
Ab(ju)dication: How Procedure Defeats Civil Liberties in the “War on Terror”

Susan N. Herman*

Terrorism poses many kinds of challenges. One of the most wrenching is the question of how far we are willing to go in our quest for security. Will we sacrifice our ideals? What should we accept as the moral, constitutional, and international limitations on practices like detention, interrogation, and mass surveillance?

An equally compelling question under our constitutional structure is who will make these society-defining decisions. What should be the relative involvement of Congress, the President, and the courts?

In a series of historic cases, the Supreme Court undertook providing a check against antiterrorism detention policies designed by the executive branch to avoid judicial oversight. Many of these cases involved non-U.S. citizens held at the Guantánamo Bay detention camp.¹ The petitioner in *Hamdi v. Rumsfeld*² was a U.S. citizen detained within the United States.³ In the course of the decision, finding that Yaser Hamdi had a right to due process in connection with his detention, Justice Sandra Day O’Connor observed:

In so holding, we necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.⁴

Even a state of war, O’Connor said, would not be a “blank check for the President when it comes to the rights of the Nation’s citizens.”⁵

While the cases involving Guantánamo detainees did not declare that those detainees enjoyed all the constitutional rights of U.S. citizens, the Court did

* Centennial Professor of Law, Brooklyn Law School; President, American Civil Liberties Union. B.A. Barnard College, 1968; J.D. New York University, 1974. I would like to thank Rebecca Richman and Megan Bumb for their research assistance, and the *Suffolk University Law Review* for the invitation to deliver the 2016 Donahue Lecture. This article is an adaptation of that speech.

1. See generally *Boumediene v. Bush*, 550 U.S. 1301 (2007); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

2. 542 U.S. 507 (2004).

3. *Id.* at 510.

4. *Id.* at 535-36.

5. *Id.* at 536.

allow the detainees to bring habeas corpus claims in federal court to address issues about their detention.⁶

By way of contrast, in the many other areas where the “war on terror” has generated deprivations of life, liberty, and privacy, the Supreme Court and lower federal courts have utterly failed to provide a much needed check on governmental excesses, including practices like extraordinary rendition,⁷ the use of “enhanced interrogation techniques,”⁸ targeted killings,⁹ and dragnet surveillance policies.¹⁰ This stonewalling has prevailed even when U.S. citizens have been involved. The courts have hidden behind procedure on a number of grounds, including standing,¹¹ technical pleading rules,¹² the state secrets privilege,¹³ and limitations on the *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*¹⁴ cause of action,¹⁵ in refusing to hear the merits of challenges based on the Constitution, federal statutes, and international law.

These opinions are an embarrassment to the legal profession. Incalculable judicial resources are invested in providing elaborate, often arcane, explanations for why the court in question should not consider the merits of each case. Some courts offer multiple procedural defenses in multi-section opinions; others dispose of a case on one procedural ground while noting that other possible excuses remain in reserve. These excruciating exercises in procedure follow excruciating recitations of the plaintiff’s allegations: terrible accounts of the U.S. government’s involvement in kidnapping, torture, unconstitutional surveillance, targeted killings beyond any battlefield, and other secret operations.

The bottom line in case after case is that the courts have managed to absent themselves from even considering whether many highly questionable

6. See generally *Boumediene*, 550 U.S.; *Hamdan*, 548 U.S.; *Rasul*, 542 U.S. The involvement of the courts in overseeing detention of non-Americans turned out to be limited. See Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 389-90 (2010) (examining “marginal” effects of *Boumediene v. Bush*’s declaration of habeas jurisdiction for noncitizen Guantánamo detainees); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537 (2010) (discussing judicial remedies for wrongfully detained individuals).

7. See *infra* Part I.A.

8. See *id.*

9. See *infra* Part I.B.

10. See *infra* Part I.C.

11. See generally *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138 (2013); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010); *infra* Parts I.B-I.C.

12. See *Ashcroft v. Iqbal*, 556 U.S. 662, 663-65 (2009); *infra* Part II.B.1.

13. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc) (expounding state secrets doctrine), *cert. denied*, 563 U.S. 1002 (2011); *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007) (holding district court correctly applied state secrets privilege), *cert. denied*, 552 U.S. 947 (2007); *infra* Part I.A.

14. 403 U.S. 388 (1971).

15. See *Arar v. Ashcroft*, 585 F.3d 559, 571-77 (2d Cir. 2009) (en banc), *cert. denied*, 560 U.S. 978 (2010); *infra* Parts I.A.2, I.A.4, & I.B.

governmental policies and practices are illegal or unconstitutional. It is remarkable, for example, that although quite a few men have gone to U.S. courts with substantiated claims that they were subjected to extraordinary rendition and torture involving American officials, not a single one of these plaintiffs has received a hearing on the merits of his claim. The courts assume the truth of allegations of barbaric treatment for purposes of the opinion, and then close the procedural closet door on those allegations. Courts of appeals have been consistent in adopting this deflective posture even when American citizens have been involved.¹⁶

Taken individually, discussion of each of the doctrines in question may look like legal business as usual: causes of action are limited, officials may be immune from lawsuits, and pleading must be done according to rules. But when these doctrines are placed side by side, they form a virtually impenetrable barrier before the courthouse door. In some cases, the majority opinion authors have to work hard to stretch a preclusive doctrine to fit. These procrustean opinions are often vulnerable to criticism for interpreting a procedural doctrine too expansively in the particular case, in a category of cases, or in general.¹⁷ Not infrequently, dissenting judges, looking at the same precedents and arguments, are able to point to available paths around and through the procedural thicket. Choosing a broader interpretation of the state secrets privilege or the standing doctrine when a narrower view is available is a choice to circumscribe the role of the courts.

The combined effect of these procedural obstacles is to undermine our constitutional system of checks and balances. It is not just one plaintiff who is barred from litigating due to a declared lack of standing or an award of qualified immunity to a particular defendant. No one else can get past the procedural Maginot Line either, as the judges often recognize. The majority opinions in the cases discussed in this Article address each preclusive doctrine in turn and sometimes, at the end of the opinion, express regret that the combined effect of all of their doctrinal interpretation is to let injustice stand. And then these judges will rationalize their conclusions by announcing that the role of the courts in these areas should be limited. Tell the elected branches, they say, rather than the courts. Our hands are tied.

Congress and two post-9/11 Presidents, however, have shown little interest in providing any form of accountability or redress for victims of torture or targeted drones. Justice O'Connor was right in concluding that the politically

16. See *Meshal v. Higgenbotham*, 804 F.3d 417, 421-23, 427-29 (D.C. Cir. 2015) (dismissing citizen's complaint alleging torture with Federal Bureau of Investigation (FBI) involvement), *reh'g en banc denied*, No. 14-5194, 2016 BL 29006 (D.C. Cir. Feb. 2, 2016), *petition for cert. filed*, 84 U.S.L.W. 3675 (U.S. May 31, 2016) (No. 15-1461); *Doe v. Rumsfeld*, 683 F.3d 390, 394-97 (D.C. Cir. 2012) (dismissing citizen's complaint alleging torture with American military involvement).

17. See Richard H. Fallon Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1062-63 (2015); *infra* Parts I.A-C.

insulated courts are indispensable in these important national debates. No judicial review in this area generally means no meaningful review at all.

