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"THE SLOW CREEP OF COMPLACENCY": ONGOING CHALLENGES FOR DEMOCRACIES SEEKING TO DETAIN TERRORISM SUSPECTS[1]

Maureen T. Duffy[2]

[1] *Quoting* Sec'y of State for the Home Dep't v. AF [2009] UKHL 28, ¶ 84 (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090610/af.pdf (Lord Hope of Craighead).

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ABSTRACT

This article assesses shifting presumptions by three democracies -- the United States, Canada, and the United Kingdom – all of whom appear to have permanently adopted some alterations to their detention practices for certain terrorism-related cases since the attacks of September 11, 2001 (hereinafter "9/11"). A review of executive, legislative and judicial outcomes in these three countries often reveals an ongoing tension between the judiciary and the other branches of government, with the judiciary frequently citing to traditional constitutional principles to reassert the primacy of individual liberties and fair trial guarantees. In spite of such rulings, however, the advance towards some system of preventive detention and abridged judicial process for terrorism suspects continues, in various forms, in each of these countries. It appears that this ongoing tension between some national high courts and political branches of government may be based, in part, on the judicial role of safeguarding constitutional protections, while the other branches have increasingly become reliant upon a form of discourse that may be at odds with those principles, and much of which was developed in a time of perceived emergency. The premises on which detention practices have been altered may not have been fully assessed in the years after 9/11 by those in policy-making positions. This ongoing tension and continuing uncertainty as to the status of certain constitutional protections may have larger implications for the viability of long-standing constitutional norms, as well as for larger criminal-justice standards, and those implications must be further examined before any such changes do, indeed, become permanent.

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I. INTRODUCTION: HASTILY IMPLEMENTED CHANGES AS PERMANENT SHIFTS

Injustice anywhere is a threat to justice everywhere.[3]

For many Americans, and indeed for many people around the world, the election of U.S. President Barack Obama seemed to initially raise the possibility of an end to the controversial detention and interrogation policies of the Bush Administration. When President Obama announced, as one of his first official actions as President, that he would be closing the infamous detention camp at Guantanamo Bay within one year, it seemed that this hope was being realized.[4]

In hindsight, however, it is clear that such promises were not so simple, and that, after years of evolving terrorism detention policies, it was not so obvious how to go back, or whether it was even possible or advisable to do so. While a given leader might or might not have made different decisions in the immediate aftermath of 9/11, those who assumed power in the following years were faced with the decisions that actually were made, and which had been institutionalized in many ways over a significant period of time. Measures implemented sometimes in haste after the terrorist attacks had been rendered permanent in many respects, and simple reversal of those policies does not appear to be an imminent possibility.[5]

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[3] Martin Luther King, Jr., Letter from Birmingham Jail (1963), *reprinted in* TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 289 (James Melvin Washington ed., 1986).

[4] Some changes were made regarding the detainees at Guantanamo Bay, but the goal of closing it within a year of President Obama's announcement was not met. *See infra* notes 9-16.

[5] *See generally* David Dyzenhaus, *The Permanence of the Temporary - Can Emergency Powers be Normalized?*, *in* THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL 21-37 (Ronald J. Daniels, Patrick Macklem & Kent Roach eds., Univ. of Toronto Press 2001) (arguing that, rather than attempting to tailor existing law based on emergency situations, democracies should declare a state of emergency when

Early in his administration, President Obama seemed to recognize that some haste went into initially implementing many of the anti-terrorism initiatives undertaken by the U.S. when he said:

> Unfortunately, faced with an uncertain threat, our government made a series of hasty decisions. I believe that many of these decisions were motivated by a sincere desire to protect the American people. But I also believe that all too often our government made decisions based on fear rather than foresight; that all too often our government trimmed facts and evidence to fit ideological predispositions. Instead of strategically applying our power and our principles, too often we set those principles aside as luxuries that we could no longer afford. And during this season of fear, too many of us -- Democrats and Republicans, politicians, journalists, and citizens -- fell silent.[6]

Regardless of how it all came about, by the time President Obama took office, it was clear that many things originally considered as temporary, emergency measures had gained indicia of permanence, and the presumption appeared to be against moving any of the measures that had been put in place back towards the standards that existed before the attacks. For example, almost as soon as President Obama announced the plan to close Guantanamo Bay, a firestorm of controversy erupted within the U.S. Some of the dramatic claims included suggestions that terrorists were going to be released to the streets of U.S. cities, and there were ongoing claims by various political figures, including former Vice-President Richard Cheney, that the Obama Administration was weak on terrorism and placing Americans in danger.[7]

It is unclear if subsequent steps by the U.S. Government were in response to this criticism, but it became evident that the change in administration did not signal a significant break from the detention policies undertaken in the years after 9/11. Shortly after the inauguration, the

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necessary, and handle accordingly under procedures consistent with the rule of law); *see also* Bruce Ackerman, *Terrorism and the Constitutional Order*, 75 FORDHAM L. REV. 475, 477-78 (2006) (noting that "whatever new powers are conceded to the President in this metaphorical war [on terror] will be his forever").

[6] President Barack Obama, Remarks by the President on National Security (May 21, 2009) (transcript available in the National Archives), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

[7] *See, e.g.*, Michael D. Shear, *Cheney Says Current Policies Put More Americans at Risk*, WASH. POST, May 22, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/21/AR2009052104427.html (quoting Cheney's description of the Obama policies as "recklessness cloaked in righteousness").

Obama Administration took the official position that detainees at the Bagram detention center, in Afghanistan, were not entitled to seek *habeas corpus* relief in U.S. federal courts.[8] On examination of the individual cases of detainees at Guantanamo Bay, the Obama Administration began to publicly comment that, in some of the cases, neither trial nor release would be possible.

Although President Obama was highly critical of the Military Commissions during his campaign, in May 2009, he announced that they would continue to be used, with some revisions, in instances in which trials in U.S. courts were not "feasible."[9] In the interim, a number of the detainees had been released pursuant to orders of federal courts, which had been hearing *habeas corpus* claims as a result of the ruling of the U.S. Supreme Court in *Boumediene v. Bush*.[10]

On November 13, 2009, at the very moment that the symposium on National Security issues – from which this article arose -- was taking place at Pace University School of Law, the U.S. Departments of Justice and Defense announced plans for ten of the detainees at Guantanamo Bay. Five of them, they announced, would be tried in U.S. federal courts. Five others, they said, would be tried before the "reformed" Military Commissions at Guantanamo Bay.

In so announcing, Defense Secretary Robert Gates explained the de-

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[8] Nedra Pickler & Matt Apuzzo, *Obama Backs Bush: No Rights for Bagram Prisoners*, *reprinted at* INFOWARS, Feb. 21, 2009, http://www.infowars.com/obama-backs-bush-no-rights-for-bagram-prisoners (describing a Justice Department filing, advising the court that the new administration was taking the position, previously taken by the Bush Administration, that that detainees at the Bagram Airfield do not have the right to seek *habeas corpus* relief in U.S. courts).

[9] Andrea Prasow, *Falling Short: Justice in the New Military Commissions*, HUMAN RIGHTS WATCH, Dec. 8, 2009, *available at* http://www.hrw.org/en/news/2009/12/08/falling-short-justice-new-military-commissions; *see also* Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190 (2009); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454-55 (2009).

