowing imprecision in legal standards to reinforce broad executive discretion. If legislative authorization plays a key role in the proper functioning of separation of powers, then separation of powers in the U.S. is not functioning properly in this context.

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<sup>228</sup> This statement does need to be qualified for Congress has passed legislation (discussed earlier) attempting to take away jurisdiction of the courts of these matters; and after the Obama Administration came into power, Congress attached provisions to multiple appropriation bills limiting the executive's authority to transfer detainees to the U.S. or in some instances to certain third states. *See, e.g.*, Supplemental Appropriations Act 2009, Pub. L. No. 111-32, 123 Stat 1859, 1920, §14103(b) (2009); Consolidated Appropriations Act 2012, Pub. L. No. 112-74, 125 Stat 786, 833-36, §§ 8119–20 (2011); Consolidated and Further Continuing Appropriations Act 2012, Pub. L. No. 112-55, 125 Stat 553, 637-38, § 532 (2011); *see also* Aziz Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499, 535 (2017).

<sup>229</sup> *See* MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 27 (2008).

<sup>230</sup> *Id.*

<sup>231</sup> For an example of a greater interplay between the courts and Congress, *see* Vladeck, *supra* note 32, at 946–48.

### III. Are All Engagements Created Equal? Pro-Constitutional Engagement

A look at the various cases and statutes examined in the previous section shows that there are different kinds of judicial and legislative actions, possible and at-play. Activity alone is not enough to declare a proper functioning of the separation of powers. The analysis in Part II provides some ideas of what valuable judicial and legislative engagement entails. Part of what we understand as the aim of separation of powers is separating out the different steps of governance.<sup>232</sup> There is value in having one branch say, with some clarity, what the law is or what powers the executive has and where those powers end, then having another branch exercise judgement in executing the law, and finally, having a third independent branch ensure that the exercise of this power complies with both enacted law and the relevant fundamental constitutional principles. In this context, that might mean the legislature saying what kind of conduct or association must be shown to make someone subject to the states' power of detention, followed by an executive making strategic choices informed by expert judgement and access to intelligence, and a court reviewing the decision. Here, where wide discretion creates constitutional problems, society wants more developed, clearly articulated, and constitutionally sensitive legislation. This Part will examine the institutional interplay in the United Kingdom to identify the categories of changes brought about through that interplay and whether these kinds of changes are valuable in advancing constitutional values. In other words, did judicial review lead to legislative refinement of the definition of detainable and punishable conduct? If not, what kind of changes were made to the legal framework authorizing executive powers and were those changes constitutionally valuable?

There is a spectrum between grants of undefined authority and clearly articulated or unambiguous standards. Part of what a well-functioning institutional dynamic should promote is finding or pushing for the best possible point on that spectrum.<sup>233</sup> A hypothetical legislative enactment could merely provide a broad grant of power, one that provides no real law to apply but merely complies with the most basic requirement of legality.<sup>234</sup> Or a legislature could exercise its authority to provide legal definitions and standards that shape and guide how this power of

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<sup>232</sup> See JEREMY WALDRON, *POLITICAL POLITICAL THEORY* 45–46 (2016) (discussing the articulated governance aim of the separation of powers); see also Aziz Huq & Jon Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* 346, 355–56 (2016).

<sup>233</sup> See generally Rosalind Dixon, *The Forms, Functions and Varieties of Weak(ened) Judicial Review*, 17 *INT'L J. CON. L.* 904 (2019) (analyzing different forms of judicial review and interactions with political processes that change the effectiveness of review); Allison Young, *Is Dialogue Working Under the Human Rights Act 1998?*, *PUB L.* 773 (2011); Peter Hogg et al., *Charter Dialogue Revisited: Or Much Ado About Metaphors*, 45 *OSGOODE HALL L.J.* 1 (2007) (analyzing the dialogue theory of judicial review, or give and take between courts and legislatures, in Canadian jurisprudence and scholarship).

<sup>234</sup> See Tess, Bridgeman, *How to Ensure New Congressional War Authorization Is Not a Blank Check*, *JUST SECURITY* (Apr. 20, 2018), <https://www.justsecurity.org/55147/stop-congressional-war-authorization-blank-check/> [<https://perma.cc/ZCH2-6F3U>]; Gene Healy & John Glaser, *Repeal, Don't Replace the AUMF*, *CATO INSTITUTE* (July/Aug. 2018), <https://www.cato.org/policy-report/julyaugust-2018/repeal-dont-replace-aumf> [<https://perma.cc/82NL-EM6Y>].

the state will be exercised. That sort of legal framework would, among other things, comply with and consider what the constitution demands.<sup>235</sup> A form of judicial review could assert the authority to look over the constitutionality of the legal authority, or the existence of legal authority, but does nothing more than uncritically accept executive definitions of the law and presentations of evidence. Another might attempt to articulate substantive legal rules or standards to guide the executive's exercise of power or reshape the scope of that power. At the very least, the judicial review could say when the existing legal framework is not precise or clear enough to satisfy legality. Each of these kinds of grants or reviews would constitute institutional activity. However, in terms of separation of powers, they are not equally valuable. This Section considers constitutionally valuable institutional engagement. One of the main conclusions this Article will draw from the analysis in these pages is that hollow judicial engagement engenders hollow, or even harmful, legislative engagement.

#### A. *Legislative Engagement as Distinct from Legislative Activity*

How to measure the right kind of engagement? The public law challenge presented by these national security detention and control powers is largely the result of lack of definition. The challenges arises because the limit on the power to detain is vague or what kind of action triggers and justifies the state's authority to take freedom away.<sup>236</sup> Under such circumstances, the risk of detaining someone because of faulty evidence or lazy, fearful, or uninformed judgement is high.<sup>237</sup> Given this, the legislature should provide a better definition of what counts as detainable conduct, or a better articulation of the framework to be used. An effective framework would articulate the process to determine the appropriate balance between the state's interest in successful prosecution of the war or interest in national defense and the individual's interest in not being arbitrarily detained—something clear enough to be understood, justified, and enforced.

