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Aziz Z. Huq

THE LAW SCHOOL
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AGAINST NATIONAL SECURITY EXCEPTIONALISM

Aziz Z. Huq*

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*Terrorist attacks trigger novel policy responses. New policies selected by the federal executive after the 9/11 attacks strained against constitutionally permissible margins, and prompted diverse judicial responses. The resulting scholarly literature is largely normative. But the currently dominant accounts of national security jurisprudence also each include some descriptive claim about what courts in fact do. Each account further claims that courts do something distinctive in these cases. That is, in the course of making a prescriptive argument for what courts ought to do differently in national security cases, these accounts make a descriptive claim about what courts in fact do differently in this class of cases. I argue that this threshold descriptive claim—call it “national security exceptionalism”—finds no empirical support in at least one important class of post-9/11 cases concerning emergency detention policies. Instead, judicial responses to national security emergencies align closely with transsubstantive trends in public law and judicial responses to non-security emergencies. Using the Supreme Court’s recent ruling in *Ashcroft v Iqbal* as a starting point, I examine the close and largely unexamined relationship between national security jurisprudence and the larger domain of public law doctrine and practice. Situating judicial responses to national security emergencies in a more general public law context draws attention to the role emergencies can play in catalyzing larger legal changes law, and the effect of transsubstantive trends on emergency responses. It further may have a bearing on the emergent “national security” discipline in the legal academy.*

Terrorist attacks trigger novel policy responses. New policies selected by the federal executive after the 9/11 attacks strained against constitutionally permissible margins. Affected individuals lodged legal challenges to the new policies in federal court. Judges’ responses ranged from self-abnegating denials of jurisdiction to aggressive repudiations of the executive’s initiatives. The diversity of judicial responses prompted debate and analysis. The resulting scholarly literature is largely normative. Sustained attention to “what courts actually do” has been “sparse.”¹ Nevertheless, the normative accounts of courts’ role in national security emergencies that now dominate the legal scholarship include not only normative

* Assistant professor of law, University of Chicago Law School. Many thanks to participants at a University of Chicago Law School faculty workshop for helpful and insightful criticism. I am grateful for comments from Daniel Abebe, Adam Cox, Rosalind Dixon, Bernard Harcourt, Alison LaCroix, Saul Levmore, Jonathan Masur, Richard McAdams, Martha Nussbaum, Eric Posner, Adam Samaha, Stephen Schulhofer, Geoffrey Stone, and especially David Strauss. All errors, of course, are mine alone.

¹ Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation* *2 (unpublished manuscript, 2008), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1297287 (visited Feb 16, 2010).

“justification[s]” but also efforts at descriptive “fit.”² That is, the dominant accounts of judicial responses to national security crises each offer, with varying degrees of conviction, a descriptive account of what courts in fact do in national security emergencies. Each account further claims that courts do something *distinctive* in these cases. This descriptive claim—that what courts do in national security crises is somehow different from what they do elsewhere—in turn underwrites theories of what courts should do differently in security emergencies. I call the threshold descriptive claim “national security exceptionalism.”³

This essay examines the descriptive claim that judicial responses to national security emergencies are in some fashion distinctive and hence warrant special, separate justification or criticism. I argue that “national security exceptionalism” finds no empirical support in at least one important class of post-9/11 cases: challenges to emergency detention policies.⁴ In the litigation trenches, judicial responses to national security emergencies do not match up with the responses predicted by any of the dominant theories found in the literature. Rather, they align more closely with transsubstantive trends in public law and with judicial responses to non-security emergencies. This suggests there is nothing *sui generis* about the behavior of courts in the domain of national security exigency, or at least that the thesis of exceptionalism is overstated.

One case from the October 2008 Term places in clear relief the close and largely unexamined relationship between national security jurisprudence and the larger domain of public law doctrine and practice. In *Ashcroft v Iqbal*, a five-Justice majority of the Court dismissed as inadequately pleaded a civil damages suit filed by a Pakistani national detained in the immediate aftermath of the 9/11 attacks.⁵ On the one hand, *Iqbal* can be viewed (and indeed has been understood) as the most recent in a run of cases in which the Court has grappled with the granularity of the threshold pleading rule in federal civil actions.⁶ On the other hand, Justice Kennedy’s majority opinion in *Iqbal* transformed dramatically the basic pleading rule largely by dint of emphasizing the national security context of the case at bar. *Iqbal* illustrates one side of the relationship between national security case law and the larger domain of public law: Emergencies are opportunities for sweeping doctrinal and functional changes affecting many

² The distinction is adapted from Ronald Dworkin, *Law’s Empire* 254–58 (Harvard, 1986).