[10] Boumediene v. Bush, 128 S. Ct. 2229 (2008); *see, e.g.*, Boumediene v. Bush, No. 04-1166, Memorandum Order (2008) (federal order, pursuant to habeas corpus review, ordering that five of the six "Algerian group" members be released, including Lakhdar Boumediene, the named party in the U.S. Supreme Court decision); JENNIFER K. ELSEA, KENNETH R. THOMAS, & MICHAEL JOHN GARCIA, CONGRESSIONAL RESEARCH SERVICE, ENEMY COMBATANT DETAINEES: HABEAS CORPUS CHALLENGES IN FEDERAL COURT (2009), *available at* http://www.fas.org/sgp/crs/natsec/RL33180.pdf.

cisions, saying:

> For over two hundred years, our nation has relied on a faithful adherence to the rule of law to bring criminals to justice and provide accountability to victims. Once again we will ask our legal system to rise to that challenge, and I am confident it will answer the call with fairness and justice. . . . Bringing terrorists to justice is an integral part of our national security . . . . The reform of Military Commissions and today's announcement are important steps in that direction.[11]

Perhaps not surprisingly, there was immediate controversy about this decision, arising from those within the U.S. on both sides of the detention debate. Opponents of trials raised concerns about insensitivity in holding trials so close to the site of the World Trade Center attacks and suggested that it would not be safe to bring those accused within the borders of the United States, or that necessary security would be prohibitively expensive.[12] At the same time, those on the other side of the debate argued that, while it was laudable that some detainees were finally being brought before federal courts, the decision to try other detainees before the Military Commissions, even as reconstituted, was still of great concern in terms of legitimacy and procedural fairness.[13] One of the more controversial aspects of the announcement was the determination that Omar Khadr, a Canadian citizen who was initially captured when he was 15 years old, would be tried before a Military Commission.[14]

Adding to the controversy, it has been reported, as of the date of this article, that the panel President Obama created to assess the cases at Guantanamo Bay is recommending to him that, in relation to approximately 50 of the detainees, trials are not considered possible, and that

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[11] Department of Justice, Department of Defense, Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees: Decisions on Accused 9/11 Plotters, Alleged Mastermind of USS Cole Attack & Others (Nov. 13, 2009), *available at* http://www.justice.gov/opa/pr/20-09/November/09-ag-1224.html [hereinafter Guantanamo Announcement].

[12] As of the date of the writing of this article, it was unclear whether these trials would, indeed, take place in New York as initially announced. *See* Sunday Times, *White House backs away from 9/11 trial in Manhattan*, Jan. 30, 2010, *available at* http://sundaytimes.lk/100131/International/int_06.html; Pete Yost, Associated Press, Holder raises question on 9/11 death penalty, MIAMI HERALD, July 11, 2010 (noting that the notion of trying Khalid Shaik Mohammed in a U.S. federal court had "all but been abandoned.").

[13] Prasow, *supra* note 9.

[14] This case has been a source of considerable controversy in Canada, and has been the subject of two proceedings before the Supreme Court of Canada. See *infra* notes 55-91.

release is not feasible because the detainees are seen as too dangerous.[15] The net result is that, if the U.S. Government adopts the recommendations of the panel, these people could be considered permanent detainees, without any of them having even the prospect of any judicial proceeding first. It seems unnecessary to explain why this is a departure from traditional concepts of the rule of law and constitutional values within the U.S., and it signals that, early promises of change notwithstanding, the alterations in detention standards initiated under President Bush were not temporary measures, but, rather, in many ways, represent permanent, or at least very long-term, changes to the legal landscape within the U.S.

Through all of this, it is often simply assumed that pre-existing criminal standards for handling terrorism cases must be done away with in their entirety. It has frequently been argued that the events of 9/11 were historically so unprecedented that they required this building of a whole new legal structure to handle these cases, a contention that some academics continue to dispute:

> But over the past 230 years, the United States has endured two world wars, a lengthy cold war, waves of domestic terrorism, and a civil war that almost broke the nation apart, without passing legislation that would allow the state to detain people for extended periods based on a prediction of future dangerousness.[16]

Without any doubt, the changes since 9/11 in particular have been most prominent in the U.S., but they are certainly not confined there, and other liberal democracies also expressly responded to 9/11 with changes to their own detention standards. As has happened in the U.S., many of those countries have struggled in the following years with whether the

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[15] Peter Finn, *Justice Task Force Recommends About 50 Guantanamo Detainees Be Held Indefinitely*, WASH. POST, Jan. 22, 2010, *available at* http://www.washingtonpost.com/wpdyn/content/article/2010/01/21/AR2010012104936.html.

[16] Jennifer Daskal, *A New System of Preventive Detention? Let's Take a Deep Breath*, 40 CASE W. RES. J. INT'L L. 561, 562 (2009) (noting further that those actions that were undertaken in those emergency situations were invariably later "resoundingly repudiated as mistaken experiments that are contrary to the United States' commitment to due process and the rule of law."); *see also* Mark R. Shulman, *Review of Law and the Long War by Benjamin Wittes and Assessing Damage, Urging Action by the Eminent Jurists Panel on Terrorism, Counter-Terrorism, and Human Rights*, 103 Am. J. Int'l L. 808 (2009)(critiquing the contention that the 9/11 attacks and subsequent threats were so unprecedented as to require the building of a new detention regime).

changes in general are permissible and consistent with their values, and, if so, what the acceptable parameters of the changes should be. It is impossible to fully assess the impact of the post-9/11 measures without looking to international and domestic responses around the world.

This is an area of the law that provides challenges for many reasons. It changes at a consistent and rapid rate, making it difficult to stay current, certainly, but also creating questions for larger theoretical discussions surrounding anti-terrorism measures, since presumptions that arise from one scenario might be invalidated by later developments. It also requires a sophisticated understanding of international law, as well as of the actions of a range of different governments, taken within the context of their own distinct legal systems.

A collection of essays relating to anti-terrorism detentions around the world contains an articulate description of the multi-dimensional characteristic of this legal discipline:

> It is important that academics bring their critical and comparative insights to the global development of anti-terrorism law and policy. This will be a challenging task because anti-terrorism law crosses boundaries between states and between domestic, regional and international law. It also crosses traditional disciplinary boundaries between administrative, constitutional, criminal, immigration, military law and the laws of war. In addition, insights from a broad range of disciplines including history, international affairs, military studies, philosophy, religion and politics will assist in understanding the development of anti-terrorism law and policy.[17]

It is within this complex context that those in decision-making power are often called upon to make decisions quickly, with lives potentially at stake, so it may be understandable in many ways that the decisions that are made during a perceived emergency might not turn out, in the long run, to have been the most prudent. When the time allows, however, for a more careful consideration of the underpinnings of these changes, that consideration must be undertaken, and it does not appear that this has always happened in this arena. It appears, in fact, that certain questions involving presumptions and framing of the issues remain relevant, regardless of the factual permutations involved, and can be applied to raise questions about the validity of certain measures. Given the sometimes extreme variations liberal democracies have taken from their traditional and long-standing values of judicial fairness, these questions might pro-

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[17] GLOBAL ANTI-TERRORISM LAW AND POLICY 1 (Victor V. Ramraj, Michael Hor & Kent Roach eds., Cambridge Univ. Press 2005).

vide a meaningful way of providing a baseline approach to new questions that continually arise in this inconsistent and constantly changing area.

II. PRESUMPTIONS OF CHANGE AND THE TERRORISM DISCOURSE

> *Now, it is clear that the decline of a language must ultimately have political and economic causes: it is not due simply to the bad influence of this or that individual writer. But an effect can become a cause, reinforcing the original cause and producing the same effect in an intensified form, and so on indefinitely. A man may take to drink because he feels himself to be a failure, and then fail all the more completely because he drinks. It is rather the same thing that is happening to the English language. It becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts.*[18]

Those seeking to advance a certain approach have worked to control the public discourse surrounding these issues, and an entirely new vocabulary has emerged in relation to terrorism, particularly within the U.S. The war of words has, at times, related to fundamental and threshold issues – such as, is this new fight against terrorism actually a war, or is terrorism a criminal matter? More subtle terminology, perhaps not new, but new in the popular lexicon, has emerged, and terms like "extraordinary rendition," "enemy combatant," "enhanced interrogation techniques" and "waterboarding" have gained everyday familiarity. How an issue could be perceived has had a great deal to do with how governments responded, whether it was the specter of the imminent destruction of our way of life, and even our own personal safety, through a terrorist attack, or the equally stark predictions of the destruction of constitutional liberty principles brought about in a misguided and panicked response to the threat of terrorism.[19]

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[18] GEORGE ORWELL, Politics and the English Language, *in* A COLLECTION OF ESSAYS 156 (Harcourt Brace 1981) [hereinafter ORWELL].

[19] *See* LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM (Cynthia Brown ed., 2003); *see also Obama tries to change terrorism rhetoric*, MSNBC, Apr. 7, 2010, *available at* http://www.msnbc.msn.com/id/36220859/-ns/politics-white_house/ (providing an example of how conscious decisions are made as to the most effective rhetoric to use to accomplish a given end in this context).