I. AB(JU)DICATION IN THE LOWER COURTS

A. *Extraordinary Rendition and Torture*

The term “extraordinary rendition” refers to clandestine abduction and detention outside the United States of people suspected of involvement in terrorism, who are then interrogated using methods impermissible under U.S. and international laws. Since the release of the Senate Intelligence Committee’s 2014 report on the Central Intelligence Agency (CIA) detention and interrogation program, it is implausible to contend that American officials were not connected with torture.¹⁸ The report found 119 instances of American involvement in extraordinary rendition and torture.¹⁹ Committee Chairwoman Dianne Feinstein’s report reached four major conclusions:

(1) The CIA’s “enhanced interrogation techniques” were not effective. (2) The CIA provided extensive inaccurate information about the operation of the program and its effectiveness to policymakers and the public. (3) The CIA’s management of the program was inadequate and deeply flawed. (4) The CIA program was far more brutal than the CIA represented to policymakers and the American public.²⁰

But even after the release of this report, none of the 119 victims of these practices, to my knowledge, has received any form of redress or apology. President Obama, who, at the very beginning of his first term, issued an Executive Order renouncing torture prospectively, also announced that he was turning the page and not looking back at what had happened before he took office.²¹ There were no investigations, no independent counsel appointments, no congressional hearings, and no apologies.²²

The victims who tried seeking redress in the courts all alleged that American agents—either with the CIA, FBI, or the military—improperly solicited, condoned, or participated in detention and interrogation methods they would

18. See S. REP. NO. 113-288 (2014).

19. See *id.* at 16 (detailing findings and conclusions of study of CIA detention and interrogation program).

20. See *id.* at 3-4, 8-13.

21. See Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009) (announcing Obama Administration’s position on past torture); see also Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L.J. 193, 193-95 (2010) (describing decisions not to prosecute government agents of Bush Administration who tortured detainees).

22. House of Representatives subcommittees held a hearing at which Maher Arar spoke via videoconference. See *Rendition to Torture: The Case of Maher Arar: Hearing Before the Subcomm. on Int’l Orgs., Human Rights, & Oversight of the Comm. on Foreign Affairs, & the Subcomm. on the Constitution, Civil Rights, and Civil Liberties on the Judiciary*, 110th Cong. 29-41 (2007), https://fas.org/irp/congress/2007_hr/arar.pdf [<https://perma.cc/2YXR-2JRU>] (documenting statement of Maher Arar). Neither the full House nor the Senate followed up on Arar’s case.

have been legally prohibited from using themselves. They argued that, at the least, the agents in these cases had substantial reasons for believing that a person being rendered to or questioned in another country was in danger of being subjected to torture. As in the Guantánamo cases, conduct outside the United States—and here involving foreign interrogators—provided an end run around accountability or liability under American law. Although the procedural excuses vary, the results in all of these attempts at litigation have been the same: case dismissed.

1. The Fourth Circuit—El-Masri and the State Secrets Privilege

On December 31, 2003, Macedonian authorities removed Khaled El-Masri, a German citizen of Lebanese descent, from a bus in Macedonia where he was on vacation, and detained him for twenty-three days.²³ From there, El-Masri alleges that CIA operatives flew him to a squalid CIA-run detention facility near Kabul, Afghanistan, where he was incarcerated incommunicado, bound, beaten, and harshly interrogated.²⁴ After four months, he was flown to a remote area of Albania and released.²⁵

There was enough evidence substantiating El-Masri's description of his nightmarish ordeal, including CIA involvement, that a draft report issued by the Council of Europe in June 2006 concluded that his account was substantially accurate.²⁶ There is also evidence that CIA officials knew at least as early as April that the detention of El-Masri was a mistake. The actual suspect wanted for questioning was another man with a similar name.²⁷

Although El-Masri's lawsuit named CIA Director George Tenet as the defendant, the United States intervened as a defendant and demanded that the court dismiss the lawsuit on the basis of the state secrets privilege.²⁸ This privilege posits that the government must have the ability to keep certain activities secret, for the sake of national security, among other reasons. If state secrets are involved, one Supreme Court precedent, *United States v. Reynolds*,²⁹ instructs the court to conduct the litigation in a manner that will avoid exposure of sensitive documents or pieces of evidence.³⁰ If the court concludes that it is not possible to conduct the trial in a manner that will preserve the secrets in question, a more extreme precedent, *Totten v. United States*,³¹ authorizes the court to dismiss the case outright, even if that means that an individual who has

23. See *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007).

24. See *id.*

25. See *id.*

26. See *id.* at 302.

27. See *El-Masri*, 479 F.3d at 300.

28. See *id.* at 299-300.

29. 345 U.S. 1 (1953).

30. See *id.* at 10-11.

31. 92 U.S. 105 (1875).

suffered grievous harm due to government misconduct will not be allowed to bring a lawsuit seeking redress.³²

In a 2007 opinion, the Fourth Circuit dismissed El-Masri's claim that his detention violated the Constitution and international norms on the ground that litigating the claim might compromise state secrets.³³ Ironically, *Reynolds*, the 1953 source of the state secrets privilege doctrine, involved a government cover-up rather than actual state secrets.³⁴ In that case, the Supreme Court ordered dismissal of three widows' wrongful death actions after the government had claimed that litigation about their husbands' deaths in an airplane crash would risk revealing military secrets.³⁵ But when the internal Air Force report on the incident was finally made public in 1996, it turned out that no military secrets had been involved. What was revealed was blatant government negligence: pilot error, prior government knowledge that engines of the type of plane involved tended to catch fire, a poor record of maintenance, and inadequate safety procedures.³⁶

It is not my goal in this Article to analyze the proper scope of the state secrets privilege (or other preclusive doctrines), or to suggest possible reform of its scope. Others have done that.³⁷ I will invite the reader to observe the Fourth Circuit's choice to spend most of its opinion finding its way to a dismissal rather than working harder to try to find a way for a trial to proceed in a manner that might have protected any legitimate secrets.

After constructing its state secrets doctrine barrier to litigation, the court concluded, "[w]e also reject El-Masri's view that we are obliged to jettison procedural restrictions—including the law of privilege—that might impede our ability to act as a check on the Executive."³⁸ The court did offer El-Masri an apology of sorts for refusing to hear his claim, acknowledging that he "suffers this reversal not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national

32. See *id.* at 106 (declaring plaintiff's "lips . . . for ever sealed respecting" matter at issue).

33. See *El-Masri v. United States*, 479 F.3d 296, 308-12 (4th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007).

34. See *Reynolds*, 345 U.S. at 3-5.

35. See *id.* at 11-12.

36. See generally BARRY SIEGEL, CLAIM OF PRIVILEGE (2008) (describing report and case at length).

37. See Victor Hansen, *Extraordinary Renditions and the State Secrets Privilege: Keeping Focus on the Task at Hand*, 33 N.C. J. INT'L L. & COM. REG. 629, 646 (2008) (criticizing result in *El-Masri v. United States*); D. A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429, 454 (2012) (critiquing extension of *Totten* bar in extraordinary rendition cases); Benjamin Bernstein, Comment, *Over Before It Even Began: Mohamed v. Jeppesen Dataplan and the Use of the State Secrets Privilege in Extraordinary Rendition Cases*, 34 FORDHAM INT'L L.J. 1400, 1403-09 (2011) (critiquing subsequent state secrets and extraordinary rendition case conflation of *Reynolds* privilege and *Totten* bar); Michael Q. Cannon, Note, *Mohamed v. Jeppesen Dataplan, Inc.: The Ninth Circuit Sends the Totten Bar Flying Away on the Jeppesen Airplane*, 2012 BYU L. REV. 407, 409 (2012) (critiquing expansive application of state secrets privilege in extraordinary rendition cases).