The analysis of what courts in the United Kingdom were able to identify as within the judicial authority raises some questions about whether better definitions for detainable conduct is likely to come about as a result of judicial scrutiny. Judicial scrutiny could create definition either through common law style definition of what kinds of factors may or may not be meaningful or by prompting the legislature to do more to provide a refined definition. While Parliament has

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<sup>235</sup> See Vicki Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM & MARY L. REV. 1717, 1737–38 (2016) (underscoring that legislators should aim to be “pro-constitutional”); Philip Sales, *The Contribution of Legislative Drafting to the Rule of Law*, 77 CAMBRIDGE L. J. 630, 631–32 (2018).

<sup>236</sup> See *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), for an example of the court accepting broad and vague definition of harmful conduct in the name of national security. See generally David Cole, *The New McCarthyism: Repeating History in the War in Terrorism*, 38 HARV. CR-CL L. REV. 1 (2003); Ellen Policinski, *The Power of Words: The Dangerous Rhetoric of the ‘Terrorist’*, INT’L REV. RED CROSS (Mar. 4, 2020), <https://blogs.icrc.org/law-and-policy/2020/03/04/power-words-dangerous-rhetoric-terrorist/> [https://perma.cc/ZT94-WJWG].

<sup>237</sup> See Cole, *supra* note 236.

developed the legal framework, it has not provided a more precise definition of terrorism or terrorist related activity.<sup>238</sup> This may mean that a better definition is not currently available. States—especially executive officials—may need to acquire a better understanding of the nature of the threat from international terrorism and the kinds of narratives, categories, and contexts that provide tailored factors for identifying the appropriate targets for the state’s preventive control powers. However, what this analysis does show, is that judicial engagement was able to identify ways in which executive power itself could be limited without limiting the definition of terrorism itself. Through the institutional interplay between the courts and Parliament, the powers granted to the executive went from power of indefinite detention to authority to impose, for one year only, a set of orders limiting the freedom of movement and association of individuals suspected of terrorism related activity.<sup>239</sup> Even though the latter power still raises significant civil rights concerns, the authority is undeniably less severe than indefinite detention.

### B. *Judicial Deference, Judicial Activism, and Judicial Review*

This section begins by identifying possible avenues for valuable judicial review by looking to the institutional ground that U.K. courts have been able to stake out. Overlap between legal, expert, and policy judgements makes courts hesitate, for fear of treading on executive or legislative ground. Thus, there is challenge to identifying the kinds of decisions, or aspects of those decisions, that are especially within judicial competence. Once courts are able to pull out and identify the constitutional problems in the existing law or practice, the legislature can know what needs to be changed to make their policy choices constitutionally compliant.

Given the analysis in Part II, of judicial activity in these two jurisdictions, what would be valuable judicial engagement? Institutional powers depend on or respond to one another. Legislation drafted with precision, providing clear evidence of justified policy, will be met with and deserve a different kind of judicial review than legislation that provides no parameters for exercise of the state’s power of violence.<sup>240</sup> Once executive decisions are added, it becomes even more complicated. If the executive had never used the AUMF to claim powers of indefinite detention, the judiciary may not have had a chance to review this legislative grant at all. Even if the judiciary had the opportunity, it would not have been with the same stakes in the litigation.<sup>241</sup> Similarly, the scope of both judicial power and legislative power is impacted by the kind of individual interests

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<sup>238</sup> The definition of “Terrorism” is still provided in Terrorism Act 2000, c. 11, § 1 (UK).

<sup>239</sup> See *supra* Sections II.D and II.E.

<sup>240</sup> See Philip Sales, *The Contribution of Legislative Drafting to the Rule of Law*, 77 CAMBRIDGE L. J. 630, 634 (2018).

<sup>241</sup> Meaning, if the executive had limited its power of detention to individuals captured in Iraq and Afghanistan, and eventually released or transferred to local authorities, there may not have been Guantanamo-style indefinite detention away from the battlefield.

involved.<sup>242</sup> In the indefinite preventive detention cases, the judiciary is particularly engaged given its mandate to serve as the independent arbiter safeguarding individuals' freedom from arbitrary detention.<sup>243</sup> Given the judiciary's heightened claim of institutional authority, justified by the individual rights at stake, the scope of legislative and executive policy choices are correspondingly impacted.

There are roughly three kinds of decisions the courts have teased out as particularly within their competence. First, defining what legal rights are at stake, i.e., line drawing on what amounts to a deprivation of liberty. Second, determining what fair trial guarantees require, i.e., limiting the use of closed evidence and safeguarding the detainee's right to know the evidence against them. Third, setting standards of scrutiny and burdens of proof according to the relevant interests. By focusing on the individual interests at stake, the courts have been compelled to measure the standards of scrutiny and burdens of proof in relation to the liberty interests at stake, and to push for more rights-compliant practices. The link between judicial power and fundamental rights provides the judiciary with the reasons to act, and thereby parameters for judicial action.

It is the highest court that is able to engage with the line drawing exercise, and so presents the clearest example of judicial review justifiably asserting and defining judicial authority. Once these parameters are set, however, it is the lower courts that must review decisions. They do so in a context where it becomes more difficult to clearly distinguish judicial judgement on legal standards from executive judgement on risk and strategy. Lower courts in the United Kingdom are able to conduct review at this level in large part because of the proportionality standard, the dominant Convention standard.<sup>244</sup> For it is the proportionality standard that allows for contextual and flexible judicial weighing of different interests.<sup>245</sup> That same contextualism, however, does raise some concerns for judicial legitimacy.<sup>246</sup>

Nevertheless, however imperfect the judicial action may be, it has advanced the law and provided impetus for judicial action and legislative reform. If the alternative is judicial abdication, of the kind found in the U.S., a little overlap or blurring of the lines between institutional domains is preferable, especially if it helps advance the law in an area where greater development of legal tools and frameworks is needed to ensure constitutional exercise of power. Counterterrorism operations are not likely to end any time soon, and the legal standards and frameworks developed in detention and control cases are likely to, and in some cases already do, influence other kinds of national security powers the executive

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<sup>242</sup> See generally Issacharoff & Pildes, *supra* note 135.

<sup>243</sup> Richard Fallon & Daniel Melzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2050 (2007); David Feldman, *Deprivation of Liberty in Anti-Terrorism Law*, 67 CLJ 4, 4–5 (2008).

<sup>244</sup> See generally Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018).