³ I use this term to describe only judicial responses to national security emergencies. None of the accounts address—and I am not concerned with—each and every case that might conceivably be subsumed under a “national security” label, from servicemen’s religious liberty claims, see *Goldman v Weinberger*, 475 US 503 (1986) (holding that First Amendment does not prevent Air Force from prohibiting yarmulkes), to clashes between environmental rules with military training needs, see *Winter v Natural Resource Defense Council, Inc.*, 129 S Ct 365 (2008) (overturning a preliminary injunction against the Navy that was based on threat to marine wildlife).

⁴ The kind of case study approach here raises problems of sample bias and selection effects. In my view, the non-criminal detention cases are the most consequential in terms of both security and liberty; they are also the most contentious. If this analysis simply throws light in a non-quantitative way on the direction and general motivating factors behind judicial intervention, I believe it contributes to the literature.

⁵ 129 S Ct 1937 (2009) (dismissing for failure to state a claim a damages action by former immigration detainee against two high-level federal officials).

⁶ See, for example, *Bell Atlantic Corp v Twombly*, 550 US 544, 556 (2007); *Erickson v Pardus*, 551 US 89, 93–94 (2007) (per curiam). Even before it was decided, *Iqbal* was viewed as the continuance of this line of cases. See Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 Iowa L Rev 873, 877 (2009).

subject matters. The other side of the coin is the pervasive influence of familiar remedial and doctrinal strategies in what has been characterized as a unique body of national security jurisprudence.

Rejecting the descriptive claim of national security exceptionalism has consequences for understanding and evaluating federal courts' work in the face of national security exigency. Analyzing judicial responses to national security emergencies in tandem with the larger body of public law draws attention to transsubstantive trends in judicial behavior, and also to the role that emergencies can play in catalyzing larger changes across the domain of public law. The analysis may have a further bearing on the emergent "national security" discipline in the legal academy.

The argument proceeds in three parts. Part I explores the disjunction between the outcomes predicted by the dominant accounts of national security jurisprudence and litigated outcomes. Part II compares national security cases first to a larger domain of public law and second, to a recent non-security emergency in which the federal courts played a minor role. Part III concludes by offering some tentative hypotheses about the consequences of rejecting the descriptive claim of national security exceptionalism.

I.

The literature on judicial responses to national security emergencies is diverse but largely normative. In one corner are celebrations of judges' counter-majoritarian role as a "corrective" to the popular democratic tendency "to give inadequate weight to civil liberties in wartime" or crisis, when panic and other emotions distort policy outcomes.⁷ In another are prescriptions of broad judicial deference on the ground that "there is no general reason to think that judges can do better than government at balancing security and liberty during emergencies."⁸ Intermediate positions posit judges as agents of social learning,⁹ or praise their fidelity to separation-of-power ideals.¹⁰ Seemingly disparate, these accounts are alike in two important ways. First, each makes some descriptive claim, relatively strong or weak, about what federal courts do in cases touching on national security emergencies.¹¹ Such descriptive claims of "fit" are made in support of

⁷ Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* 544 (W.W. Norton, 2004). Accord Stephen Holmes, *The Matador's Cape: America's Reckless Response to Terror* 233 (Oxford, 2007) ("Wartime leaders ... need some form of adversarial process to protect them from cognitive bias and false certainties.").

⁸ Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 31 (Oxford, 2007).

⁹ Mark Tushnet, *Defending Korematsu: Reflections on Civil Liberties in Wartime*, 2003 Wisc L Rev 274.

¹⁰ Samuel Issacharoff and Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 Theoretical Inq L 1 (2004).