38. See *El-Masri*, 479 F.3d at 312.

security.”³⁹

As in *Reynolds*, the government’s shield in this case certainly covered up misconduct. It is less clear whether this decision contributed anything more to national security than the *Reynolds* decision did. The facts surrounding El-Masri’s case were widely known. There is no way for the public to tell what secrets, if any, the government might have been protecting beyond the embarrassment of its own conduct and its own mistake, or whether the litigation might have been conducted in a manner that would have respected those secrets appropriately. There was no dissent and no rehearing in the Fourth Circuit. The Supreme Court denied certiorari.⁴⁰

After this decision, El-Masri published an Op-Ed in the Los Angeles Times entitled, *I Am Not a State Secret*.⁴¹ “It seems” he said, “that the only place in the world where my case cannot be discussed is in a U.S. courtroom.”⁴² El-Masri has not received an apology.

2. *The Second Circuit – Arar and Bivens Special Factors*

Maher Arar, a dual citizen of Canada and Syria, was apprehended at the John F. Kennedy International Airport in September 2002 while he was waiting for a connecting flight home to Montreal after a vacation in Tunisia.⁴³ The FBI, having received what turned out to be erroneous information from Canadian authorities, apprehended and questioned him.⁴⁴ American immigration authorities concluded, from the misleading information, that Arar was a member of al Qaeda.⁴⁵ He was removed to Jordan and then to Syria despite his request to return to Canada or Switzerland.⁴⁶ In Syria, he was detained for ten months in an underground cell measuring six feet by three feet by seven feet high, and interrogated and allegedly tortured, under the direction of U.S. officials.⁴⁷

39. El-Masri v. United States, 479 F.3d 296, 313 (4th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007).

40. El-Masri v. United States, 552 U.S. 947 (2007) (mem.).

41. Khaled El-Masri, *I Am Not a State Secret*, L.A. TIMES (Mar. 3, 2007), <http://www.latimes.com/news/la-oe-elmasri3mar03-story.html> [<https://perma.cc/FAZ7-7SWN>].

42. *Id.*

The U.S. government does not deny that I was wrongfully kidnapped. . . . Above all, what I want from the lawsuit is a public acknowledgment from the U.S. government that I was innocent, a mistaken victim of its rendition program, and an apology for what I was forced to endure. Without this vindication, it has been impossible for me to return to a normal life.

Id.

43. See *Arar v. Ashcroft*, 585 F.3d 559, 565 (2d Cir. 2009) (en banc) (discussing circumstances of case), *cert. denied*, 560 U.S. 978 (2010).

44. See *id.* at 565-66.

45. See *id.* at 566.

46. See *id.* at 565-66.

47. See *Arar*, 585 F.3d at 566.

Arar raised claims under the Torture Victim Protection Act (TVPA) and also under the Fifth Amendment Due Process Clause (regarding his treatment while in the United States).⁴⁸ The Second Circuit Court of Appeals, sitting en banc, interpreted the TVPA as not covering Arar's claim.⁴⁹ The court went on to hold that Arar could not raise constitutional claims against the federal officials involved under the *Bivens* doctrine, which creates a cause of action for people to sue federal officials for violating their constitutional rights,⁵⁰ because "special factors" weighed against offering Arar a judicial forum.⁵¹ The Court's exposition of this prudential doctrine amounts to an elaborate show of deference to executive officials, and then to Congress, which is left to decide whether to specially invite the courts to play a role in evaluating the constitutionality of executive branch policies.⁵² In light of this resolution, the court noted that it had no need to reach the defendants' back-up claims of qualified immunity or the state secrets privilege.⁵³

The en banc court was divided seven to four on the *Bivens* issue.⁵⁴ The dissenters thought the majority could have chosen to afford a *Bivens* remedy to Arar and then allow Congress to decide whether to legislate to close that door, rather than closing the door and then leaving Congress to decide whether to open it—a classic burden of proof decision.⁵⁵ The dissent also charged that the majority was artificially dissecting Arar's claims to reach dismissal and double-counting "special factors" regarding secrecy and security, interests already protected by the state secrets privilege.⁵⁶ On the whole, the dissenters said, "[w]e fear that the majority is so bound and determined to declare categorically that there is no *Bivens* action in the present 'context,' that it unnecessarily makes dubious law."⁵⁷ The Supreme Court denied certiorari.⁵⁸

Arar's quest for accountability fared better in Canada, where a high-level Commission of Inquiry was appointed. In 2004, after exhaustively investigating the circumstances surrounding the case, the Commission published its report, comprising 1,195 pages over three volumes.⁵⁹ The

48. See *id.* at 567-69.

49. See *Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009) (en banc), *cert. denied*, 560 U.S. 978 (2010).

50. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 388 (1971).

51. See *Arar*, 585 F.3d at 573-81.

52. See *id.* at 581.

53. See *id.* at 563.

54. See *id.* at 596-605 (Sack, J., concurring in part and dissenting in part).

55. See *Arar v. Ashcroft*, 585 F.3d 559, 582-83 (2d Cir. 2009) (en banc) (Sack, J., concurring in part and dissenting in part), *cert. denied*, 560 U.S. 978 (2010); Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 764 (2012) (arguing *Bivens* remedy should be implied in absence of contrary congressional preference).

56. See *Arar*, 585 F.3d at 583, 605-10 (Sack, J., concurring in part and dissenting in part).

57. See *id.* at 583.

58. See *Arar v. Ashcroft*, 560 U.S. 978 (2010) (mem.).

59. See COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 311-69 (2006),

Commission concluded that serious mistakes had been made in the handling of Arar, analyzed how those mistakes had occurred, and made recommendations for reforms designed to prevent any such errors in the future.⁶⁰ As a result of this painstaking study, the Canadian government apologized to Arar, awarded him damages, and agreed to reform its systems as recommended by the Commission.⁶¹ The United States has not followed suit and has never apologized to Arar for his treatment.⁶²

3. *The Ninth Circuit—Mohamed, State Secrets, and the Obama Administration*

I will spare readers' sensitivities by not recounting the facts alleged by Ethiopian extraordinary rendition victim Binyam Mohamed and his fellow plaintiffs. The opinion recounts Mohamed's description of the torture he endured, which is even more gruesome than what El-Masri and Arar suffered.⁶³

Given the appellate courts' closed ranks in rejecting extraordinary rendition claims against government officials, Mohamed's attorneys decided to sue a private contractor, Jeppesen Dataplan, jocularly known as the "CIA's Travel Agent" because of its involvement in transporting torture victims.⁶⁴ But the United States intervened and asked the court to dismiss the complaint under the state secrets privilege.⁶⁵ The district court complied, a panel of the Ninth Circuit reversed, and the Court of Appeals for the Ninth Circuit granted a rehearing en banc.⁶⁶

Notably, government lawyers continued to rely on the state secrets privilege on appeal even after the administration changed hands following the election of Barack Obama.⁶⁷ The en banc Court of Appeals for the Ninth Circuit split six to five on the question of whether the state secrets privilege should preclude all litigation of these claims, with the dissenting judges emphasizing the fact that a large amount of the evidence proffered in the case was already publicly available.⁶⁸ The Supreme Court denied certiorari.⁶⁹

<http://publications.gc.ca/site/eng/295791/publication.html> [<https://perma.cc/3LE7-UL48>].

60. *See id.*

61. *See Prime Minister Releases Letter of Apology to Maher Arar*, VIVE LE CANADA (Jan. 27, 2007), <http://www.vivelecanada.ca/article/192154985-prime-minister-releases-letter-of-apology-to-maher-arar> [<https://perma.cc/2P2T-3ZSQ>].