<sup>245</sup> See *id.*; see also Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303 (2003); Kathleen Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

<sup>246</sup> See Tom Hickman, *Problems for Proportionality*, 2010 N.Z. L. REV. 303, 316 (2010).

relies on.<sup>247</sup> Developing the legal framework, and ensuring it complies with our constitutional values, is imperative.

The case of *Secretary of State for the Home Department v. JJ* is an example of the Law Lords clearly asserting and exercising their unique institutional authority to define Convention rights, liberty, and the level of restraint that amounts to a deprivation of a right, rather than an interference with an interest.<sup>248</sup> The relevant legal question in *JJ* was what amounts to a deprivation?<sup>249</sup> It was more easily distinguished from mixed questions of policy, expertise and law, i.e., what kind of a risk does the defendant pose and what measures would be sufficient to counter that risk? Once the court determined that an 18-hour curfew constitutes a deprivation, and not just a restriction of liberty, the legal standard was set. The distinct question of just how long of a curfew would be sufficient for security purposes is then up to the legislature to set, and the executive to decide on a case-by-case basis. In this case, Parliament came to impose a limit of 10 hours for a curfew.<sup>250</sup>

The Court has also used its authority to identify and defend fair trial rights. In many of the control measure cases the government relied on evidence it was not willing to produce in open court.<sup>251</sup> Whether it was the risk of exposing intelligence assets and methods, or respecting conditions of intelligence sharing with foreign intelligence services, there was often some closed material the controlee did not know about.<sup>252</sup> Closed material procedures, which existed in other contexts prior to the control measures framework, allowed the Secretary of State to present evidence—disclosure of which would be contrary to the public interest—to the court in a closed session where the controlee and the public could not hear the evidence submitted.<sup>253</sup> This procedure raised serious fair trial concerns. For one, it is a basic principle of fair process that the evidence must be put to the opposing party so it can be challenged and tested, as there is concern that “[e]vidence which has been insulated from challenge may positively mislead.”<sup>254</sup> Uncontested evidence also allows the party submitting it considerable advantage in controlling just how the evidence is presented and perceived.<sup>255</sup> The use of the special advocate

<sup>247</sup> See, e.g., *Trump v. Hawaii*, 138 S.Ct. 2392, 2420–22 (2018); *Ziglar v. Abbasi* 137 S. Ct. 1843, 1848–49 (2017); Humanitarian Law Project, 561 U.S. at 1–6; *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 74–79 (D.D.C. 2014).

<sup>248</sup> See *Secretary of State for the Home Department v. JJ* [2007] UKHL 45, [2007] 3 W.L.R. 642.

<sup>249</sup> See *id.* at [36]–[38].

<sup>250</sup> See Terrorism Prevention and Investigation Measures Act 2011 c. 23 (UK).

<sup>251</sup> See generally Daphne Barak-Erez & Matthew Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT’L L. 3 (2009); AMNESTY INTERNATIONAL, *LEFT IN THE DARK: THE USE OF SECRET EVIDENCE IN THE UNITED KINGDOM* (2012).

<sup>252</sup> See Anderson, *supra* note 192, ¶ 3.69 (identifying the risks of disclosing full evidence to the controlled person).

<sup>253</sup> See AMNESTY INTERNATIONAL, *supra* note 251.

<sup>254</sup> *Al-Rawi v. Security Service* [2011] UKSC 34 [93–94].

<sup>255</sup> See *Secretary of State for the Home Department v. AF* [2008] EWCA (Civ) 1148 [113] (CA) (Sedley LJ, dissenting) (“[far] from being difficult... it is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side.”); In the U.S. context, see also *Al-Hela v. Trump*, 972 F.3d 120, 136 (D.C. Cir. 2020) (“Here, the district court

was meant to ameliorate these dangers. A special advocate would be chosen by the controlee from a group of security-cleared barristers. While the special advocate can hear the closed material and represent the interests of the controlled person in the closed hearings, once the evidence is submitted in closed session, the advocate is not permitted to speak with the controlee, to take instructions, or to ask for an alibi or where to find evidence of an alternative narrative.<sup>256</sup> These procedures raised serious article 6 fair trial concerns.

The House of Lords first came to analyze the use of closed hearings in the control order regime in *MB*.<sup>257</sup> Lord Bingham's opinion adopted a contextual and flexible standard, informed by article 6 and common law fair trial principles, but adaptable enough to safeguard the substance of the procedural right without formal and rigid rules. Lord Bingham reasoned that the civil limb of article 6 requires that the controlee be provided "such knowledge, in whatever form, of what was said against him as was necessary to enable him, with or without a special advocate, effectively to challenge or rebut the case against him."<sup>258</sup> Maintaining that link between institutional power of the judiciary and fundamental principle of liberty, Lord Bingham wrote, "the application of the civil limb of article 6(1) does in my opinion entitle such person to such measure of procedural protection as is commensurate with the gravity of the potential consequences."<sup>259</sup> Unwilling to say to what extent the use of a special advocate provided a sufficient measure of an opportunity to "challenge or rebut the case" writ large,<sup>260</sup> Lord Bingham left open the question of how much disclosure was required for case by case assessment. In some circumstances the special advocate would be able to effectively challenge the case; in others, the open materials would contain enough information to provide the controlee the opportunity to answer the case against him.<sup>261</sup>

Ultimately, with the Grand Chamber judgement in *A v United Kingdom*, the European Court of Human Rights settled the matter and the House of Lords adopted the legal standard in *AF (No. 3)* that "the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations."<sup>262</sup> The adopted standard is similar to the one set out by Lord Bingham in *MB*.<sup>263</sup> However, the main difference is that

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found the challenged evidence reliable after an ex parte, in camera review of the source material. . . . As official government records, intelligence reports receive a rebuttable 'presumption of regularity,' even when they include layered hearsay information from non-governmental sources.").

<sup>256</sup> See Anderson, *supra* at note 192, ¶ 3.71.

<sup>257</sup> See Secretary of State for the Home Department v. MB [2007] UKHL 46 [50]-[55], [2008] 1 AC 440 (Bingham LJ).

<sup>258</sup> *Id.* at [34]

<sup>259</sup> *Id.* at [24]; see also Secretary of State for the Home Department v. GG, [2009] EWCA (Civ) 786, [2010] QB 585 [12] (Sedley LJ).

<sup>260</sup> *Id.* at [32]-[35].