The language used in the terrorism context often lacks a certain amount of nuance, instead involving issues characterized in stark, "either/or," terms.[20] In talking about whether to pass specific legislation, for instance, the framing of the issue may have been a key point in determining how the public, and often legislative bodies, would perceive the appropriate course to take. A common tendency, for instance, is for people to discuss the need to "balance" security against human rights, and this "balancing" notion is often accepted, with little questioning into whether these are, in fact, commensurable notions that must involve a trade-off.[21] It is simply assumed to be true and structures are then built on this assumption.

This approach appears, at times, to be in contrast with the approach taken by some national high courts, in which the actions taken are measured against the discourse of long-standing constitutional principles, rather than the somewhat newer semantics of recent public discourse. That constitutional discourse has, at times, seemed incompatible with the public discourse surrounding terrorism, and in many ways it appears to underpin the conflict often arising between the judiciary and public officials.[22]

Of course, the most obvious example of a way in which discourse can impact policies is seen through the designation of recent events as the "War on Terror" – a designation that, itself, is the product of this new

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[20] For similar examples of the polarized presentation of some of these issues, *see, e.g.*, NATIONAL SECURITY: OPPOSING VIEWPOINTS (David Haugen ed., 2007) (collecting issues from various people, with opposing perspectives presented on certain questions, including some relating to the limitations of civil rights in the name of national security); *see also* GLENN GREENWALD, A TRAGIC LEGACY: HOW A GOOD VS. EVIL MENTALITY DESTROYED THE BUSH PRESIDENCY 8, 14, 26-32 (2007).

[21] *See, e.g.*, Stuart Macdonald, *The Unbalanced Imagery of Antiterrorism Policy*, 18 CORNELL J.L. & PUB. POL'Y 519 (2009) (criticizing the traditional language characterizing a need for "balance" between national security interests and individual civil liberties); Gerd Oberleitner, *Porcupines in Love: The Intricate Convergence of Human Rights and Human Security*, 6 EUR. HUM. RTS. L. REV. 588 (2005) (examining the asserted conflict between security and rights); *see also* A and Others v. United Kingdom, App. No. 3455/05, Eur. Ct. H.R. (2009) (expressly rejecting the UK Government's contention that the anti-terrorism provision at issue allowed the Government to "balance" state security versus an individual's right to personal liberty).

[22] *See generally* TIMOTHY LYNCH, DOUBLESPEAK AND THE WAR ON TERRORISM, (2006), *available at* http://www.cato.org/pubs/bp/bp98.pdf (citing GEORGE ORWELL, *Politics and the English Language*, *in* A COLLECTION OF ESSAYS 156 (1981)); WILLIAM LUTZ, THE NEW DOUBLESPEAK: WHY NO ONE KNOWS WHAT ANYONE'S SAYING ANYMORE (1996) (describing this phenomenon dating well before the 9/11 attacks); RICHARD JACKSON, WRITING THE WAR ON TERRORISM (2005).

vocabulary and of terminology that was formally abandoned when the U.S. Governmental Administration changed.[23] While abandoning the war terminology, however, the new U.S. administration has not entirely abandoned the structures that were created under that discourse. A terrorism suspect might now be classified as an "enemy combatant," or as a criminal defendant, for essentially the same conduct, and the designation chosen is dispositive in determining the judicial process the person can expect to receive.[24] If the same person were to be characterized as a suspect in criminal activity, holding the person indefinitely with no judicial process would seem unimaginable.[25] Somehow, though, through an ongoing public discourse, doing so has become accepted when the detainee

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[23] *Clinton: New Team not Using "War on Terror" Term*, U.S.A. TODAY, Mar. 30, 2009, *available at* http://www.usatoday.com/news/washington/2009-03-30-global-war_N.htm.

[24] Many of the cases at Guantanamo Bay, for instance, raise this inference. While some detainees were arrested on battlefields in Afghanistan and Iraq, others were not. In the case of the "Algerian Six," for example, six men who were either citizens or residents of Bosnia and Herzegovina were arrested by U.S. forces in Bosnia and Herzegovina, shortly after a court in that country had cleared them of any connection with a plot to bomb the U.S. Embassy in Sarajevo. They were held at Guantanamo Bay for several years, and one of the men, Lakhdar Boumediene, became the named party for the *Boumediene v. Bush* decision in the U.S. Supreme Court. Throughout their captivity, the U.S. Government had claimed they were being held on suspicion of plotting to bomb the U.S. Embassy, a claim later abandoned in favor of more vague claims that they had provided assistance to Al Qaeda. After the *Boumediene* decision granted *habeas corpus* rights to Guantanamo Bay detainees, five of the six men were ordered released by a U.S. federal judge. *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008); *see also* Boumediene v. Bush, No. 04-1166, Memorandum Order (2008); Pardiss Kebriaei, Citizens Betrayed: Algerian group v. BiH, Nov. 19, 2007, *available at* www.pulsdemokratije.net/index.php?id=576&l=en (explaining the procedural history of the six members of the so-called "Algerian Group" or "Algerian Six") [hereinafter Kebriaei].

[25] *See generally* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (delineating the parameters relating to terrorism detentions as to what has been categorized under a military detention model, and what remains under the criminal justice model); RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, HUMAN RIGHTS FIRST (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf; RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS: 2009 UPDATE AND RECENT DEVELOPMENTS (2009), *available at* http://www.human-rightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf (providing a compelling and detailed case for the effectiveness of the U.S. criminal justice system in addressing terrorism cases).

is suspected of terrorism involvement, and sometimes all that seems to have been required was for a government to attach this onerous-sounding label to the person.[26] The importance of the language used cannot be overstated, as it paints the picture under which various actions are then set forth as justified. As Orwell pointed out, language can be the impetus for bringing about a change in societal values, as well as being a reflection of cultural changes that have already taken place, with both components creating an endless loop.[27]

As time passes, it appears that certain notions have become so embedded in the discourse that they cannot now be dispelled, and that a fundamental shift has taken place in certain traditional cultural values. The 9/11 attacks caused a ripple effect throughout many liberal democracies, under which "the soft and facilitating state was replaced by a strong and intrusive state, and the categorical gap between rights-based democracies and authoritarian polities narrowed worryingly under a declared open-ended state of emergency and the so called 'war on terror.'"[28] This dramatic shift in principles once deemed foundational appears to have created a lack of underlying stability in certain elements of democratic governance, described by one author as "democracy without moorings."[29] The larger impact of these changes makes fundamental underlying questions that much more critical. Questions emerge in relation to these changes that go well beyond positivistic analyses of whether the changes fit into existing formal legal mandates, but instead go to larger issues of whether the changes can be sustained as a matter of logic and consistent with proclaimed values.

A. Using the Discourse to Create Presumptions

It is notable that, as a very general matter, presumptions tend to be in favor of the *status quo*. Generally speaking, many of the objections to the alterations in detention practices shortly after 9/11 were based on the presumption that the pre-existing legal structures were adequate to address any threat of terrorism, and also that pre-existing constitutional

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[26] It is notable that this "combatant" terminology is largely used by the United States as its war paradigm for addressing terrorism cases.

[27] *See* ORWELL, *supra* note 18.

[28] Dora Kostakopoulou, *How to do Things With Security Post 9/11*, 28 OXFORD J. LEGAL STUD. 317 (2008) (describing the discourse of security particularly with relation to the United Kingdom).

[29] *Id.*

standards were inviolable, at least absent a compelling and individualized showing of necessity. Opponents of many of the altered standards implemented after 9/11 suggested that, before implementing any changes, governments had the burden of proving that the changes were necessary and permissible. It appears now that the passage of years has created the same *status quo* presumption in terms of the alterations. Take, for instance, Robert Gates's comment about the Military Commissions, quoted above, in which he describes the beginning of trials for some, but not all, detainees, and the reconstituting of the Military Commissions as a "step in the right direction."[30] The question arises as to what direction they deem themselves to be walking in, and what the starting point is for the walk. If the starting point is long-standing constitutional values, then rather than a step in the right direction, such changes might be viewed as just less of a deviation from acceptable norms, but a deviation nonetheless. If the starting point is the alteration, which now enjoys the presumption of validity, then any step away from that point is described as a positive change, rather than simply a less negative state of affairs. The point at which the discussion begins, and the presumption regarding the *status quo*, make a significant difference as to the perception of the validity of a given measure.