62. *The Unfinished Case of Maher Arar*, N. Y. TIMES (Feb. 17, 2009), http://www.nytimes.com/2009/02/18/opinion/18wed2.html?_r=0.

63. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073-75 (9th Cir. 2010) (en banc) (describing Mohamed's allegations concerning his extraordinary rendition and torture), *cert. denied*, 563 U.S. 1002 (2011).

64. *See Jane Mayer, CIA's Travel Agent*, NEW YORKER (Oct. 30, 2006), <http://www.newyorker.com/magazine/2006/10/30/the-c-i-a-s-travel-agent> [<https://perma.cc/GXZ8-R8SJ>].

65. *See Mohamed*, 614 F.3d at 1076.

66. *See id.* at 1073.

67. *See id.* at 1077.

68. *See id.* at 1089. A considerable amount of this evidence is listed in an appendix to the opinion. *See id.* at 1102-31.

After declining to hear the case, the majority helpfully offered the plaintiffs some ideas for seeking remedies elsewhere. The executive branch, the court noted, was not prevented from “honoring the fundamental principles of justice.”⁷⁰ In addition, the court observed, Congress—“where the government’s power to remedy wrongs is ultimately reposed”—has the power to investigate alleged excesses, enact private bills, or enact remedial legislation authorizing courts to hear cases like this one.⁷¹ None of that has happened.

4. *The D.C. Circuit – Meshal (a U.S. Citizen) and Bivens*

Amir Meshal’s account of extraordinary rendition, detention, and interrogation differs from the three experiences above in several respects. First, Meshal was not actually tortured, although he was detained in deplorable conditions and threatened with torture and death.⁷² Second, Meshal is an American citizen. Like the non-citizens El-Masri and Arar, Meshal was released without being charged with any offense.⁷³ Third, the American officials allegedly involved in mistreating Meshal overseas in Kenya were not CIA agents, but employees of the FBI, the very agency whose employees the Court allowed to be sued in *Bivens*.⁷⁴

Nevertheless, the D.C. Circuit held that unless Congress affirmatively decides to legislate and create a new cause of action affording someone in Meshal’s position a judicial hearing, his claim is barred.⁷⁵ Analysis of “special factors” again led to the conclusion that a cause of action should not be available under *Bivens*.⁷⁶ Further, the circuit court reached this conclusion even though there was less cause to be concerned about the government’s foreign affairs interests, where domestic criminal law enforcement was involved rather than intelligence or military agents.⁷⁷ One member of the panel dissented.⁷⁸

69. See *Mohamed v. Jeppesen Dataplan, Inc.*, 563 U.S. 1002 (2011) (mem.).

70. *Id.* at 1091.

71. *Id.* at 1091-92 (citation omitted). Mohamed was subsequently sent to Guantánamo where he spent nearly five years. See *id.* at 1074.

72. See *Meshal v. Higgenbotham*, 804 F.3d 417, 418-19 (D.C. Cir. 2015), *reh’g en banc denied*, No. 14-5194, 2016 BL 29006 (D.C. Cir. Feb. 2, 2016), *petition for cert. filed*, 84 U.S.L.W. 3675 (U.S. May 31, 2016) (No. 15-1461).

73. See *id.* at 419-20.

74. See *id.* at 419.

75. See *id.* at 426-27.

76. See *Meshal*, 804 F.3d at 426-27.

77. See Patrick Gregory, *No Relief for Allegedly Tortured U.S. Citizen*, BLOOMBERG BNA (Oct. 27, 2015), <http://www.bna.com/no-relief-allegedly-n57982062793/> [<https://perma.cc/3FAE-V526>] (discussing case and quoting critiques of opinion’s breadth).

78. See *Meshal v. Higgenbotham*, 804 F.3d 417, 431 (D.C. Cir. 2015) (Pillard, J., dissenting) (noting, *inter alia*, viability of Meshal’s claim under *Bivens* if experience occurred within United States), *reh’g en banc denied*, No. 14-5194, 2016 BL 29006 (D.C. Cir. Feb. 2, 2016), *petition for cert. filed*, 84 U.S.L.W. 3675 (U.S. May 31, 2016) (No. 15-1461).

In earlier cases, the D.C. Circuit held that *Bivens* claims were unavailable to both non-citizens⁷⁹ and citizens⁸⁰ who wanted to bring lawsuits about the constitutionality or legality of their abusive treatment while in military detention in Afghanistan or Iraq. The opinions in cases alleging misconduct by the military read somewhat differently from those involving the CIA because the court can find additional “special factors” counseling against judicial review, arising out of the military context.⁸¹

A divided Seventh Circuit agreed that all such cases against military personnel should be dismissed, as did the Fourth Circuit; the Supreme Court denied certiorari in both cases.⁸² While some district court judges and individual appellate judges have disagreed, arguing that the courts do have a role to play in these cases, circuits have closed ranks, and the Supreme Court has closed its doors.

The lesson from these cases is that government officials can engage in kidnapping and torture, at least abroad, and if their victims sue, those officials can simply hide behind allegations of national security and foreign affairs interests. The courthouse doors will not look behind their shield.

5. *Salim v. Mitchell and the Psychologists*

The American Civil Liberties Union (ACLU) is currently representing three of the men named in the Senate torture report as victims of the CIA program of “enhanced interrogation techniques.” These techniques included prolonged sleep deprivation, nudity, starvation, beating, water dousing, and extreme forms of sensory deprivation routinely administered with the intention of breaking a detainee’s will. Two of these men, a Somalian citizen, Suleiman Abdullah Salim, and a Libyan citizen, Mohamed Ahmed Ben Soud, tell shocking tales of abduction, rendition, and torture.⁸³ In 2005, Ben Soud was rendered back to Libya, from which he had fled in 1991 because he feared persecution over his involvement with a group opposing Muammar Gaddafi’s dictatorship. He was

79. See *Ali v. Rumsfeld*, 649 F.3d 762, 764-65 (D.C. Cir. 2011) (dismissing claims by Afghani and Iraqi citizens). These citizens alleged abusive treatment in military detention facilities including the infamous Abu Ghraib. See *id.*

80. See *Doe v. Rumsfeld*, 683 F.3d 390, 391-92 (D.C. Cir. 2012) (dismissing U.S. citizen’s lawsuit against military for illegal and abusive detention).

81. See Katrina Carmichael, Note, *The Unconstitutional Torture of an American by the U.S. Military: Is There a Remedy Under Bivens?*, 29 GA. ST. U. L. REV. 1093, 1126-27 (2013) (arguing judicial obligation exists to hear such claims).

82. See *Vance v. Rumsfeld*, 701 F.3d 193, 195 (7th Cir. 2012) (en banc) (dismissing torture claims on basis of *Bivens* and revised pleading rules of *Iqbal*), *cert. denied*, 133 S. Ct. 2796 (2013) (mem.); *Lebron v. Rumsfeld*, 670 F.3d 540, 544 (4th Cir. 2012) (dismissing illegal and abusive detention claims on basis of *Bivens*), *cert. denied*, 132 S. Ct. 2751 (2012) (mem.).