<sup>261</sup> See *id.*

<sup>262</sup> Secretary of State for the Home Department v. AF (No. 3) [2009] UKHL 28 [59], [2010] 2 AC 269 (Phillips LJ) (following the judgement of the Grand Chamber of the European Court of Human Rights in *A v. United Kingdom*, 2009-II Eur. Ct. H.R. 137 (2009)).

<sup>263</sup> See MB [2008] at [41], [43] (Bingham LJ).

while Lord Bingham's opinion left it possible for a control order to be upheld, if most of the evidence was presented in closed session, the *AF (No. 3)* standard foreclosed this option. *AF (No. 3)* makes it a categorical article 6 violation to deny a controlee a sufficient understanding of the evidence against him.<sup>264</sup>

Even when the decision turns on the application of the proportionality standard, emphasis on the Convention principles at stake can shape judicial analysis, either by reference to another Convention right, as was the case in *Belmarsh* or by strengthening standards of scrutiny through weight and importance ascribed to given individual interest at stake, i.e., the importance of the right to liberty.<sup>265</sup> In *Belmarsh*, when the House of Lords analyzed the decision to derogate from article 5 of the ECHR, it explained and defended the exercise of judicial power and level of scrutiny in terms of the substantive rights and interests at stake.<sup>266</sup> The court relied on article 14 (discrimination) to give structure and shape to the necessity prong of the proportionality test and to exercise heightened scrutiny.<sup>267</sup>

The courts have been able to accomplish what they have, in no small part, because of the flexibility of the proportionality standard.<sup>268</sup> As the U.S. courts sought to provide definitions, standards, and categories, the U.K. courts employed the contextual proportionality standard to weigh the interests in each case. What is distinctly useful about the proportionality test in this context is that it allows security and expertise to be directly and openly considered along with the liberty interests at stake. Proportionality “does not camouflage judicial lawmaking. Properly employed, it requires courts to acknowledge and defend—honestly and openly—the policy choices that they make when they make constitutional choices.”<sup>269</sup> In practice, the judiciary is not always able to clearly confront the pull of executive claims of authority over national security.<sup>270</sup> However, the U.K. courts have managed to protect the link between the formal doctrine and the substantive values and principles that justify their use.

The more we move from House of Lords decisions to lower court decisions, conducting review within the parameters set by the highest court, the greater the

<sup>264</sup> See *A v. United Kingdom*, 2009-II Eur. Ct. H.R. 137, 233–235 (2009) (“in the circumstances of the present case, and in view of the dramatic impact of the lengthy—and what appeared at that time to be indefinite—deprivation of liberty on the applicants’ fundamental rights, Article 5 § 4 must import substantially the same fair-trial guarantees as Article 6 § 1 in its criminal aspect.”)

<sup>265</sup> See *id.*; see also *Secretary of State for the Home Department v. JJ* [2007] UKHL 45 [27], [2007] 3 W.L.R. 642 (Bingham LJ).

<sup>266</sup> See *A v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [100] (Hope LJ) (“It is impossible ever to overstate the importance of the right to liberty in a democracy.”).

<sup>267</sup> See *id.* at [45]–[73].

<sup>268</sup> See Mark Elliott, *From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification*, in Hanna Wilberg & Mark Elliott (eds.) *THE SCOPE AND INTENSITY OF SUBSTANTIVE JUDICIAL REVIEW: TRAVERSING TAGGART’S RAINBOW* 61, 87–89 (2015); Julian Rivers, *Proportionality and Variable Intensity of Review*, 65(1) *CAMBRIDGE L. J.* 174, 202 (2006).

<sup>269</sup> Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *COLUM. J. TRANSNAT’L L.* 72, 77 (2008).

<sup>270</sup> See, e.g., *A v. Secretary of State for the Home Department* [2004] UKHL 56, [2005], 2 AC 68 [29] (deferring to executive judgement on the existence of the public emergency).

overlap between executive and judicial institutional competencies. Three of the main cases concerning the executive's detention and coercion powers by The House of Lords decisions were *A v. Secretary of State for the Home Department*,<sup>271</sup> *Secretary of State for the Home Department v. MB; AF*,<sup>272</sup> and *Secretary of State for the Home Department v. JJ*.<sup>273</sup> Each involved a decision about a particular legal definition or a clarification of a legal standard to guide lower courts in carrying out their review. The lower court decisions, in contrast, are not generally concerned with defining liberty or what fair trial standards require, but with carrying out contextual review based on established standards.<sup>274</sup> Here, the virtue of flexibility must confront its own vices.<sup>275</sup>

Contextual engagement presents its own set of constitutional and institutional challenges. When matters of policy, expertise and law are entangled, the courts risk undermining judicial authority by failing to elaborate and justify the exercise of the judicial power.<sup>276</sup> The criticism often falls on the flexible nature of the proportionality standard, and the particularly malleable final step: narrow proportionality. Lord Justice Laws, writing in *Miranda*, made the following observation about narrow proportionality:

It appears to require the court, in a case where the impugned measure passes muster [on the first three criteria of the proportionality standard], to decide whether the measure, though it has a justified purpose and is no more intrusive than necessary, is nevertheless offensive because it fails to strike the right balance between private right and public interest; and the court is the judge of where the balance should lie. I think there is real difficulty in distinguishing this from a political question to be decided by the elected arm of government. If it is properly within the judicial sphere, it must be on the footing that there is a plain case.<sup>277</sup>

To the extent that the U.K. courts have been able to provide a *plain case* for asserting judicial scrutiny and challenging executive decision-making, they have done in two ways. Courts often will focus on the first three steps of the

<sup>271</sup> See *A v. Secretary of State for the Home Department* [2004] UKHL 56, [2005], 2 AC 68.

<sup>272</sup> See *Secretary of State for the Home Department v. MB; AF* [2007] UKHL 46 [2007] 3 W.L.R. 681.

<sup>273</sup> See *Secretary of State for the Home Department v. JJ* [2007] UKHL 45, [2007] 3 W.L.R. 642.

<sup>274</sup> See, e.g., *BF v. Secretary of State for the Home Department* [2013] EWHC 2329 (Admin) [34]–[38] (analyzing the specific circumstances of BF's case); *Secretary of State for the Home Department v. LG & ORS* [2017] EWHC 1529(Admin) [85]–[118].