¹¹ All of the accounts discussed here trade in descriptive claims even if they are largely normative. The descriptive claims can be isolated from the larger prescriptive frameworks. First, the "social learning" thesis looks to "historical examples" and "identifies a pattern in those examples." Tushnet, 2003 Wisc L Rev at 274 (cited in note 9). Second, the "heroic" countermajoritarian model is the most cautious of the five in advancing descriptive claims. See generally Stone, *Perilous Times* at 542–50 (cited in note 7). But some of its advocates propose that "the Court [has] imposed essential checks on executive power." Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 UC Davis L Rev 1, 17 (2006). Third, the executive accommodation view "describes the law as it has actually operated in the courts." Posner and Vermeule, *Terror in the Balance* at 16 (cited in note 8). Fourth, national security minimalists say that "an identifiable form of minimalism captures the practices

normative arguments. Second, all the descriptive claims share a common assumption: Each asserts there is something distinctive about the pattern of judicial supervision of emergency national security policies. Because each theory aspires to justify a normative account of the judicial role distinct to national security, it paints judicial behavior in the exigent national security domain as different from judicial behavior at other times. Implicitly or explicitly, the theories assume that some factor unique to national security emergencies—e.g., the tendency of democratic governments to echo public panics, the breakdown of multi-branch deliberation, or the executive’s informational advantage and agility—already shape what courts do. National security exceptionalism is thus underwritten implicitly by the sense that judicial behavior changes in response to the unique dynamics of a security emergency.¹²

This Part begins by sketching briefly the five dominant theoretical accounts in the literature that identify regularities in judicial responses to national security policies on the way to making normative claims about what courts should do. It then describes the observed consequences of federal court litigation, in one particular area of law—non-criminal detention on national security grounds. Specifically, I gauge consequences by looking at judges’ selection between different remedies. This focus on remedies is central to my analytical method. Remedies provide a more fine-grained tool for assessing the consequences of judicial action than dichotomous metrics such as win/loss rates or tendencies to deference that are used in other studies. Finally, I consider whether any of the five dominant theoretical accounts generate good predictions of observed outcomes.

Three caveats are in order. First, this Part isolates descriptive elements from accounts that are largely normative. To the extent they include description, the theories of the judicial role in national security on offer generally do not try to predict *every* case outcome in the way that a theory in the physical sciences might. Instead, a theory will “set an agenda” or “prescribe a direction” that fits a majority or large plurality of cases.¹³ It will also provide a baseline to identify and to criticize outlying results.¹⁴ A perfect hit rate is neither demanded nor ever found.

Second, theoretical accounts of the role of courts in regard to national security tend to operate at a high level of generality. None of the accounts examined in this Part identifies which

of the American courts when national security is threatened.” Cass Sunstein, *Minimalism at War*, 2004 Sup Ct Rev 47, 50; see also Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 Sup Ct Rev 1, 1 (“Liberty-promoting minimalism can be found at diverse stages of American history.”). Finally, bilateralism institutional endorsement is offered as the “framework for analysis that American courts have used in earlier eras of exigent circumstances.” Issacharoff and Pildes, 5 *Theoretical Inq* L 1 at 5 (cited in note 10). Whatever the larger normative projects of these accounts, in each case there is a descriptive element that plausibly can be isolated. In each case, the descriptive claim implies that judicial behavior in national security cases is distinctive.

¹² National security exceptionalism could take strong and weak forms. The strong form suggests that a unique dynamic directs outcomes in all cases touched by national security concerns. The weak version of national security exceptionalism suggests that *exigent* responses to national security threats elicit different judicial responses from exigent policies in other policy domains. This weak version of national security exceptionalism, which seems more plausible, is the one principally examined here.

¹³ David A. Strauss, *The Intellectual Crisis of Judicial Conservatism* *9 (unpublished manuscript, July 2009) (on file with author).

¹⁴ See, for example, Posner and Vermeule, *Terror in the Balance* at 271 (cited in note 8) (describing the result in *Hamdan* as “lawless”).

judicial remedies it would prescribe or predict in particular cases, nor even discusses the question of remedial selection at all. This is a failing of each account. It is not clear that the cost to analytic parsimony from closer attention to the question of remedies would be great. But, the absence of discussion of remedies also means that none of the theoretical accounts can be criticized directly for failing to predict particular outcomes.¹⁵ As a result, the analysis in this Part must proceed by trying as best as possible to identify the distribution of remedies implied by a given theoretical account, and then by comparing that inferred set of outcomes to the observed outcomes.