83. See James Risen, *After Torture, Ex-Detainee Is Still a Captive of ‘the Darkness,’* N.Y. TIMES (Oct. 12, 2016), http://www.nytimes.com/2016/10/12/world/cia-torture-abuses-detainee.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=photo-spot-region®ion=top-news&WT.nav=top-news&_r=0 (recounting lasting impact of treatment on Salim).

imprisoned in Libya for five years and released only after Gaddafi was overthrown. The third man, Gul Rahman, cannot tell his own story because he died in a prison cell in Afghanistan while being subjected to “enhanced interrogation techniques.”⁸⁴ The most likely cause of death seems to have been hypothermia.⁸⁵

Instead of naming government officials as defendants, likely a futile gesture in light of the cases described above, the lawsuit targets James Elmer Mitchell and John “Bruce” Jessen, the psychologists who designed and sold the “learned helplessness” detention and interrogation program to the CIA.⁸⁶ Only the United States government can claim the state secrets privilege so that defense is not available to the psychologists. The plaintiffs’ lawyers specifically asked U.S. Attorney General Loretta Lynch not to interpose a state secrets privilege claim so that a court could finally evaluate the legality of Mitchell and Jessen’s protocol.⁸⁷ The government has not, as of this writing, raised a state secrets claim.

Nevertheless, these defendants seek to hide behind other procedural bars. Their motion to dismiss raises the stark argument that whatever torture has occurred should not be the subject of any lawsuits because of the political question doctrine.⁸⁸ Avoiding the twists and turns of the narrower procedural doctrines previously discussed, the political question argument frankly asserts, with no mask, that the courts have no business second guessing decisions made by the elected branches, even when those decisions involve the torture of innocent people. The district court denied the motion to dismiss and agreed to allow the parties to depose former CIA officials, John Rizzo and Jose Rodriguez.⁸⁹ The Ninth Circuit and the Supreme Court thus have another chance to decide whether or not the courts will play any role at all in maintaining our avowed principles opposing torture.

84. *See id.*

85. *See* Complaint & Demand for Jury Trial at 3, 72, *Salim v. Mitchell*, No. CV-15-0286-JLQ, 2016 WL 1717185 (E.D. Wash. Apr. 28, 2016) (No. 2:15-CV-286-JLQ).

86. *See* *Salim v. Mitchell*, No. CV-15-0286-JLQ, 2016 WL 1717185, at *3 (E.D. Wash. Apr. 28, 2016); S. REP. NO. 113-228, at 11 (2014) (reporting neither psychologist previously familiar with counterterrorism or interrogation techniques).

87. *See* Letter from Steven R. Shapiro, Legal Dir., Am. Civil Liberties Union, to Loretta Lynch, Att’y Gen., U.S. Dep’t of Justice (Nov. 5, 2015), https://www.aclu.org/sites/default/files/field_document/aclu_letter_to_lynch_on_cia_torture_lawsuit.pdf [<https://perma.cc/6Q56-TA4B>].

88. *See* Defendants’ Motion to Dismiss at 3-10, *Salim v. Mitchell*, No. CV-15-0286-JLQ, 2016 WL 1717185 (E.D. Wash. Apr. 28, 2016) (No. 2:15-CV-286-JLQ) (arguing lawsuit meets all requirements for political question defense). The defendants also claimed the case should be dismissed on the basis of derivative sovereign immunity. *Id.* at 6.

89. *See* *Salim*, No. 2016 WL 1717185, at *1; *see also* Steven M. Watt, *Historic Ruling Puts Justice Within Reach for CIA Torture Victims*, ACLU (Apr. 29, 2016), <https://www.aclu.org/blog/speak-freely/historic-ruling-puts-justice-within-reach-cia-torture-victims> [<https://perma.cc/B8QU-GAZQ>].

B. Targeted Killings

There is no way to tell how many people have been killed by targeted drone strikes outside of traditional battlefields. However, the numbers are significant.

Both the Bush and Obama Administrations were reluctant to release any information about this program at all. A number of Freedom of Information Act lawsuits sought to uncover more about the process of deciding who should be a target and the extent of collateral damage.⁹⁰ President Obama only recently admitted that such a program even exists, and now has offered some swan song transparency providing details about the program, including estimates of the number of innocent people killed.⁹¹ According to the Director of National Intelligence's (DNI) long-overdue summary, there have only been 473 strikes outside of Afghanistan, Iraq, and Syria—areas of “active hostility”—between January 20, 2009 and December 15, 2015.⁹² And during that time, the DNI reports that only 64-116 “non-combatants”—defined as “individuals who may not be made the object of attack under applicable international law”—have been killed.⁹³

The estimates in the Obama Administration's report, however, are dramatically different from the estimates of independent observers. The Bureau of Investigative Journalism,⁹⁴ for example, estimates that since 2004, at

90. See Complaint at 1, *ACLU v. U.S. Dep't of Justice*, No. 1:15-cv-01954-UA (S.D.N.Y. Mar. 16, 2016), <https://www.aclu.org/legal-document/aclu-v-doj-records-casualties-targeted-killing-program-foia-complaint> [<https://perma.cc/2B2V-C8MF>] [hereinafter Complaint No. 1:15-cv-01954-UA] (seeking release of records regarding target-killing program); Complaint at 1, *ACLU v. U.S. Dep't of Justice*, No. 12-CV-0794 (S.D.N.Y. Feb. 1, 2012), https://www.aclu.org/files/assets/tk_foia_complaint.pdf [<https://perma.cc/GSL3-UY8V>] (seeking release of records regarding targeted killings of American citizens); Amended Complaint for Injunctive Relief at 2, *ACLU v. U.S. Dep't of Justice*, 808 F.Supp. 2d 280 (D.D.C. 2011) (No. 1:10-cv-0436-RMC) (seeking release of records containing all information on drone use since 2001). Among other documents, the ACLU has sought the release of records regarding the legal basis for targeted killings, the standards used to evaluate the decision to use lethal force, measures of civilian and bystander casualties, and data (e.g., numbers, affiliation, identity) of those killed by the targeted killing program. See Complaint No. 1:15-cv-01954-UA, *supra*.

91. See Press Release, Office of the Press Sec'y, Remarks by the President at the Nat'l Def. Univ. (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [<https://perma.cc/SN49-Q9RU>] (discussing use of drones and transparency); Stephen Collinson, *Obama Confronts 'Cruel' Reality of His Drone War*, CNN (Apr. 24, 2015), <http://www.cnn.com/2015/04/23/politics/obama-drone-warren-weinstein-hostages/> [<https://perma.cc/8ZHE-E4RM>] (highlighting Obama's increased drone use); see also Brett Max Kaufman, *President Obama's New, Long-Promised Drone 'Transparency' Is Not Nearly Enough*, ACLU (July 1, 2016), <https://www.aclu.org/blog/speak-freely/president-obamas-new-long-promised-drone-transparency-not-nearly-enough> [<https://perma.cc/ZB5S-EL59>].

92. See *Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities*, DIRECTOR NAT'L INTELLIGENCE 1, <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNIRelaseCTStrikesOutsideAreasofActiveHostilities.PDF> (last visited Nov. 4, 2016) [<https://perma.cc/6WW6-N7LL>] [hereinafter Summary of U.S. Counterterrorism Strikes].

93. See *id.*

94. See *Covert Drone War*, BUREAU INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/category/projects/drones/> (last visited Nov. 4, 2016) [<https://perma.cc/L6YP-JMWA>] (compiling data about drone strikes).

least 2,499 people in Pakistan alone have been killed by CIA drone strikes, including hundreds of adult civilians (424-966) and children (172-207).⁹⁵ The DNI report “acknowledges” its figures differ from non-governmental organizations, suggesting that a possible reason for this discrepancy is the U.S. government’s “sensitive intelligence” about the “combatant” status of many individuals whom non-governmental organizations deem “non-combatants.”⁹⁶ The government defines a “combatant” as any “individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of U.S. national self-defense.”⁹⁷ It is the Obama Administration’s application of this definition and process for deciding who is a “combatant” that are controversial.