<sup>275</sup> See Tom Hickman, *Problems for Proportionality*, 2010 N.Z. L. REV. 303, 316 (2010) (identifying the variability of proportionality and different characterizations of the virtue, and flaws, of that flexibility).

<sup>276</sup> See T.R.S. ALLAN, *LAW, LIBERTY AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM*, 8 (1994) (Even if “[executive and judicial] discretions are complementary, rather than opposed; and exercise of the latter, if not the former, must be fully reasoned and open to public scrutiny.”); see also Allan, *supra* note 159, at 97 (“I sought to distinguish *external* factors, irrelevant to adjudication when properly conducted, from those considerations pertaining to the particular case that rightly affect the court’s deliberation.”).

<sup>277</sup> *Miranda v. Secretary of State for the Home Department* [2014] EWHC (Admin) 255 [40] (Laws J); see also *Bank Mellat v. HM Treasury (No. 2)* [2013] UKSC 39 [71].

proportionality standard.<sup>278</sup> Alternatively, when the decision rests on the final step of proportionality, courts will articulate a principled, and factually substantiated, reason for why the measure is not proportionate given the individual rights at stake.<sup>279</sup> Nevertheless, the breadth of factors that can shape judicial reasoning and prompt either deference or scrutiny raises questions about predictability and consistency.<sup>280</sup>

Judicial tests that allow for a great deal of flexibility and contextualism may compromise judicial legitimacy, by failing to articulate the distinctly judicial function involved in reviewing executive decision making.<sup>281</sup> When there is no clean way to separate the assessment that a certain harm is likely to result from a failure to detain or control a person from the decision that the risk of the harm is proportionate to the interference in a right, is judicial decision making distinguishable from executive decision making?<sup>282</sup> And if it is not, given the subject matter, what legitimizes the exercise of the judicial power?<sup>283</sup> This shows how the flexibility of the proportionality standard is in danger of becoming a double-edged sword: on the one hand, proportionality plus deference supports the use of a mechanism for weighing rights and institutional powers; on the other hand, the resulting flexibility risks collapsing judicial decision-making into something unpredictable, which could erode the constitutional case for judicial involvement.<sup>284</sup>

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<sup>278</sup> See Aileen Kavanagh, *Defending Deference in Public Law and Constitutional Theory*, 126 L. Q. REV. 222, 226 (2010).

<sup>279</sup> See *id.*

<sup>280</sup> For criticisms of flexible standards, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (“[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgement on analysis and reason quite transcending the immediate result that is achieved.”); J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1, 19–20 (1979); Lord Sumption, 27th Sultan Azlan Shah Lecture on “The Limits of Law” (November 20, 2013).

<sup>281</sup> See Tom Hickman, *Problems of Proportionality*, N.Z. L. REV. 303, 316 (2010) (“Lawyers and public officials could not know from the mere fact that a proportionality test was being applied what ‘intensity’ or ‘degree’ of scrutiny would be applied.”).

<sup>282</sup> See Julian Rivers, *Proportionality and Variable Intensity of Review*, 65(1) CAMBRIDGE L.J. 174, 192–93 (2006) (“The alternative ‘correctness-conception’ of Convention rights assumes that the doctrine of proportionality provides just one right answer to every decision within the scope of Convention rights. Some, at least, of the impetus behind the move to identify a discretionary area of judgement on the part of other public authorities lies in the perceived need to prevent the collapse of supervisory jurisdiction into a fully-fledged review of the merits of every case.”).

<sup>283</sup> See Jeff King, *Institutional Approaches to Judicial Restraint*, 28 OX. J. LEG. STU. 409, 410–11 (2008); TOM HICKMAN, PUBLIC LAW AFTER THE HUMAN RIGHTS ACT 57 (2010); Elliott, *supra* note 171, at 4.

<sup>284</sup> See generally Julian Rivers, *Proportionality and Variable Intensity of Review*, 65(1) CAMBRIDGE L.J. 174, 201 (2006) (“We probably do not believe in complete incommensurability between constitutional values. Few would view with indifference a massive loss of liberty for a marginal gain in national security. Our problem is not that the values are incommensurable, but that relative assessments can only be carried out in a crude manner.”).

### C. Constitutionally Valuable Legislative Engagement

Having identified standards and interventions available to the judiciary, this section identifies changes the legislature can make to legal authorization in response to judicial holdings. The section lays out Parliamentary responses and details how each new legislative authorization incorporated or responded to constitutional flaws the courts identified. While Parliament did not refine the definition of terrorism, it did change—and in fact, reduce—the power it granted to the executive. Parliament also imposed procedural limits meant to protect convention rights.

The legislature sits in a privileged, and tricky, position. It is the branch charged with enacting laws and translating complex political, legal, and practical considerations and compromises into a text. It has a great deal of power to decide the nation's approach. Confronted with the threat of international terrorism, a legislature can decide: (1) who to target; (2) how the state should go after them, what kinds of powers; (3) where the state's response should be focused, or where it cannot go; (4) how long the authorized framework should be in place; and 5) what diplomatic, foreign relations, or other considerations may counsel caution, etc.<sup>285</sup> Each choice above entails an enumerable number of options and additional decisions. Take (2) for example, the decision of how the state should respond to this threat and what kind of powers it should authorize. The legislature could authorize (1) deadly force, (2) indefinite detention, (3) control measures, (4) asset freezing, (5) deportation/exclusion, (6) criminalization/prosecution, (7) military prosecution, (8) prevention programs (PVCE), (9) citizenship stripping, or (10) enhanced surveillance, among other options.<sup>286</sup> The legislature can choose all of these, some of these, or something else altogether. Some decisions will overlap with executive power and expertise and require policy input, while others, and the practice that results from them, will overlap with judicial competencies and require guidance from the courts. Each overlay raises different considerations for the legislature.

Constitutional scholars often look to the legislature as the institution most capable of and constitutionally empowered to place limits on executive power and safeguard the rule of law.<sup>287</sup> This emphasis on legislative power and prerogative pays insufficient attention to the institutional costs the legislature pays for intervening in matters of national security.<sup>288</sup> The norm tends to be legislative

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<sup>285</sup> See generally JAMES BECKMAN, *COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM* (2007) (identifying different legislation in different countries in response to terrorism, including the United States and the United Kingdom).