The power of presumptions and burdens of proof is well documented in legal discourse, which is why the presumption of innocence for criminal defendants is so powerful, and why the burden of proof in such cases is generally placed on the State. In allowing these emergency detention standards to be so quickly implemented, and then to take root, governments may have created a situation in which the presumption favors these hastily created structures, rather than favoring the pre-existing constitutional structures relating to the detentions of those suspected of terrorism or other offenses. This, if true, is a significant underlying component of many national anti-terrorism initiatives, and raises questions as to whether these new presumptions impact other criminal proceedings, as well as to whether, with the presumption shifted away from constitutional norms, those constitutional principles have been diminished.

Clearly, detention standards for terrorism suspects have evolved

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[30] Guantanamo Announcement, *supra* note 11.

since the early days after 9/11, but what remains is that, for certain detainees, a presumption of guilt still attaches, and a presumption exists that the person should be detained, unless that person can demonstrate otherwise. Moreover, a culture allowing for preventive detention of future terrorists has arisen. The niche of "terrorism" has created in the minds of many a seemingly permanent state of exception, so people who might question certain governmental actions in other contexts are more muted where terrorism is at issue. While one might justify not vigorously questioning this shift in the early days after the attacks, when a sense of immediate danger may have attached, it is much more difficult to justify allowing it to continue many years after the attacks, when an environment of greater calm should prevail. The changes implemented to this end tend to be rather generalized, rather than narrowly tailored to address one expressly identified threat, and the correlation between the detention practices implemented and an effective response to terrorism is not always clear.[31]

Terrorism has in many ways stepped out of its traditional place in national criminal justice systems, and the policy of punishment for past crimes has become blurred with a more general sense that detention is now necessary for prevention of future crimes. Moreover, in relation to alleged past acts of terrorism, national security concerns became increasingly cited as a basis for side-stepping traditional criminal proceedings, and for altering the process afforded those accused. Instead, the safety-liberty intersection is treated as a balance of commensurable and diametrically opposing elements.[32] The argument is made that detention prac-

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[31] *See* Michael P. Scharf & Gwen Gillespie, *Foreword: Security Detention*, 40 CASE W. RES. J. INT'L L. 315 (2009) (noting "[a]lthough western democracies such as Canada, the United Kingdom, and the United States, justify the minimal procedural protections on grounds of national security, these same governments rarely offer more than a cursory explanation as to why a given detainee constitutes such a threat.").

[32] There are scholars who question whether these two factors are automatically the antithesis of each other, but such questions tend not to be extensively examined in the jurisprudence and legislative enactments undertaken regarding these issues, nor in the more theoretical writings on this topic. For an example of one work questioning the commensurability of "security" versus "liberty," *see* DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (2007). For an example of an approach that begins with an acceptance of the "balance" notion, although arguing in favour of protection of individual liberties, *see* MARK SIDEL, MORE SECURE, LESS FREE?--ANTITERRORISM POLICY AND CIVIL LIBERTIES AFTER SEPTEMBER 11 (2004). The issue of commensurability is introduced here simply to raise the question of whether this acceptance of the "balance" of these two factors has played a major role in a shift towards a more state-centric, and less individual-oriented, model of criminal procedure. For an

tices may be altered in a way that circumvents traditional notions of due process, if that circumvention can be claimed to reduce the risk of a terrorist attack, then the rather general and often simplistic statement of "necessity" is frequently the extent to which such "balancing" is justified.

Some simply concede that this shift in presumptions has occurred, and that it is inevitable that prevention detention and altered judicial process will be permanent structures of terrorism detentions going forward. The Brookings Institution, for example, released a report in 2009, relating to the "incapacitation" of terrorism suspects, which suggests that there is a "consensus" that at least some of these altered detention practices must be accepted as permanent.[33]

It is most likely because of the judiciary's role in safeguarding constitutional principles that, in a number of countries, national high courts have sometimes emerged as the strongest voice in favor of civil liberties, and sometimes as the ongoing lone voice where the advance away from individual-rights dominance otherwise continues unabated. Listening to the voices of some of these judicial bodies makes it clear that, unlike the fatalistic acceptance by so many that there is a consensus that constitutional protections of individual rights must give way to national security concerns, those charged with safeguarding constitutional protections do not always concede this point.[34] For example, in a ruling of the UK

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overview of commensurability and its history in the analysis of law, *see generally* Jeanne L. Schroeder, *Apples and Oranges: The Commensurability Debate in Legal Scholarship*, (Cardozo Law Sch., Pub. Law, Paper No. 48, 2002), *available at* http://ssrn.com/abstract=326821.

[33] BENJAMIN WITTES & COLLEEN A. PEPPARD, DESIGNING DETENTION: A MODEL LAW FOR TERRORIST INCAPACITATION (Governance Studies at Brookings 2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0626_detention_wittes/0626_detention_wittes.pdf.

[34] *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (finding significant portions of the Military Commissions Act of 2006, as it pertained to habeas corpus rights, to be unconstitutional. The Military Commissions Act had been enacted by the U.S. Congress and signed into law by U.S. President George W. Bush). Compare, however, the disposition concerning the same detainees before the European Court of Human Rights, which found the detainees' claim inadmissible, and thus accorded no fault in the alleged actions of the Bosnian Government, in spite of strong indications that they kidnapped the six detainees, often referred to as the "Algerian Six" and turned them over to U.S. custody, even after a Bosnian court had cleared the six of any wrongdoing. Boumediene et al. v. Bosnia and Herzegovina, 48 Eur. Ct. H.R. 163 (2008), 2008 WL 5683947 (it is un-

House of Lords, issued at about the same time that the Brookings Institution issued its report, Lord Hope lambasted the government's use of secret evidence in certain terrorism actions, warning:

> The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be most dangerous out of circulation for as long as possible. But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him.[35]

The debate over preventive detentions and abridged judicial proceedings for terrorism suspects is far from over, and yet it is increasingly clear that a certain complacency is seeping into the political discourse. This complacency is disturbing, given that long-standing constitutional protections have often been swept aside on a cursory analysis of the premises for doing so, and often without regard to the larger implications outside of the terrorism context. It is also disturbing, given the fact that many of the present anti-terrorism detention structures were built upon emergency measures implemented shortly after 9/11, which, again, were often built on certain presumptions that appear to be questionable.

B. The Presumption of "The Other" as the More Likely Terrorist

Although a number of underlying presumptions might be identified as having fueled the initial anti-terrorism responses of national governments, perhaps the most prominent one, and the one that will be assessed in this article, is the notion of "the Other." Although this concept has considerable theoretical underpinning, put in its most simple form, it involves classifying a particular group with characteristics, beginning with aspects of the group that differ from those of one's own group.[36] National origin, religion, race, gender, and citizenship provide the most easy and obvious mechanisms under which people are seen as "the Other,"

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clear, however, how much of the ECHR's ruling was influenced by the rather unusual procedural posture of this case in the U.S., since the U.S. Supreme Court had already ruled relating to these particular detainees, and, as a result, *habeas* petitions were pending before the federal court in the U.S. This posture may have influenced the ECHR's conclusion that the detainees were receiving adequate process through proceedings in the U.S.).

[35] Sec'y of State for the Home Dep't. v. AF [2009] UKHL 28, ¶ 84 (U.K.).

[36] *See. e.g.*, EDWARD SAID, ORIENTALISM (1978).

and this one-dimensional way of viewing certain groups makes it much easier to view those groups as different, and to thus attribute characteristics to the group as a whole.