Like the unilateral executive decisions about detention that the Court disapproved in *Hamdi* and the Guantánamo cases, decisions about whom to target and when to strike are made wholly within the executive branch and out of the public view. Congress has neither debated whether to authorize such strikes nor exercised meaningful oversight. President Obama maintains that there is no reason to be concerned about the level of discretion being exercised unilaterally and in secret because he has promised to be careful and evidently hopes that his protocols will have enough inertia to bind or at least influence his successor.⁹⁸

One plaintiff has attempted to litigate the legality and constitutionality of this program. When the news media reported that an American citizen living in Yemen, Anwar Al-Aulaqi, had been put on the kill list, Anwar’s father, Nasser Al-Aulaqi, brought a lawsuit naming President Barack Obama as a defendant and seeking to enjoin the killing of his son.⁹⁹ Arguments that the targeted killing program violates provisions of the Constitution including the Due Process Clause, other American law, and international law were met with a barrage of procedural objections: standing, the political question doctrine, the Court’s exercise of its “equitable discretion,” the absence of a cause of action under the Alien Tort Statute, and the state secrets privilege.¹⁰⁰

The district court, in an eighty-three-page opinion, did not need to get beyond the first offering, and held that Nasser Al-Aulaqi did not have standing to bring the lawsuit.¹⁰¹ The judge was disturbed by Al-Aulaqi’s anti-American advocacy, but also by the government’s conduct and the breadth of the

95. See *Get the Data: Drone Wars*, BUREAU INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> (last visited Nov. 4, 2016) [<https://perma.cc/D8SK-MRXE>].

96. See Summary of U.S. Counterterrorism Strikes, *supra* note 92, at 2-3.

97. See *id.* at 1 n.a.

98. These decisions could be viewed as within the President’s discretion as Commander-in-Chief to decide how to conduct a war, if one accepts the idea that we are at war everywhere in the world.

99. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

100. See *id.*

101. See *id.* at 22-23 (concluding plaintiff did not meet requirements of third party or next friend standing).

government's anti-judicial review arguments: "How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?"¹⁰²

But procedure won the day. The judge held that Anwar Al-Aulaqi, could make legal or constitutional arguments only on his own behalf, and only if he submitted himself to the jurisdiction of an American court.¹⁰³ The complaint was dismissed in 2010. Nasser Al-Aulaqi did not appeal this decision. Subsequently, his son and another American, Samir Khan, were killed by a drone on September 30, 2011.¹⁰⁴ Anwar Al-Aulaqi's sixteen-year-old son, Abdulrahman, not knowing his father had died, went to look for him and was also killed by a drone in Yemen two weeks later.¹⁰⁵ Nasser Al-Aulaqi brought another lawsuit, this time against the Secretary of Defense, as the father of an intended victim and the grandfather of an unintended victim who was also an American citizen.¹⁰⁶

A different district judge declined to reject the case on the broad ground that it posed a political question, but did grant the government's motion to dismiss on the ground that "special factors" counseled against implying a *Bivens* remedy.¹⁰⁷ In light of D.C. Circuit precedent on the *Bivens* doctrine from rendition and torture cases, the court found it unnecessary to reach the backup defense of qualified immunity.

C. Surveillance

The standing doctrine also defeated numerous attempts to challenge the legality and constitutionality of controversial surveillance programs, including the unauthorized National Security Agency (NSA) surveillance programs revealed by a 2005 New York Times story.¹⁰⁸ The Sixth Circuit ruled that plaintiffs cannot establish sufficient injury to challenge a covert surveillance program unless they can show that they personally were subjected to covert surveillance.¹⁰⁹ The district court judge in the Michigan case found that the plaintiffs alleged sufficient injury to establish standing: several plaintiffs were

102. See *id.* at 8.

103. See *Al-Aulaqi*, 727 F. Supp. 2d at 17-20 (discussing Anwar Al-Aulaqi's potential standing in U.S. courts).

104. See Mark Mazzetti et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all>.

105. See *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 60 (D.D.C. 2014).

106. See generally *id.*

107. See *id.* at 74-80.

108. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html?_r=0.

109. See *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 687 (6th Cir. 2007).

criminal defense attorneys who could not interview potential defense witnesses over the telephone because they feared surveillance; others were authors and scholars whose wary sources in the Middle East had dried up.¹¹⁰ That district judge also dismissed the plaintiffs' allegations about the legality and constitutionality of a data-mining program on the basis of the state secrets privilege.¹¹¹

In 2011, a panel of the Second Circuit Court of Appeals finally broke ranks by ruling in *Amnesty International v. Clapper*¹¹² that plaintiffs who could show injuries like those described above could establish standing to challenge the legality and constitutionality of another expansive surveillance program, even without proof that they themselves had actually been under surveillance.¹¹³ A motion for rehearing en banc was denied, with half the judges on the court vigorously dissenting.¹¹⁴ The Supreme Court rushed into the breach, granted certiorari, and guaranteed dismissal by reversing the panel's ruling on standing.¹¹⁵

There is a sequel here too. After Edward Snowden's revelations about the magnitude of post-9/11 surveillance, the ACLU brought another lawsuit challenging the NSA's bulk collection of metadata. Because the ACLU itself was a client of Verizon Wireless, one of the companies required to turn over customer metadata, standing was not an issue. Finally freed from procedural chains, the Second Circuit ruled that the metadata program was illegal.¹¹⁶ Subsequently, Congress modified the underlying authority that had contributed to the ruling.¹¹⁷

II. SUPREME COURT GATEKEEPING

A. "Cert. denied"

The Supreme Court has a unique procedural move available to avoid issues it does not wish to decide: denying certiorari. In simply declining to hear a case, the Court does not need to offer a reason. While the Court did want to hear some issues about the detention of "enemy combatants" at Guantánamo and beyond, the Justices' willingness to consider whether the political branches

110. See *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 767 (E.D. Mich. 2006), *rev'd on other grounds*, 493 F.3d 644 (6th Cir. 2007).

111. See *id.* at 766 (elaborating reasoning for dismissal).

112. 638 F.3d 118 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1138 (2013).

113. See *id.* at 149-50 (declaring surveillance cases not subject to stricter law of standing than in other cases).

114. See *Amnesty Int'l v. Clapper*, 667 F.3d 163, 164 (2d Cir. 2011) (denying review en banc); see also *id.* at 172-73 (Raggi, J., dissenting) (objecting to denial of en banc review).

115. See *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1143 (2013).

116. See *ACLU v. Clapper*, 785 F.3d 787, 792 (2d Cir. 2015) (holding metadata program exceeded scope of congressional authorization).

117. See USA FREEDOM Act of 2015, H.R. 2048, 114th Cong. (2015).

have trampled on constitutional rights in their antiterrorism efforts has not extended to the other areas discussed above. These include extraordinary rendition and the use of “enhanced interrogation techniques,” governmental secrecy, and dragnet surveillance policies.