<sup>286</sup> See, e.g., *COMPARATIVE COUNTER-TERRORISM LAW* 752–53 (Kent Roach ed., 2015).

<sup>287</sup> See de Londras & Davis, *supra* note 159, at 20 (noting that one scholarly position “favours trusting parliamentary and popular democratic processes to bring about responsible and lawful action with the Judiciary taking a ‘hands off’ approach in line with the ‘extra-constitutionalist’ theory.”).

<sup>288</sup> See Hathaway, *supra* note 10, at 181; Tushnet, *supra* note 3, at 247. See generally J MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* (2004).

disengagement or allowance of vast discretion for a number of reasons. For one, it is difficult to articulate clear rules and definitions governing current national security and counterterrorism issues.<sup>289</sup> This is not only because terms tend to be vague or general but also because there is an unshakable fear among lawmakers of failing to provide a necessary power to the government simply because we cannot imagine or predict circumstances that require it.<sup>290</sup> Where prediction fails, discretion allows the national security officials to react (or act) effectively.<sup>291</sup> For another, the political costs of setting sharp and clear limits are high, especially when there is no price to pay for failing to do so since those impacted hold no political power.<sup>292</sup>

How much can judicial scrutiny push the legislature to provide better guidance and a clearer definition of conduct and scope of executive authority? Put another way, if one of the main concerns with legislation in this counterterrorism context is the lack of clear and detailed law authorizing these powers, then the aim is to prod the legislature to set some parameters or limits on that power. Current legislation creates great latitude, perhaps necessarily and certainly not uniquely in this context, delegating a significant amount of law-making power.<sup>293</sup> But the power granted and claimed is a profoundly consequential one; for the people it is used against, it is a power of great control and violence.<sup>294</sup> The authorizing legislation should look for and provide limits for how that power should be used or mechanisms for ensuring the power is not exercised arbitrarily, erroneously, or

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<sup>289</sup> See, e.g., Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, In re Guantanamo Bay Detainee Litigation, No. 08-0442 (D.D.C. Mar. 13, 2009) <https://www.justice.gov/archive/opa/documents/memo-redet-auth.pdf> [<https://perma.cc/4ZVX-6Y4F>] ("It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of 'substantial support', or the precise characteristics of 'associated forces', that are or would be sufficient to bring persons and organizations within the foregoing framework."). See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Thomas Tegg ed., 1823) (1689) 169, 175 ("[I]t is much less capable to be directed by antecedent, standing, positive laws than the executive, and so much necessarily be left to the prudence and wisdom of those whose hands it is in, to be managed for the public good.").

<sup>290</sup> See *id.*

<sup>291</sup> See Eric Posner, *Deference to the Executive in the United States after September 11: Congress, The Courts, and the Office of Legal Counsel*, 35 HARV. J. L. PUB. POL'Y 213, 224–25 (2012). See generally ERIC POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS (2007).

<sup>292</sup> See, e.g., Lee Kovarsky, *Citizenship, National Security Detention, and the Habeas Remedy*, 107 CALIF. L. REV. 867, 919 (2019) ("[I]t would invite more unlawful detention of noncitizen combatant designees held abroad. Such people have virtually no chance of security protection through the political process.").

<sup>293</sup> See Sunstein, *supra* note 3, at 2666 ("Congress knows that the President will construe any authorization to use force, and it has every incentive to limit his discretion if it so wishes.").

<sup>294</sup> See R v. Halliday [1917] UKHL 1 [1917] AC 260, 292 (Shaw LJ) ("There is the basic danger ... found in an especial degree whenever the law is not the same for all, but the selection of the victim is left to the plenary discretion whether of a tyrant, a committee, a bureaucracy or any other depository of despotic power. Whoever administers it, this power of selection of a class, and power of selection within a class is the negation of public safety or defense. It is poison to the commonwealth.").

unjustifiably. The less law there is to limit and guide the executive, the greater need there will be for judicial oversight.<sup>295</sup>

Consider what the U.K. Parliament has done in response to judicial review. Parliament has been unable, or unwilling, to refine a legal definition of terrorism or terrorism related activity but has found other means of setting limits on executive power. First, Parliament abandoned the most severe power—detention—and replaced it with a less restrictive, though still incredibly coercive, intrusive, and disruptive, approach of control measures.<sup>296</sup> Parliament also winnowed the measures authorized in order to remove their most intrusive powers. They limited the amount of time a person could be restricted to their home, removed the authority to force someone to move to a different part of the country, and lessened restrictions on access to communication and the internet.<sup>297</sup> Parliament also imposed a one year limit on the duration someone could be placed under control measures, ensuring that indefinite restriction of liberty on limited evidence would not become the practice.<sup>298</sup> This kind of engagement limited the severity of the authority granted as a way of mitigating the stakes and balancing interests. Parallel legislative refinement could be imagined in the U.S. context, perhaps limiting the authority geographically to active kinetic fields of battle, to enumerated lists of countries, to individuals in the command structure of named organizations, or to those directly participating in armed conflict. Similarly, Congress could set temporal limits on how long someone could be detained without more evidence and rigorous judicial process. There is a great deal of discretion, freedom, and opportunity to tailor limits to the circumstances and lessons learned. There is also room to recalibrate how we balance interests and to change the constitutional calculus by providing better justifications. Judicial review does not mean the end of this process.<sup>299</sup>

Take, for example, the issue of relocation orders. Parliament included them in the statute that first authorized control orders (PTA), finding the authority necessary to control those suspected of posing an ongoing threat.<sup>300</sup> When the courts came to review these orders, they did not find this power non-compliant with

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<sup>295</sup> Lord Irvine, *Judges and Decision Makers: The Theory and Practice of Wednesbury Review*, PUB. L. 59, 59 (1996) (“The consequences of the ‘democratic deficit’, the want of Parliamentary control over the executive in recent years, have been, to an important degree, mitigated by the rigours of judicial review.”).

<sup>296</sup> See Ewing & Tham, *supra* note 31, at 675.

<sup>297</sup> See *id.* at 682 (“[T]he standard at which the level of rights’ violations is set is now so low that even serious restraints on liberty can cross the hurdle of legality with relative ease.”).

<sup>298</sup> See Anderson, *supra* note 200, ¶ 4.12.