In the case of the post-9/11 responses, an obvious and widespread example of this phenomenon seems to have related to citizenship. It is apparent from a number of the national responses to the attacks that there was an underlying presumption that non-citizens of a given country were more likely than citizens to be terrorists. It is not uncommon for national governments, when faced with perceived threats, to tighten their borders and to view non-citizens with some suspicion.[37] That the horrors of 9/11 were allegedly committed by 19 men, who were not citizens of the U.S., and who claimed to act in the name of Islam, likely had a heavy role in shaping the form of the response. After 9/11, a number of governments expressly instituted security measures that applied only to non-citizens, or enhanced the use of such existing structures. The forms varied, and some of the governments that implemented this initial response have since modified their approaches.[38]

While the U.S. model has been heavily characterized by the "war versus crime" debates, a major aspect of the post-9/11 approach to terrorism also involved use of the immigration system. Measures included tightening security at U.S. Borders, round-ups of "special-interest" detainees who were specifically identified as men from particular, largely Muslim, countries, and interrogation and sometimes controversial "renditions" of people passing through U.S. ports of entry, all under an apparent assumption that the immigration system could legitimately be used as a primary anti-terrorism tool.[39] In places like Canada and the UK, there

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[37] *See, e.g.*, DAVID COLE, ENEMY ALIENS 85 (2003) (discussing at length the U.S. post-9/11 responses involving non-citizens, and analyzing historical precedent for similar panics against non-citizens) [hereinafter COLE, ENEMY ALIENS].

[38] *See, e.g.*, Dominic McGoldrick, *Security Detention: United Kingdom Practice*, 40 CASE W. RES. J. INT'L L. 507 (2009) (explaining the genesis of the current system of control orders in the UK, instituted after the Government abandoned a practice of relying on its immigration system as a primary anti-terrorism tool).

[39] COLE, ENEMY ALIENS, *supra* note 37; *see also* Hon. Paul H. McConnell, *Military Commissions and the Global War on Terror: Due Process in a War-Fighting Paradigm*, 45 JUDGES' J. 18 (2006); Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255 (2006); Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1272-73 (2004) (stating that the U.S. Government had the

has also been an explicit trend towards securitizing the immigration system, and the immigration system, rather than the criminal-justice system, has been used in these countries at different times as a primary terrorism fighting tool.[40] The assumption appears to have been that the immigration system, initially designed as a tool for controlling entry, could replace the criminal-justice system as a primary system for addressing the threat of terrorism.[41]

The UK initially relied heavily on its own immigration system to detain those it suspected of terrorism, resulting in the House of Lords blasting the government for its treatment of foreign nationals in the landmark *Belmarsh Detainees* case. The Law Lords criticized the Government on issues of logic in its apparent assumption that non-nationals were more likely to be terrorists, and on more fundamental issues relating to cornerstone constitutional principles, arising from the UK's cherished common law tradition. Some of the most compelling language regarding individual liberties for terrorism suspects arose in this context, and it resulted in the Government abandoning its reliance on the immigration system in favor of a system of control orders that can be applied to citizens as well as non-citizens – a system that has been riddled with its own controversy.[42]

At issue was the status of 16 non-citizens, who were certified under immigration legislation and detained at London's Belmarsh prison. None of the detainees were charged with any criminal offense, and there was no apparent plan to hold any criminal trials.[43]

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appropriate option of electing to proceed under the immigration system in criminal matters, implying that the two systems are interchangeable, while critiquing the course followed by the U.S. Government).

[40] *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (revising various sections of the U.S. Code) ("USA Patriot Act") (subsequently revised and renewed); Immigration and Refugee Protection Act 2001 S.C., ch. 27 (Can.) (subsequently revised); Anti-terrorism, Crime and Security Act 2001, part 4 (U.K.) (subsequently revised).

[41] *See generally* U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS ch. 4 (2003), *available at* http://www.us-doj.gov/oig/special/0306/index.htm.

[42] *See* McGoldrick, *supra* note 38.

[43] John Ip, *National Security: Detention, War Powers, and Anti-Proliferation*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 773, 797 (2007); A (FC) and others (FC) v. Sec'y of State for the Home Dep't, [2004] UKHL 56 (U.K.) ¶ 2 [hereinafter Belmarsh Detainees].

The detainees argued that this detention scheme conflicted with the UK's obligations under the European Convention on Human Rights and with the Human Rights Act of 1998. They further argued that the UK was not legally entitled to derogate from these standards, and, that, even if such derogation were permissible, the specific nature of the derogation would still be impermissible, because the measures taken went beyond what was required to address any emergency.[44]

The Law Lords had different bases for their findings, but the decision stands out for the strong nature of language used to criticize immigration detentions in terrorism cases. For example, Lord Scott famously said:

> An individual who is detained . . . will be a person accused of no crime but a person whom the Secretary of State has certified that he "reasonably . . . suspects . . . is a terrorist". . . . The individual may then be detained in prison indefinitely. True it is that he can leave the United Kingdom if he elects to do so but the reality in many cases will be that the only country to which he is entitled to go will be a country where he is likely to undergo torture if he does go there. He can challenge before the SIAC the reasonableness of the Secretary of State's suspicion that he is a terrorist but has no right to know the grounds on which the Secretary of State has formed that suspicion. The grounds can be made known to a special advocate appointed to represent him but the special advocate may not inform him of the grounds and, therefore, cannot take instructions from him in refutation of the allegations made against him. Indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares, associated whether accurately or inaccurately with France before and during the Revolution, with Soviet Russia in the Stalinist era and now associated, as a result of section 23 of the 2001 Act, with the United Kingdom.[45]

Lord Hoffman was equally scathing in his critique. He clarified, however, that there were problems with the detention structure that went beyond the citizen/non-citizen distinction, and that this distinction was only one of several shortcomings with the scheme:

> I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to ex-

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[44] Belmarsh Detainees, [2004] UKHL 56.

[45] *Id.* ¶ 155 (internal citations omitted).

> tend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.[46]

The Lords also criticized the use of an immigration system to address a security matter on the basis of simple logic. Lord Scott in particular attacked the logic of restricting anti-terrorism measures to one group, even if arguments are set forth that more members of that group might be terrorists. He described such distinctions as "irrational and discriminatory," saying that some people not in the targeted groups could very well turn out to be terrorists as well.[47] Although the British Government subsequently eliminated the citizen/non-citizen distinction as a major component of terrorism detentions, it implemented a system of control orders that limit the movements of those suspected of terrorism, but apply to both citizens and non-citizens.[48]

Canada had occasion to examine a similar use of its own immigration legislation in relation to "security certificates," which are issued for those subject to the immigration system who are deemed inadmissible for national security reasons. The Supreme Court of Canada specifically cited the British system in finding that the prior system of security certificates was unconstitutional, primarily because the proceedings were established without proper access by the detainee to the evidence against him. The Canadian court found, unlike the House of Lords, that the scheme of detentions relating only to non-citizens was not discriminatory, distinguishing the legislation in the UK based on the fact that it allowed for indefinite detentions.[49] In so doing, the Canadian court dif-

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[46] *Id.* ¶ 97.

[47] *Id.* ¶ 158.

[48] Chris Johnston, *Hopes of Belmarsh Terror Detainees Dashed*, TIMES (U.K.), Jan. 26, 2005, *available at* http://www.timesonline.co.uk/article/0,,2-1457086_1,00.html.; *see also* Sec'y of State for the Home Dep't v. MB, [2007] UKHL 46, ¶¶ 34–40, 54, 60–77, 82–87 (U.K.); Sec'y of State for the Home Dep't v. JJ, [2007] UKHL 45, ¶ 56 (U.K).; Sec'y of State for the Home Dep't v. E, [2007] UKHL 47 (U.K) (rulings issued the same day, containing varying critiques); Sec'y of State for the Home Dep't. v. AF, [2009] UKHL 28.

[49] Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9, at ¶¶ 125-32 (Can.) [hereinafter Charkaoui]. For a discussion of the *Charkaoui* case, and the legislation passed in response to the ruling, see Maureen T. Duffy & René Provost, *Constitutional Canaries and the Elusive Quest to Legitimize Security Detentions*

fered from the express finding in the House of Lords that use of the immigration system as a whole was an invalid and discriminatory approach to terrorism detentions, so a law was passed, which was designed to address the concerns of the Supreme Court of Canada regarding evidence, and which was still based on the immigration system, and on the citizen/non-citizen distinction.[50] As an express selling point as the law was debated in Parliament, people were told that they had no reason to be concerned, because these controversial practices could not be used against Canadian citizens.[51] Several of the original detainees in Canada, however, have since had their security certificates quashed, and have been released, and the Canadian Government announced in late 2009 that it intends to re-examine the controversial system of security certificates.[52]

1. The "Other" to Whom?

The notion of "the Other," or that non-citizens are to be treated differently, is, not surprisingly, also evident in the war paradigm created within the U.S. after 9/11. The Military Order, for instance, under which President Bush first established the Military Commissions at Guantanamo Bay, specifically delineated that such proceedings could only be used

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in Canada, 40 CASE W. RES. J. INT'L L. 531 (2009).