Third, one counter-argument to my analytic project would point out that some of the theoretical accounts considered here are not limited to national security. Hence, it might be argued, they make no claim to identify a unique pattern of judicial responses in national security cases. Minimalism, to pick the most obvious candidate, took shape first as a general account of the judicial role.¹⁶ The object of criticism here, the claim of descriptive “uniqueness,” is thus chimerical. But this counter-argument is overstated. Even theories with broader normative ambitions are presented as especially attractive in the national security domain because the latter is one area of law in which courts follow the normative prescription. Consider minimalism, the most generalizable of the five theoretical accounts considered. Minimalism is presented as *especially* successful in the national security arena even though, its proponents concede, in other areas of the law it is only aspirational.¹⁷ Minimalism may have broad aspirations, but its narrow claim to descriptive success is articulated most powerfully with respect to national security jurisprudence. Hence it is properly classified as a kind of national security exceptionalism.

A.

Scholarly attention to the judicial role respecting national security has produced five accounts of the federal courts’ function: i) the “social learning” thesis; ii) heroic counter-majoritarianism; iii) the executive accommodation account; iv) national security minimalism; and v) bilateral institutional endorsement. Each theory is “a set of interrelated causal propositions” that “hol[d] out the ... promise of a successful explanation.”¹⁸ The five theories also leverage a descriptive account of what courts do to support a normative prescription about what courts should do.¹⁹ The descriptive and the normative converge. Exceptions are cause for condemnation and criticism.

The first account of the judicial role in national security is the “social learning” model. This model offers an explanation of judicial outcomes within a larger framework of historical

¹⁵ It seems to me unsatisfying, though, to defend a theory against the allegation of inaccuracy with the assertion that the theory operates only on a higher level of generality. Why bother with a general theory of judicial review in a given policy space if it bears no relation to judicial outcomes on the ground?

¹⁶ See generally Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard, 1999).

¹⁷ See Cass R. Sunstein, *Problems with Minimalism*, 58 Stan L Rev 1899, 1910–15 (2006) (describing challenges to minimalism).

¹⁸ Jon Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* 17 (Cambridge, 2007).

¹⁹ See note 11 (collecting citations and quotations of descriptive claims for each account).

change. Social learning views judicial intervention as a cog in “a process of social learning in which past examples of what come to be understood as incursions on civil liberties progressively reduce the scope of civil liberties violations in wartime.”²⁰ The government acts; the courts endorse; but then “society” concludes that the threat was exaggerated and the response excessive.²¹ *Korematsu v United States*²² furnishes the archetypal example. Both democratic branches of the national government adopted a sweeping detention policy later endorsed by the federal courts. Subsequently, “society reach[ed] a judgment that the action was unjustified and courts mistaken.”²³ Rather than providing affirmative guidance for subsequent decisions, the ensuing precedent exerts a negative gravity by instantiating the Court’s moral nadir.²⁴

Second, the “heroic” model views the federal judiciary as a counter-majoritarian check on the political branches’ tendency to trade away constitutional entitlements in moments of crisis. Like the social learning model, it starts from the view that at times when “the nation faced extraordinary pressures—and temptations” to suppress dissent and to target vulnerable minorities, politicians have succumbed to those pressures and have gone “too far” detaining and punishing individuals for their views or because of their ethnic, racial, or religious identity.²⁵ On this account, the constituent pressure on government to engage in animus-based measures lacking sound justification increases in wartime. For advocates of the heroic model, the “counter-majoritarian difficulty” then becomes a “striking” advantage for the federal courts.²⁶ Insulated by life tenure, judges will resist the momentary heat-wave of invidious motives better than elected officials.²⁷ It is predictable and “appropriate,” on this account, that “the judiciary gives greater protection to civil liberties than the legislature or the executive.”²⁸

Third, the “executive accommodation” model insists on the dexterity and informational advantages of the executive over both other branches, and argues on their basis that judicial interventions will in the aggregate do more harm than good. This model is based on the observation that the executive has an institutional advantage in responding to emergencies because of its ability to aggregate and process information, to respond quickly, and to do so in

²⁰ Tushnet, 2003 Wisc L Rev at 275 (cited in note 9).

²¹ *Id.* at 287.

²² 323 US 214 (1944).

²³ Tushnet, 2003 Wisc L Rev at 287 (cited in note 9); Stone, *Perilous Times* at 537 (cited in note 7).

²⁴ See, for example, *Stenberg v Carhart*, 530 US 915, 953 (2000) (Scalia, dissenting) (invoking *Korematsu* and *Dred Scott*, as negative examples of Court at its worst); *Reno v Flores*, 507 US 292, 344 n 30 (1993) (Stevens dissenting) (urging that any attempt to follow *Korematsu* must proceed with “extreme caution”); *Skinner v Railway Labor Executives’ Ass’n*, 489 US 602, 635 (1989) (Marshall dissenting) (same); see also *City of Richmond v. J.A. Croson, Co.*, 488 US 469, 501 (1989) (invoking *Korematsu* as a reason not to defer to official justifications for the use of race in government decision-making).