<sup>299</sup> See Kavanagh, *supra* note 24, at 175–76 (“It must be emphasized that this idea of due deference should not be equated with the idea that judges should *presume* themselves to lack expertise, competence, or legitimacy or, indeed, presume that the ‘executive knows best’—even in the national security context. ... Rather than presume that the legislature or executive automatically possess superior expertise or legitimacy, the courts will scrutinize with some intensity the justification in favor of the legislative or administrative decision.”).

<sup>300</sup> See Prevention of Terrorism Act 2005, c. 2 (UK); see also Matthew Flinn, *Another Control Order Rules Unlawful*, UK HUMAN RIGHTS BLOG (Oct. 6, 2010), <https://ukhumanrightsblog.com/2010/10/06/another-control-order-ruled-unlawful/> [<https://perma.cc/8PPN-QGFD>].

the Convention in all circumstances. However, in individual cases, the courts found the measure too onerous to justify, giving greater weight to individual interests in these cases than the executive had.<sup>301</sup> When Parliament enacted the TPIM, it removed these powers.<sup>302</sup> Then, the real-world circumstances changed. Several controlees absconded, raising the need for stronger measures, according to some, and ISIS emerged as a new and significant threat, drawing recruits from the United Kingdom to Syria and Iraq.<sup>303</sup> Due to these new circumstances, the government argued, the need for more significant powers was justified.<sup>304</sup> Convinced, Parliament gave this power back.<sup>305</sup> There is a great deal of disagreement over the quality and soundness of this reasoning, whether the government needs these powers, and whether Parliament should have given them back.<sup>306</sup> But what it does demonstrate is the flexibility that exists in the process: the exercise of judicial power does not foreclose further analysis, learning of lessons, or elaboration of new and better reasons for public policies and laws. The legislature has several ways it can respond to a judicial decision that a statute violates the Constitution/convention; options will vary depending, among other things, on the nature of the judicial decision and legislative policy goals.<sup>307</sup>

The second main type of change Parliament made to the legal framework was to strengthen the due process and fair trial protections, as a way to mitigate the risk of an erroneous deprivation of someone's liberty.<sup>308</sup> The influence of judicial

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<sup>301</sup> See Secretary of State for the Home Department v. AP [2010] UKSC 24; see also Flinn, *supra* at note 300.

<sup>302</sup> See Terrorism Prevention and Investigation Measures Act of 2011, c. 23 (UK).

<sup>303</sup> See KENT ROACH, *COMPARATIVE COUNTER-TERRORISM LAW* 752 (2015) (“The Counter-Terrorism and Security Act, 2015, however, strengthened TPIMs to include residence relocation and travel restrictions in an attempt to deal with threats associated with people in the UK leaving to fight for the Islamic State or returning after such foreign terrorist fights.”).

<sup>304</sup> See *id.*

<sup>305</sup> See *id.*

<sup>306</sup> See, e.g., Amnesty International, *United Kingdom: Submission to UN Human Rights Committee, 114<sup>th</sup> Session, 29 June-24 July 2015*, 17 (2015),

<https://www.amnesty.org/download/Documents/EUR4517932015ENGLISH.PDF>

[<https://perma.cc/9PGV-5QHF>]; Ian Turner, *A Communitarian Justification for Measures to Prevent Terrorism in the UK*, 10 *PERSPECTIVES ON TERRORISM* 68, 73 (2016); Angela Patrick, *A Worrying New Anti-Terror Law is Sneaking Through Parliament*, UK HUMAN RIGHTS BLOG (Jan. 9, 2015), <https://ukhumanrightsblog.com/2015/01/09/a-worrying-new-anti-terror-law-is-sneaking-through-parliament-angela-patrick/> [<https://perma.cc/CF43-M7FQ>];

<sup>307</sup> For example, in *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that the Gun-Free School Zones Act of 1990 went beyond Congress's powers under the Commerce Clause. In response, Congress amended the legislation limiting the statutes coverage to guns that had traveled through interstate commerce. Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, 110 Stat. 3009, Div. A, Title 1, § 101(f) [Title VI, § 657] (1996) (amending 18 U.S.C. § 922(q)) (“It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.”).

<sup>308</sup> See Arturo J. Carrillo, *The Price of Prevention: Anti-Terrorism Pre-Crime Measures and International Human Rights Law*, 60 *VA. J. INT'L L.* 571, 580 (2020); see also Helen Fenwick, *Designing ETPIMs Around ECHR Review or Normalisation of 'Preventive' Non-Trial-Based Executive Measures?*, 76 *MOD. L. REV.* 876, 901–903 (2013).

review is obvious and appropriate given the judicial branch's institutional competence to determine what fair process entails. But, as was the case with relocation orders, U.K. courts did not issue a declaration of incompatibility when it came to the standard of proof or the use of closed evidence.<sup>309</sup> Instead, the courts made case by case assessments of whether the process provided was sufficient to give the accused an opportunity to mount a defense.<sup>310</sup> In the process, courts pointed out the real faults in the system.<sup>311</sup> When Parliament reworked the legal framework, the fair trial protections were statutorily strengthened.

In the United Kingdom, judicial identification of particularly constitutionally troubling aspects of the legal regime and practice pushed the legislature to reconsider and refine the framework. And that is what separation of powers and judicial review are meant to achieve.<sup>312</sup> A statute may have faults because it is passed quickly, in response to an emergency before there is time to consider the full meaning and consequences of the adopted approach. Or a statute may be constitutionally flawed because the legislature paid insufficient attention to the constitutional issues or ascribed too little weight to the individual interests involved. We have an independent branch in the system, that is especially focused on individual rights and constitutional principles, to point out and correct those mistakes. The three branches have different, but entangled, competencies, which are brought to bear (in different but overlapping ways) on the same circumstances, policies, and acts. Further, the action of one branch, legislative, will impact the scope of legitimate power of the other, executive or judicial.<sup>313</sup> This is how a system of separated powers is meant to function.

In the United States, Congress has exercised its power in two ways, neither of which qualifies as pro-constitutional engagement. Congress passed the NDAA

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<sup>309</sup> See notes 187–194 *supra* and accompanying text.