[50] *See* Immigration and Refugee Protection Act, Part 1, Div. 9, § 83-87.1 (2008) (Can).

[51] Canadian Minister of Public Safety, the Hon. Stockwell Day, said, before the House of Commons in support of the proposed legislation,

> "I would encourage all colleagues to set aside partisanship to realize that the security certificates have been proven not to threaten the individual rights and freedoms of Canadians. As a matter of fact, the security certificate cannot even be applied against a Canadian citizen. It can only be used on foreign nationals or those who are not Canadian citizens."

142 39th Parl. Deb., H.C. 2nd Session, (2008) No. 041, at 1340, *available at* http://www2.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&-Doc=41&Language=E&Mo-de=1&Parl=39&Ses=2.

[52] *Government will review anti-terrorist law: Van Loan*, CBC NEWS, Dec. 13, 2009, *available at* http://www.cbc.ca/canada/story/2009/12/13/national-security-certificates-review.html; *see also* Cristin Schmitz, *Special advocates predict no more security certificates*, The Lawyers Weekly, July 16, 2010, *available at http://www.lawyersweekly.ca/index.php?section=article&volume=30&number=11&article=1*.

to try "certain non-citizens."[53]

In a traditional armed conflict, those taken prisoner would normally have citizenship of the country with whom the conflict has arisen, although there could be some exceptions to that. In the "War on Terror," however, this played out quite differently. It was reported at one point that nationals of at least 36 countries were detained at Guantanamo Bay, including the nationals of countries who were allies of the U.S. in various aspects of its War on Terror.[54]

The citizen/non-citizen distinction has thus created complex scenarios as some of these governments struggled to determine what their responsibilities were to their own nationals, and the way in which a person was processed and treated as a detainee of the U.S. as part of the War on Terror often depended heavily on the person's citizenship. In Canada, there has been considerable controversy over the case of Omar Khadr, who is a Canadian citizen and was 15 years old when he was captured and injured after a firefight in Afghanistan. He has been held at Guantanamo Bay for most of the time since his capture in 2002.

As a non-citizen of the U.S., Khadr is subject to trial by Military Commission under the standards laid out by the U.S. Government. As a citizen of Canada, it is perhaps ironic that, were he physically present in Canada, he would not be subject to the security certificates that have been so controversial in Canada.[55] Citizenship appears, in many cases, to be a bright-line rule in determining how a terrorism suspect will be

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[53] Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002).

[54] *See* ANDY WORTHINGTON, THE GUANTÁNAMO FILES: THE STORIES OF THE 774 DETAINEES IN AMERICA'S ILLEGAL PRISON (Pluto Press 2007). Although not examined in depth in this article, much controversy arose as well as to whether many of the people detained at Guantanamo Bay as "enemy combatants," were, in fact, "combatants" at all, or whether they were people arrested in what really amounted to criminal investigations. The cases of the "Algerian Group," provide an example of this phenomenon, as the six were arrested, not on a battlefield, but in Bosnia and Herzegovina, shortly after a court there had exonerated them of accusations of involvement in terrorism. The controversy surrounding Guantanamo Bay certainly goes well beyond the citizen/non-citizen distinction discussed herein. *See* Kebriaei, *supra* note 24 (explaining the background of the "Algerian Group").

[55] It cannot be assumed, however, that, were he present in Canada, he could not be sent to Guantanamo Bay, but he would, generally, have greater protection. In the case of the "Algerian Group," the six people were actually present in Bosnia and Herzegovina, the country of citizenship for some of them (and residency for the others), when U.S. officials, allegedly with the complicity of the Government of Bosnia and Herzegovina, arrested them and took them to Guantanamo Bay. *See* Kebriaei, *supra* note 24.

treated, and in some ways of even greater significance than the underlying alleged conduct of the person involved.[56]

Specific aspects of Khadr's detention at Guantanamo Bay have twice been the subject of proceedings before the Supreme Court of Canada, which is interesting, because he is a prisoner of the United States, not of Canada.[57] To demonstrate some of the complexities that can arise from this presumptive use of the "Other" to distinguish people based on citizenship, this section will describe the facts and rulings relating to Khadr.

In the first case, the Supreme Court of Canada ruled that the Canadian Security Intelligence Services agency ("CSIS") was required to turn over notes of an interview of Khadr, undertaken by its agents at Guantanamo Bay. The agents visited Khadr there, interviewed him, and then turned over the notes of the interview to the U.S. Government, but not to Khadr or his attorneys.[58] In ordering CSIS to turn over the information to Khadr's attorneys, the Supreme Court of Canada noted that, normally, the Canadian Charter of Rights and Freedoms (hereinafter "the Charter") is not deemed to apply to the actions of Canadian officials while outside of Canada. Where, however, "clear violations of international law and fundamental human rights begin," there is an exception to the principle of comity.[59]

The Supreme Court of Canada noted that it had to determine, then, whether there was such a violation. In the case of Guantanamo Bay, it noted that it was unnecessary for it to rule on the issue, because the Court

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[56] Some of the terminology in this instance is rather convoluted, since Khadr was captured as a combatant in Afghanistan, and designated as an "enemy combatant," which is the term the U.S. Government has frequently used since 9/11 to refer to those deemed to be affiliated with the Taliban or Al Qaeda, although the term has different meanings in different contexts, sometimes also interchanged with "unlawful combatants" or "unlawful enemy combatants.".Although captured as a combatant during a firefight, Khadr has been treated as an unlawful combatant, in essence, by the U.S. Government, and he has been denied the protections of the Geneva Conventions.

[57] In this section, the U.S. Supreme Court and the Supreme Court of Canada are both mentioned repeatedly. To avoid confusion, the short forms will not be used within this section, and the full name will be used to clarify to which court a specific reference applies.

[58] Canada (Justice) v. Khadr, [2008] 2 S.C.R. 125, 2008 SCC 28 (Can.) [hereinafter Khadr I].

[59] *Id.* ¶ 18 (quoting R. v. Hape, [2007] 2 S.C.R. 292, 2007 SCC 26, ¶¶ 51-52, 101).

could, instead, defer to prior rulings of the U.S. Supreme Court, which found that the proceedings at Guantanamo Bay improperly deprived the detainees of *habeas corpus* rights, and that they were subject to the Geneva Conventions of 1949.[60] The CSIS agents had interviewed Khadr at Guantanamo Bay before the rulings of the U.S. Supreme Court, and before the changes that were made in response to those rulings, so the Supreme Court of Canada determined that, as of the time of the interviews, Khadr's detention and the Military Commissions he faced were in violation of these principles. Thus, the Supreme Court of Canada noted,

> [t]he violations of human rights identified by the United States Supreme Court are sufficient to permit us to conclude that the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law.[61]

The Supreme Court of Canada explained that Canada is a signatory to the Geneva Conventions of 1949, which have been incorporated into Canadian law, and that *habeas corpus* is an inviolable right under both the Geneva Conventions and the Charter. Based on these violations, the Supreme Court of Canada concluded that there was "no question of deference to foreign law."[62] The remedy, the Supreme Court of Canada suggested, related to the extent of the participation in the process by Canadian officials, pointing out:

> The crux of that participation was providing information to U.S. authorities in relation to a process which is contrary to Canada's international human rights obligations. Thus, the scope of the disclosure obligation must be related to the information provided to U.S. authorities.[63]

The Supreme Court of Canada, noting that it did not have the full information before it to determine what information had been turned over to U.S. authorities, left it to the federal court to make that determination. The Canadian Government had attempted to argue that the disclosure duty related solely to disclosure from the U.S. authorities who were prosecuting him, and the Supreme Court of Canada expressly disagreed, noting that the remedy was for the breach, by Canadian officials, of Canada's international obligations, and that Khadr was entitled to that

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[60] *Id.* ¶¶ 21-26 (citing to Rasul v. Bush, 542 U.S. 466 (2004) and Hamdan v. Rumsfeld, 548 U.S. 557 (2006)).