1. *Extraordinary Rendition*

The Court has denied certiorari in each case where extraordinary rendition plaintiffs have asked the Court to review lower court decisions sloughing off their claims as described above: German citizen Khaled El-Masri,¹¹⁸ Canadian citizen Maher Arar,¹¹⁹ and Ethiopian Binyam Mohamed and his co-plaintiffs.¹²⁰

2. *Pretextual Detentions*

When the Second Circuit ruled that the government could use the federal material witness statute to arrest and detain people who might have information relevant to terrorism investigations even where no trial was pending, the Court denied the certiorari petition of a man detained under this novel policy.¹²¹

3. *Secrecy*

The Court has routinely denied certiorari in antiterrorism-related cases involving governmental secrecy and lack of transparency.

a. *The Mosaic Theory*

The D.C. Circuit responded to a Freedom of Information Act (FOIA) lawsuit seeking government disclosure of the identities of people within the United States who were being detained in connection with antiterrorism activities by accepting the government’s “mosaic theory”: any bit of information about the government’s antiterrorism activities, no matter how small, might be helpful to our enemies because they might be able to combine that piece of information with other bits of information to figure out how to avoid detection.¹²² This controversially broad theory can provide the government with a justification for concealing all of its antiterrorism activities, including those that might be controversial if the public were aware of them and even patent governmental misconduct.¹²³ The Supreme Court declined to review the case and has not

118. *El-Masri v. United States*, 552 U.S. 947 (2007) (mem.).

119. *Arar v. Ashcroft*, 560 U.S. 978 (2010) (mem.).

120. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 U.S. 1002 (2011) (mem.).

121. *See United States v. Awadallah*, 349 F.3d 42, 45 (2d Cir. 2003), *cert. denied*, 543 U.S. 1056 (2005). The Court later granted certiorari in another case involving pretextual detention of a terrorism suspect under the material witness statute. *See infra* note 155 and accompanying text.

122. *See Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

123. *See* David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information*

considered whether the mosaic theory goes too far in defeating calls for greater transparency.

b. Closed Deportation Hearings

The Third Circuit approved the government's subsequently rescinded blanket policy of closing deportation hearings in "special interest" cases and thus barring the public and press from attending.¹²⁴ The cases covered by this policy involved deportees suspected of some link to terrorist activities, even if the evidence was slim or unreliable. The court's opinion slighted the idea that the First Amendment confers a right on the public and press to attend deportation proceedings.¹²⁵ Not having found a substantial constitutional counterbalance, the court readily accepted the government's contention that closing all such proceedings was appropriate because open proceedings might help our enemies to know who was being targeted for deportation—a version of the "mosaic theory."¹²⁶

The Supreme Court denied certiorari even though this Third Circuit opinion was in tension with an earlier Sixth Circuit opinion that interpreted the First Amendment right to open proceedings as encompassing an essential right to attend deportation hearings.¹²⁷ The Sixth Circuit's opinion, ruling in favor of the First Amendment claim, grandly declared, "[d]emocrac[y] die[s] behind closed doors."¹²⁸ Although the Supreme Court usually favors hearing cases involving a split between circuits, the Court avoided reviewing the differences of opinion between these two circuits about the proper application of the "experience and logic" test of *Richmond Newspapers, Inc. v. Virginia*.¹²⁹

c. Secret Docket Entries

Authorities arrested and detained a Florida man named Mohamed Kamel Bellahouel after discovering that he had been a waiter in a restaurant where several of the 9/11 hijackers had eaten a few weeks before the attacks.¹³⁰

Act, 115 YALE L.J. 628, 628 (2005) (arguing post-9/11 mosaic theory "susceptible to abuse"). Pozen notes that the theory "has been applied in ways that are unfalsifiable, in tension with the text and purpose of FOIA, and susceptible to abuse and overbreadth." *Id.*

124. See *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 204-05 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

125. See *id.*

126. See *id.* at 217-18.

127. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (holding open deportation proceeding presumptively required by First Amendment).

128. *Id.*

129. 448 U.S. 555 (1980). The two opinions were not completely conflicting, as the Sixth Circuit relied on the facts of the particular case before it in reaching its results. The circuits, however, certainly differed in their interpretation of First Amendment precedent.

130. See SUSAN N. HERMAN, *TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY* 199 (2011).

Bellahouel was released five months later, after testifying before a grand jury.¹³¹ While he was in custody as a material witness, he brought a habeas corpus petition to challenge the legality of his detention.¹³²

After his release, he discovered that all proceedings relating to his habeas corpus petition were not only sealed but completely invisible.¹³³ All court opinions were filed under seal, his case was not even listed on the court's docket, and all courtrooms where his case was proceeding were closed to the public and press.¹³⁴ Ironically, the Eleventh Circuit's argument in Bellahouel's First Amendment challenge to this level of hyper-secrecy was held in secret, and the court then issued a secret opinion.¹³⁵ The Supreme Court denied certiorari.¹³⁶

4. Surveillance

The Supreme Court also avoided early cases challenging the constitutionality of the government's post-9/11 surveillance powers. These included the Sixth Circuit's decision vacating—on the ground that none of the plaintiffs had standing—the 2006 Michigan opinion holding NSA surveillance unconstitutional.¹³⁷ They also included a 2010 ruling in the case of Brandon Mayfield, an Oregon lawyer mistakenly suspected of involvement in a Madrid train bombing, which considered the constitutionality of an important post-9/11 expansion of the Foreign Intelligence Surveillance Act (FISA).¹³⁸ The Oregon district court's conclusion that the provision in question was unconstitutional conflicted with an earlier decision of the Foreign Intelligence Surveillance Court of Review (FISCR) upholding this expansion of surveillance powers.¹³⁹

The Supreme Court had no need to deny certiorari in the earlier case because the FISCR is an *ex parte* court where only the government appears if it wishes to appeal a lower FISA court denial of surveillance authority.¹⁴⁰ The

131. *See id.*

132. *See id.*

133. *See id.* at 200-01.

134. *See* HERMAN, *supra* note 130, at 200.

135. *See id.*

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

137. *See* ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 781 (E.D. Mich. 2006), *rev'd*, 493 F.3d 648 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008).

138. *See* Mayfield v. United States, 599 F.3d 964, 966, 968 (9th Cir. 2010), *cert. denied*, 562 U.S. 1002 (2010). Although the district court found that Mayfield was a victim of unconstitutional surveillance, his case was vacated for procedural reasons: the government could not be compelled to disgorge the records relating to the Mayfield family's surveillance in light of the terms of a settlement Mayfield had reached with the government for his reckless detention. *See generally* U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FBI'S HANDLING OF THE BRANDON MAYFIELD CASE (2006), <https://www.oig.justice.gov/special/s0601/final.pdf> [<https://perma.cc/7H39-ZX4S>] (giving extensive account of Mayfield's saga).

139. *See In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) (holding amended version of FISA constitutional).

140. *See* Letter from the Honorable Reggie B. Walton, Presiding Judge, to the Honorable Patrick J. Leahy,

government won in the appellate court; there was no losing party because there was no party other than the government. Therefore, there was no one in a position to ask the Supreme Court to hear the case. The ACLU tried filing a motion to intervene in the case to be able to seek Supreme Court review, but the Supreme Court denied the motion to intervene, ending the case.¹⁴¹ In the later Mayfield case, there was an appellant, and so the Court had an actual certiorari petition to deny.

B. *Certiorari Granted*

There is another obvious principle of selection at work in the Supreme Court's docket of cases regarding antiterrorism strategies. The only cases in which the Court has granted certiorari have been those in which the government lost in the court below. In most of these cases, the Court reversed or vacated lower court rulings in favor of the plaintiffs, relying on procedural bars.