<sup>310</sup> See *id.*

<sup>311</sup> See Kavanagh, *supra* note 24, at 187, 189–90 (“Although the control-order litigation concerning the right to liberty was important in reducing the number of hours of the overnight curfew, it was the further litigation concerning the compatibility of the control-order regime with the right to a fair trial under Article 6 that has the more far-reaching effect. ... The control-order decisions show how the constitutional constraints underpinning Convention rights can be brought to bear on primary legislation and executive decisions, even in the fraught area of national security, yet can do so in a subtle and undramatic way, thus obviating the need for a ‘strike down’ of primary legislation. Perhaps this subtlety, avoiding open confrontation between the judiciary and the executive or legislature, is one of the virtues of the British model of constitutionalism under the HRA.”).

<sup>312</sup> See e.g., T.R.S. Allan, *Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism*, 9 INT’L J. CON. L. 155, 158 (2011) (“Just as it is ‘one condition’ of sovereignty that Parliament cannot bind itself, so that successive Parliaments are free to make what laws they choose, the requirement of an authoritative judicial source for the interpretation of law is another such condition. The ‘sovereignty’ thereby affirmed, however, is plainly the sovereignty of the *Constitution* under which legislative supremacy is exercised.”).

<sup>313</sup> See generally Mark Elliott, *Judicial Power and the United Kingdom’s Changing Constitution, Paper No. 49*, UNIVERSITY OF CAMBRIDGE LEGAL STUDIES RESEARCH PAPER SERIES, 2 (2017) (“Notions of constitutional propriety are thus informed in the UK to a peculiar degree by accretions of understanding and consensus born of institutional practice and interaction. And if institutional practice changes, the question arises of whether that evidences a challenge to or a shift in the prevailing consensus.”).

2012, a fairly empty and purely ‘declarative’ act that does nothing to add substantive content or limits to the existing, executively defined, framework.<sup>314</sup> The other major Congressional activity has been the series of provisions attached to multiple appropriation bills limiting the executive’s authority to transfer detainees out of Guantanamo and to the United States.<sup>315</sup> The former merely seeks to solidify executive discretion and power; the latter forecloses some executive power, but in a way that does nothing to lessen the public law problem these powers present, and may even exacerbate the problem by foreclosing the executive’s power to transfer detainees.<sup>316</sup>

#### IV. Conclusion

On June 10, 2019, the U.S. Supreme Court denied certiorari in the case of Moath al-Alwi, a man detained at Guantanamo since 2002. Justice Breyer, dissenting from the denial of certiorari, articulated the consequences of the Court’s failure to take up the question of whether the continued and indefinite detention of someone under the armed conflict paradigm could still be justified under the Constitution.<sup>317</sup> There is a real chance, he wrote, that al-Alwi will “spend the rest of his life in detention based on his status as an enemy combatant a generation ago.”<sup>318</sup> The case presented an opportunity for the Court to provide some standards or draw some lines on the scope of executive authority to detain pursuant to the AUMF. The Court did not.<sup>319</sup> The D.C. Circuit, understanding the Supreme Court was unwilling to reengage with the Guantanamo cases, stepped in. Writing for the court, Judge Rao put an end to the nearly two-decade long debate of whether Guantanamo detainees are entitled to substantive constitutional protections.<sup>320</sup> The court held the detainees were not protected by the constitutional guarantee of due process, explicitly eliminating any substantive constitutional limits on executive

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<sup>314</sup> See David Feldman, *Legislation Which Bears No Law*, 37 STATUTE L. REV. 212, 214 (2016) (“Legislation which is non-law bearing hovers on the boundary between law, politics, and morality. . . . We may call legislation . . . ‘declaratory’ when it purports to say what the law is (often to hide or suppress a serious disagreement on the matter), ‘aspirational’ where it embodies a hope, and ‘politically rhetorical’ when it merely emphasizes that the political elite favours certain kinds of behaviour or a particular view on a contested issue.”).

<sup>315</sup> See, e.g., Supplemental Appropriations Act 2009, Pub L. No. 111-32, 123, § 14103(b) Stat. 1859, 1920 (2009); Consolidated Appropriations Act 2012, Pub. L. No. 112-74, § 511 125 Stat. 786, 833-36, (2011); Consolidated and Further Continuing Appropriations Act 2012, Pub. L. No. 112-55, 125, § 532 Stat. 553, 637-38, (2011).

<sup>316</sup> See Huq, *supra* note 228, at 503–04.

<sup>317</sup> See *Al-Alwi v. Trump*, 139 S.Ct. 1893, 1894 (2019) (cert denied).

<sup>318</sup> See *id.*

<sup>319</sup> See *id.* at 1893; see also *Al Helu*, 972 F.3d 120 (holding GTMO detainees have no due process rights, substantive or procedural); *Qassim v. Trump*, 927 F.3d 552 (D.C. Cir. 2019) (confronting the position (or assumption) within the jurisprudence of D.C. Circuit that the right to habeas review did not include the extension of due process rights to detainees at Guantanamo. While the DC Circuit did not address or settle the question of whether the due process protections apply and just what they would require in this context, the Court limited the holding in *Kiyemba* and rejected the argument that the Court had settled and removed all constitutional due process considerations in GTMO habeas litigation).

<sup>320</sup> See *Al Helu*, 972 F.3d at 120.

power.<sup>321</sup> The D.C. Circuit cited the institutional inaction of Congress and the Supreme Court as the basis for its holding.<sup>322</sup>

It is now over 17 years since the opening of Guantanamo Bay as a detention site in the *War on Terror*. U.S. courts, especially the Supreme Court, have yet to address some of the core constitutional issues raised by the executive practices at Guantanamo and beyond. The Authorization for the Use of Military Force (2001) and the NDAA 2012 continue to serve as the main legislative authorizations. Congress has taken no additional steps to clarify or limit the powers granted to the executive. The judiciary has failed to scrutinize the legal framework, instead deferring to executive decisions and standards. As we near the twenty-year anniversary of September 11th, it may be time to consider what form of judicial engagement may prompt better legislative engagement, thereby revitalizing the proper functioning of the separation of powers in the service of constitutional governance.

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<sup>321</sup> Subject to possible review and reversal by the DC Circuit sitting en banc.

<sup>322</sup> See *Al Hela*, 972 F.3d at 150 (“[N]either Congress nor the Supreme Court have suggested we should embellish further constitutional limits on the detention of terrorists abroad.”)