[61] *Id.* ¶ 24.

[62] *Id.* ¶ 26.

[63] *Id.* ¶¶ 31-32.

remedy regardless of any disclosures from the U.S. Government.[64]

While the Supreme Court of Canada was careful to frame its rulings in deferential terms to the U.S. Supreme Court rulings relevant to the issue, it is still a rather unusual situation for a ruling to state that cooperation with a legal process instituted by the U.S. Government is a violation of Canada's international human rights obligations, and the legal complications caused by the citizenship distinction in many of these cases is well illustrated by Khadr's case.

The Khadr case, of course, is unusual even in the unusual world of Guantanamo detentions, in that he was 15 years old when he was captured. His attorneys had tried, unsuccessfully, to have him designated as a child soldier at Guantanamo Bay, and allegations, provided with substantiation, that the injured 15- year-old may have been tortured during his time in U.S. custody resulted in a strong public response in Canada.[65] The Canadian Government has officially taken the position that the U.S. legal process must run its course, and has resisted pressure to seek Khadr's repatriation to Canada. Some of this may stem from a reaction to Khadr's family, as they have some notoriety in Canada for having been affiliated with Al Qaeda.[66]

The tensions between those pressuring the Government to seek repatriation, and the Government's continued resistance to doing so, resulted in a second ruling on Khadr's situation by the Supreme Court of Canada. This second ruling, issued in late January 2010, again highlights some of the citizenship complexities that so often underpin terrorism-related detentions.[67]

In Canada (Prime Minister) v. Khadr [hereinafter Khadr II], the issues before the court were whether Khadr's Charter rights had been violated when Canadian officials interrogated him twice, once with the knowledge that Khadr had been mistreated, and, if so, whether that

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[64] *Id.* ¶ 36.

[65] *See* Canada (Prime Minister) v. Khadr, 2010 SCC 3, 16 (Can.), ¶ 5 [hereinafter Khadr II] (describing the circumstances under which Khadr was interrogated by Canadian officials, including being subjected to the "frequent flyer program," involving sleep deprivation, before the interview, and with the knowledge of the official who interviewed him in 2004).

[66] See MICHELLE SHEPHARD, GUANTANAMO'S CHILD: THE UNTOLD STORY OF OMAR KHADR (2008).

[67] Khadr II, 2010 SCC 3 (Can.).

meant the Supreme Court of Canada could order the Canadian Government to undertake efforts to repatriate Khadr. During the second interview by Canadian authorities, when it is alleged that officials knew he had been subjected to extreme sleep deprivation, Khadr refused to answer questions, and a subsequent Canadian federal court injunction barred Canadian officials from further interviewing him, citing a concern over a potential grave injustice."[68]

The Court noted that Khadr had repeatedly asked the Government of Canada to request that the United States return him to Canada.[69] When the Canadian Government reiterated, in July 2008, that it would not be seeking repatriation of Khadr, but added that it was seeking assurances in regard to his treatment, Khadr filed a petition in federal court. The federal court, subsequently upheld in an appellate ruling, determined that Canada had a "duty to protect" Khadr, and ordered the Canadian Government to undertake efforts to repatriate him.[70]

Before the Supreme Court, Khadr took the position that, while Canada did not have a broad duty to so act on behalf of all of its citizens overseas, it did have a duty to seek his repatriation based on the violation of Khadr's Charter rights in collaborating with the U.S. Government in 2003 and 2004. Based on that violation of his rights, he sought, as a remedy, that the Government be ordered to undertake efforts to repatriate him.[71]

In considering whether Khadr's rights had been violated, the Supreme Court noted that the circumstances under which Khadr was held had changed since the beginning, noting various legislative and judicial rulings setting particular parameters for the Guantanamo detainees.[72] In spite of its acknowledgment of improvements to the system at Guantanamo Bay, however, the Supreme Court pointed out that the underlying

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[68] *Id.* ¶ 5 (citing Khadr v. Canada, [2006] 2 F.C.R. 505, 2005 FC 1076, ¶ 46 (Can.)).

[69] *Id.* ¶ 6.

[70] *Id.* ¶¶ 9-10.

[71] *Id.* ¶ 12.

[72] *Id.* ¶ 17 (explaining the sequence of events as follows: "The Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739, prohibited inhumane treatment of detainees and required interrogations to be performed according to the Army field manual. The Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600, attempted to legalize the Guantanamo regime after the U.S. Supreme Court's ruling in Hamdan v. Rumsfeld. However, on June 12, 2008, in Boumediene v. Bush, 128 S. Ct. 2229 (2008), the U.S. Supreme Court held that Guantanamo Bay detainees have a constitutional right to habeas corpus, and struck down the provisions of the Military Commissions Act of 2006 that suspended that right.").

claims on which Khadr was basing his allegations of breach of his Charter rights were the same as those considered and decided in the *Khadr I* decision.[73]

The Court said:

> [W]e conclude on the record before us that Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention, which is the subject of his current claim. The causal connection demanded by Suresh between Canadian conduct and the deprivation of liberty and security of person is established.[74]

Determinations of potential breaches of rights under the Canadian Charter involve an additional step, once a violation has been established, of determining whether, the violation notwithstanding, the conduct was consistent with "principles of fundamental justice." In this case, the Supreme Court determined that the conduct of Canadian officials did not comport with "principles of fundamental justice," because, when they interviewed Khadr, it was part of a system that denied him basic *habeas corpus* rights, and which failed to take into consideration that he was 16 years old and had not had the benefit of access to legal counsel "or to any adult who had his best interests in mind."[75] Describing the conduct of Canadian officials in scathing terms, the Court explained:

> Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person and was alone during the interrogations. Further, the March 2004 interview, where Mr. Khadr refused to answer questions, was conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission in Jawad as designed to "make [detainees] more compliant and break down their resistance to interrogation."[76]

One interesting element of this case is that, unlike the *Khadr I* ruling, the Supreme Court in *Khadr II* did not base its critique on any prior, implicit or explicit, agreement by the U.S. Supreme Court as to its find-

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[73] Khadr II, 2010 SCC 3 (Can.) ¶ 18.
[74] *Id.* ¶ 21.
[75] *Id.* ¶ 24.
[76] *Id.*

ings. Contrary to the still somewhat deferential language used in *Khadr I*, the *Khadr II* decision makes clear the Court's disdain, not just for the conduct of Canadian officials, but implicitly for that of U.S. officials as well. The Court bluntly noted:

> Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.[77]

The stronger language used by the Court, which later referred to the Canadian officials' knowledge of Khadr's "improper treatment by the U.S. authorities," seems to suggest some level of outrage on the part of the Justices.[78] Obviously, the Court confined itself to specifically criticizing the conduct of Canadian officials, but the reaction to U.S. actions is clear.

The Court further concluded that the remedy sought was sufficiently related to the violation, based on the "continuing effect of these breaches."[79] The Court pointed out that the information obtained through these improper means by Canadian authorities, and turned over to U.S. officials, could still be used in legal proceedings against Khadr.[80]

Having determined in such frank terms that the conduct of the Canadian authorities violated Khadr's Charter rights, however, the Court declined to grant the remedy sought. The Canadian Government had argued that the Canadian Constitution does not grant the Supreme Court the power to interfere with the Executive's exercise of foreign relations.[81] The Court explained the deference generally given to the Executive and expressed concern about the wider impact beyond this case of ordering the Executive to seek repatriation. Rather, the Court made the following statement:

> For the following reasons, we conclude that the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for for-

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[77] *Id.* ¶ 25.
[78] *Id.* ¶ 30.
[79] Khadr II, 2010 SCC 3 (Can.).
[80] *Id.*
[81] *Id.* ¶ 33.

eign affairs, and in conformity with the Charter.[82]

The Court also noted that the record before it did not give it enough information on what the Government's considerations and concerns were relating to Khadr, or what discussions had actually taken place between the two Governments on repatriation.[83] It also pointed out that it learned, during the oral arguments on this case, that the U.S. Government had decided to try Khadr before a Military Commission – the announcement from the U.S. having been made on the same day as the oral arguments before the Supreme Court of Canada – and that this and other developments required a certain caution on the part of the Court's "remedial jurisdiction."[84] Thus, the Court concluded, the proper remedy in this instance would be "declaratory relief." It granted Khadr a "declaration," advising the Canadian Government of its conclusions as to the question and record before it, and suggesting that the declaration provide the "legal framework" to guide the Canadian Government in its future actions.[85]

The Canadian Government has continued to refuse to seek repatriation of Khadr.[86] While the Supreme Court ruling may not be surprising in light of courts' general reluctance to infringe on constitutional powers of other branches of government, it is somewhat surprising in the strength of the criticism of both the Canadian and the U.S. Governments as to the treatment of this Canadian minor. The ruling suggests declaratory relief to guide certain future actions, and does seem intended to enhance the political pressure on the Canadian Government to act on Khadr's behalf.