²⁵ Stone, *Perilous Times* at 12–13 (cited in note 7); *id.* at 528–30; see generally David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New Press, 2003); Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 Washburn L J 1, 14 (2005).

²⁶ Stone, *Perilous Times* at 543; cf Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (Bobbs-Merrill, 1986).

²⁷ See, for example, Chemerinsky, 40 UC Davis L Rev at 17 (cited in note 11).

²⁸ Stone, *Perilous Times* at 544 (cited in note 7).

secret.²⁹ Judicial action will be characterized by high error rates because courts lack information and suffer from the same distorting influences as democratic branches. At the same time, “erroneous judicial invalidation of new security policies can produce large harms.”³⁰

The fourth model is national security minimalism.³¹ Minimalism in general is characterized by a preference for “shallowness”—incompletely reasoned decisions that eschew theorization of divisive fundamental issues—and “narrowness”—resolution of as few legal or factual disputes as feasible per decision.³² Standing alone, minimalism is “a strictly procedural instruction” that generates no guidance as to the choice between government and a private litigant.³³ In the national security context, minimalism has three traits: a demand for clear congressional authorization, the requirement of individual “hearing rights,” and a preference for “narrow, incompletely theorized decisions.”³⁴

The final account of courts’ role in national security, “bilateral institutional endorsement,” endows the judiciary with a democratic deliberation-forcing function. It suggests courts are not well-placed to make first-order decisions about the allocation of substantive liberties. Judges’ comparative advantage instead lies in identifying the appropriate institutional arrangement to generate optimal policy decisions.³⁵ In war and emergency, as power ebbs to the executive, judges insist on a sharing of decisional power between the two elected branches “with different democratic pedigrees, different incentives, and different interests.”³⁶ On this account, better decisions emerge from the judicially mandated participation of multiple democratic actors.³⁷ The courts’ goal, therefore, is the forcing of multi-branch democratic deliberation at a time when such deliberation has been short-circuited by exigency.

B.

What have federal courts in fact done? Do any of these theories successfully predict the responses of courts in actual cases? The purely descriptive literature is “sparse.”³⁸ Studies to date have examined invalidation rates, panel effects, and the longitudinal interaction between wartime

²⁹ See generally Posner & Vermeule, *Terror in the Balance* at 15–129, 161–81 (cited in note 8) (canvassing other checking devices).

³⁰ *Id.* at 45.

³¹ The model is developed in Sunstein, 2006 Sup Ct Rev at 1 (cited in note 11); see also Sunstein, 2004 Sup Ct Rev at 47 (cited in note 11).

³² Sunstein, 2004 Sup Ct Rev 47 at 48–49 (cited in note 11); see generally Cass R. Sunstein, *Burkean Minimalism*, 105 Mich L Rev 353, 362–66 (2006).

³³ Posner and Vermeule, *Terror in the Balance* at 19 (cited in note 8).

³⁴ Sunstein, 2004 Sup Ct Rev 47 at 53–54 (cited in note 11).

³⁵ Issacharoff and Pildes, 5 Theoretical Inq L 1 at 5 (cited in note 10) (stressing “process-based, institutionally-focused approach”); Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 Oxford J Legal Stud 189, 190 (2009).

³⁶ Issacharoff and Pildes, 5 Theoretical Inq L 1 at 5 (cited in note 10).

³⁷ See also Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in a Time of Terror* 139 (Yale, 2006) (arguing that courts should preserve the political equilibrium between the political branches).

³⁸ Sunstein, *Judging National Security Post-9/11* at 2 (cited in note 1).

and changes to aggregate judicial protection of rights.³⁹ Previous empirical analyses have looked in the main at win/loss rates but elide important questions of what *form* judicial intervention takes.

To take stock of the effect of judicial interventions into exigent national-security policy making, I look instead at what remedies courts have issued. A focus on remedies is instrumentally useful as a means of getting at the consequences of judicial intervention for three reasons. First, remedial selection is more varied and more consequential in practical terms than metrics such as win/loss rates or decisions to defer or not. Judges have within reach a range of remedial strategies, including injunctions and damages actions. Injunctive relief can also be tailored by being granted *ex ante* or *ex post*. Or it can be issued in retail or wholesale form. When courts toggle between damages and various injunctive forms, costs and gains to security or liberty may vary. Inattention to remedies elides significant differences.