1. *Pleading Requirements*

In *Iqbal v. Hasty*,¹⁴² the plaintiff, who was arrested and detained at the Metropolitan Detention Center in Brooklyn (MDC) for an immigration violation during the fall of 2001, complained that he was subjected to punitive and abusive treatment because he was a Muslim.¹⁴³ A report by the Department of Justice Inspector General's Office previously concluded that the kinds of abusive practices alleged in the complaint, including physical and verbal abuse, had indeed been prevalent at the MDC.¹⁴⁴ The Second Circuit upheld the district court's decision to deny a motion to dismiss the complaint. But in *Ashcroft v. Iqbal*,¹⁴⁵ the five-to-four Court found that the complaint failed to meet federal pleading standards. The dissenters and commentators charged that the pleading standards had been augmented post hoc to defeat these claims.¹⁴⁶

Chairman, Comm. on the Judiciary, U.S. Senate (July 29, 2013), <https://www.leahy.senate.gov/imo/media/doc/Honorable%20Patrick%20J%20Leahy.pdf> [<https://perma.cc/25FA-DKJ4>].

141. See *ACLU v. United States*, 538 U.S. 920 (2003) (mem.).

142. 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

143. See *id.* at 147-48.

144. See U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GEN., SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (2003), <https://oig.justice.gov/special/0312/final.pdf> [<https://perma.cc/F3LU-QETA>].

145. 556 U.S. 662 (2009).

146. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823-24 (2010) (critiquing "gatekeeping regime" initiated by *Iqbal*); David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 122 (2010) (addressing new fact-finding role courts will play in motions to dismiss after *Iqbal*); Ruth Bader Ginsburg, Remarks for Second Circuit Judicial Conference, 2009 SUPREME CT.GOV (June 12, 2009), http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_06-12-09 [<https://perma.cc/SW8P-BCRA>] (maintaining Court "messed up the Federal Rules" in *Iqbal*).

Most recently, the Court granted certiorari to consider a later Second Circuit decision to allow claims to proceed that arose out of the Fall 2001 detentions.¹⁴⁷ The plaintiffs in *Turkmen v. Hasty*¹⁴⁸ had been seeking redress in the courts since 2002.¹⁴⁹ After the Supreme Court's 2009 decision in *Iqbal*, the plaintiffs amended their complaints¹⁵⁰ and in 2015, the Second Circuit ruled that some of their claims should not have been dismissed: they were sufficiently pleaded,¹⁵¹ a cause of action existed under *Bivens*,¹⁵² and the defendants could not claim qualified immunity as to all claims.¹⁵³ The Supreme Court granted certiorari to review these conclusions even though two Justices, Elena Kagan and Sonia Sotomayor, recused themselves.¹⁵⁴ Thus, as of the date certiorari was granted, October 11, 2016, only six Justices were available to hear the case.

2. *Qualified Immunity*

A ruling that qualified immunity protected Attorney General Ashcroft insulated his decision to use the material witness law as a pretext to incarcerate suspects over whom there was insufficient evidence to charge with an offense.¹⁵⁵

3. *Standing*

In the 2008 case, *Clapper v. Amnesty International*,¹⁵⁶ the Supreme Court chose to hear an appeal from a rare circuit court ruling that would have allowed a challenge to the legality and constitutionality of surveillance powers.¹⁵⁷ The Court reversed the Second Circuit's conclusion that the plaintiffs had standing, once again avoiding the merits of the claims.¹⁵⁸

147. See *Ashcroft v. Turkmen*, No. 15-1359, 2016 U.S. LEXIS 6272 (Oct. 11, 2016) (mem.); *Hasty v. Turkmen*, No. 15-1363, 2016 U.S. LEXIS 6273 (Oct. 11, 2016) (mem.); *Ziglar v. Turkmen*, No. 15-1358, 2016 U.S. LEXIS 6271 (Oct. 11, 2016) (mem.).

148. 789 F.3d 218 (2d Cir. 2015).

149. See *id.* at 224.

150. See *id.* at 225.

151. See *id.* at 233.

152. See *Turkmen*, 789 F.3d at 233-37.

153. See *id.* at 246-47.

154. See *Hasty v. Turkmen*, No. 15-1363, 2016 U.S. LEXIS 6273, at 1 (Oct. 11, 2016) (mem.).

155. See *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011). Another aspect of the lawsuit against the FBI agents involved was later settled. See *US Settles ACLU Lawsuit Challenging Post-9/11 Arrests of Muslim Men*, ACLU (Jan. 16, 2015), <https://www.aclu.org/news/us-settles-aclu-lawsuit-challenging-post-911-arrests-muslim-men> [<https://perma.cc/VKR5-H42G>].

156. 133 S. Ct. 1138 (2013).

157. See *id.* at 1143, 1146.

158. See *id.* at 1143.

4. Procedural Ruling

Finally, in *Holder v. Humanitarian Law Project*,¹⁵⁹ the Court granted certiorari to redress a rare government loss on the merits in a circuit court and actually reviewed the merits of the claim: vagueness and First Amendment challenges to a USA PATRIOT Act provision criminalizing the provision of “expert advice or assistance” to terrorists.¹⁶⁰ The Humanitarian Law Project, a group of peace activists who worked with insurgent groups to utilize peaceful dispute resolution rather than violence, was concerned that this elastic category might expose them to prosecution for their antiterrorism activities.¹⁶¹

The Supreme Court, in a six-to-three ruling, held that the statute was not vague and could indeed cover even expert assistance of the type the respondents offered.¹⁶² The Court also held that prosecuting Humanitarian Law Project members for such activities would not violate the First Amendment’s guarantee of free association or free speech.¹⁶³ The majority chose deference to executive branch decisions about whom to prosecute over traditional First Amendment analysis.¹⁶⁴

IV. CONCLUSION

The fact that *Humanitarian Law Project*, the extraordinary case in which the Court did not take a procedural out, resulted in a decision blowing a hole in the First Amendment, raises a provocative question. Might it be better to have courts foul off claim—like a batter staying alive—rather than ruling on the merits and minimizing constitutional and other rights? If procedural avoidance is the only alternative to shredding the Constitution, might it seem the more desirable approach?

Justice Robert Jackson’s memorable dissenting opinion in *Korematsu v. United States*¹⁶⁵ suggests that avoidance of controversial issues is sometimes the Court’s better choice. He criticized the Court for endorsing the government’s claim that a purported national security measure is constitutional where he believed that the justices did not actually have sufficient expertise to evaluate the government’s justifications:

[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the

159. 561 U.S. 1 (2010).

160. *See id.* at 13-14.

161. *See id.* at 10-11.

162. *See id.* at 7-8.

163. *See Humanitarian Law Project*, 561 U.S. at 25-28.

164. *See id.* at 48 (Breyer, J., dissenting). It was unclear that Congress had actually intended the statute to be broad enough to cover such activities. *See id.*

165. 323 U.S. 214 (1944).

principle. . . . The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.¹⁶⁶

But the “war on terror” is very different from World War II, a traditional war that had a definite physical and temporal duration. Our post-9/11 regime of detention, surveillance, and targeted killing has been going on for fifteen years and currently shows no sign of abating. America’s reach is no longer limited by the geography of battlefields or national borders; our surveillance capabilities have increased exponentially; we cannot expect to negotiate an end to hostilities with terrorists. Nevertheless, our elected officials seem, for the most part, to have accepted wartime measures as our new normal.

As Justice O’Connor’s observations suggest, the alternative to a judicial remedy for deplorable conduct like torture and extra-legal killings seems to be no remedy at all. And if we do not acknowledge past misconduct, how can we realistically expect that such conduct will not continue or even worsen under future administrations?

166. *Id.* at 246 (Jackson, J., dissenting).