The Khadr case continues to present confusing legal issues on both sides of the U.S.-Canada border. In Canada, in July 2010, a federal judge, hearing Khadr's petition following the latest Supreme Court rul-

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[82] *Id.* ¶ 39.

[83] *Id.* ¶ 44.

[84] *Id.* ¶ 45.

[85] Khadr II, 2010 SCC 3 (Can.), ¶ 47.

[86] Janice Tibbetts, Government Pondering Alternatives to Repatriation for Khadr, CAMWEST NEWS SERVICE, Feb. 3, 2010, *available at* http://www.canada.com/news/Government+pondering+alternatives+repatriation+Khadr/2517765/story.html (containing statement by Canadian Prime Minister Stephen Harper that the Government would not seek repatriation in response to the ruling of the Supreme Court of Canada, but was seeking other undisclosed remedies).

ing, determined that Khadr was entitled to "procedural fairness" by the executive in the decision as to the appropriate remedy for violation of his rights, and that Khadr has not been afforded this "procedural fairness." In a surprising ruling, the judge found that Khadr had a right to notice of the remedies the Government was considering, as well as a right to submit suggested remedies. The Government was given seven days to present Khadr with a list of potential remedies, and the judge retained jurisdiction to, among other things, determine whether a suggested remedy is appropriate if the parties fail to agree. The court also retained jurisdiction to impose a remedy if the Government failed to provide an appropriate one.[87] As of the writing of this article, the Canadian Government had announced its intent to appeal the ruling.[88]

The continued use of the Military Commissions for hearing Khadr's case by the U.S. has also led to complications. As of the date of this article, Khadr had fired his civilian attorneys and had informed a Military Commission he was boycotting his hearing, because he did not believe he could get a fair trial. He had attempted to also fire his military lawyer, but the military judge hearing the case denied the request.[89]

In telling the Military Commission he was boycotting the proceedings, he said "I'm going to get 30 years no matter what."[90] As of the date of this article, his hearing before the Military Commission has been set for August 12, 2010.[91]

Whether Khadr will be convicted before the Military Commission, and what the resulting sentence would be on such a conviction, remain to be seen. What is certain is that Khadr, now 23, has been held with no criminal proceeding or criminal conviction since he was 15. It is likely that the convoluted legal posture of this case – on both sides of the Border -- will continue into the foreseeable future, and it is not difficult to understand Khadr's skepticism about the possibility of getting a fair proceeding at this late date. The theoretical notion of "the Other," at least based on citizenship, has, indeed, created a legal nightmare for some, without producing any demonstrable benefit in reducing the risks posed by terrorism.

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[87] Khadr and the Prime Minister of Canada et al., 2010 FC 715.
[88] CBC News, Khadr court ruling to be appealed by Ottawa, July 12, 2010, *available at*: http://www.cbc.ca/politics/story/2010/07/12/omar-khadr-court-ruling-nicholson.html.
[89] *Id.*
[90] *Id.*
[91] CBC News, *Khadr's Guantanamo trial date set*, July 12, 2010, *available at:* http://www.cbc.ca/world/story/2010/07/12/guantanamo-omar-khadr.html.

III. CONCLUSION: PERMANENT CHANGES AND THE SHIFTING SANDS OF CONSTITUTIONAL STANDARDS

"Someone must have been telling lies about Joseph K., for without having done anything wrong he was arrested one fine morning."[92]

Debates over the parameters of appropriate detention standards for terrorism suspects will certainly continue, and it is difficult to predict how things will develop in this rapidly changing area of the law. In his book, *The Trial*, Franz Kafka describes a world clearly without the constitutional due process protections long established in many democratic cultures. The picture he paints is a chilling one, in which people are arrested but do not know why, where they are unable to decipher the procedures of the courts before which they stand accused, and in which they do not know what evidence is considered to support the unrevealed charges. It is not surprising that some have drawn parallels between Kafka's nightmare world and many of the structures established in liberal democracies to address terrorism cases. What began as short-term, perhaps emergency changes in response to a devastating terrorist attack have, in many cases, begun to appear to be more fundamental structural changes with some aspects of the feel of Kafka's world.

Those detained since 9/11 may not only be unable to rely on the detention standards that existed before 9/11, but they cannot rely either on the standards set in place since that date, since even those parameters constantly shift, in large part because of the tension between national judiciaries and executive/legislative branches. In many cases, without assistance from legal counsel that, before 9/11, would have been deemed fundamental, many detainees have been in the unenviable position of facing proceedings under conditions of serious mistreatment, in a language other than their mother tongues, in a system different from that which they might know in their countries of origin, and under rules that shift so constantly that it can sometimes be difficult even for legal scholars to stay current.[93]

The peculiar nature of the present state of terrorism detention standards was illustrated in a recent Congressional discussion. As U.S. intel-

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[92] FRANZ KAFKA, THE TRIAL 149 (1937).

[93] *See, e.g.*, STEVEN T. WAX, KAFKA COMES TO AMERICA 45 (2008).

ligence officials advised Congress that another attempted terrorism attack in the coming months, in the U.S., was "certain," a debate ensued over the handling of Umar Farouk Abdulmutallab, who unsuccessfully tried to blow up a plane on Christmas Day, 2009, by trying to ignite an explosive in his underwear.[94] Some lawmakers harshly criticized the Obama Administration, because Abdulmutallab was read his Miranda rights and charged in a U.S. criminal court. The critics contended that providing him with Miranda rights was a mistake, and that he should have been taken, absent that advisory, for interrogation, before being tried before a Military Commission. Of course, Abdulmutallab is not a U.S. citizen, which is the reason it was even possible to raise this issue, and which is the reason that these critics simply assumed that the two options were comparable alternatives, to be chosen according to necessity or convenience. It was noted, in an article describing this debate, that Congress heard evidence that Abdulmutallab was, in fact, talking to investigators and "providing useful, current and actionable intelligence."[95] Apparently, the existing criminal justice system is, in fact, proving adequate to handle his case, thus undermining even the questionable "necessity" justifications for altered standards. It is disturbing that constitutional standards in such cases are simply viewed as optional, to be used only when deemed necessary.

A number of countries continue to struggle with how best to address terrorism detentions and legal proceedings, but it is becoming increasingly clear that alterations from existing constitutional principles have been accepted on some level, and this debate suggests that certain constitutional protections are entirely flexible and necessary only when useful. In the terrorism context, sweeping presumptions, supported by a form of discourse that often obfuscates the issues, appear to have undermined those principles that have long been established in many democratic nations as threshold principles of fairness and judicial process. Before those changes become permanent, national jurisdictions should consider the bases underpinning these changes and should consider the wider implications of such changes in terms of long-standing constitutional principles, and, at some level, even in terms of cultural identity.

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[94] Abdulmutallab's name is spelled differently in different reports. It sometimes appears as "Abdul Mutallab," or as "AbdulMutallab," and, in this article, the spelling appearing in most published reports is used.

[95] Intelligence Chiefs Say Another Terror Attempt in U.S. is 'Certain,' CNN, Feb. 2, 2010, *available at* http://www.cnn.com/2010/POLITICS/-02/02/us.terror.attacks/index.html?hpt=T1.

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