Second, attention to remedies and their effects illuminates important timing questions and downstream consequences. It invites particular scrutiny of the question whether an individual judgment's effect rippled out to change larger institutional practices.

Third, a focus on remedies is more informative than separate treatment of substantive and procedural rules. For one thing, substantive rulings have been few and far between in the post-9/11 context. Little has turned on whether substantive constitutional rules are weakened in crisis times.⁴⁰ By contrast, procedural rulings have been consequential. The cash value of judicial intervention is a function of both interlocutory and final jurisdictional and procedural rulings that have little directly to do with the relative strength of substantive rules in times of crisis.⁴¹ And, at least in the set of cases under examination here, there is thus “no room for a distinction between the abstract, analytic definitions of constitutional rights and remedial concerns that prevent courts from enforcing those rights to their ‘true’ limits.”⁴²

I attend here to one especially active area of national security law in which courts are relatively unbounded by statutory limits or channels: new non-criminal detention policies that emerged in response to the September 2001 al Qaeda attacks. National security concerns, of course, impinge also on the criminal law, surveillance regulation, federal disclosure law, immigration law, and financial regulation of charitable giving. But non-criminal detention is a useful object of isolated attention. It too presents novel legal issues, complex implementation challenges, and a rich body of case law. Unlike criminal cases or litigation under the Freedom of

³⁹ Id; Lee Epstein, et al, *The Supreme Court During Crisis*, 80 NYU L Rev 1 (2005).

⁴⁰ See generally Jenny Martinez, *Process and Substance in the “War on Terror”*, 108 Colum L Rev 1013 (2008). One way of explaining this result is by noticing the relative absence of criminal cases. Courts thus have few opportunities for what might be called offensive remediation—dealing with government overreach by, say, dismissing an indictment. Rather, they have instead engaged in defensive remediation by denying motions to dismiss on jurisdictional grounds and by demanding do-overs with more or different procedure. Hence, there have been fewer opportunities for merits rulings and more scope for policy arbitrage through procedural manipulation.

⁴¹ There is a large literature on whether courts should adjust substantive rules or remedies. See, for example, Mark V. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, 2006). Whatever use the distinction has in the social rights context, it is insufficiently granular (or largely irrelevant) as a tool for parsing what happens in contemporary national security cases.

⁴² Daryl Levinson, *Rights Essentialism and Remedial Equilibrium*, 99 Colum L Rev 857, 924 (1999).

Information Act,⁴³ non-criminal detention litigation does not channel courts into a statutorily determined menu of responses. It thereby enables a study of courts' remedial selections largely undistorted by most exogenous constraints.⁴⁴

Requests for judicial supervision in non-criminal detention cases after September 2001 have taken four forms: injunctive relief granted before the government acts against an individual; injunctive relief granted to an individual after government has acted coercively; relief that restructures ongoing government operations (even if it is not in the technical form of a structural injunction); and damages remedies secured after a constitutional, statutory, or treaty right is violated. These four kinds of judicial relief diverge along several metrics. In opting between injunctions and damages, courts select between property rules and liability rules.⁴⁵ Judges also toggle along a temporal scale between more or less *ex ante* or *ex post* interventions. They can allow either retail or wholesale interventions. Remedial choice is thus multifaceted and complex.

A synoptic view of the consequences of federal courts' intervention suggests that judicial selection of remedies in national security cases is asymmetrical. It is biased away from the granular toward the molar. Courts grant injunctive relief that disrupts and reorders the structure of entire government programs. They generally do not grant retail preliminary injunctive relief or individualized final injunctive remedies. Nor have litigants typically prevailed in suits for money damages pursuant to federal statutes, international law, or the Constitution. The post-9/11 remedial distribution is thus tilted toward broad remediation and away from individually tailored equitable relief or remedies at law. To illustrate this, I survey first individualized injunctive relief and damages, and then turn to what might be termed the more "structural" forms of interventions.

1. Individual injunctive relief

Injunctive relief can be sought before coercive government action happens. The warrant requirement for surveillance is a well-known example of *ex ante* regulation. Warrant requirements in the Fourth Amendment and the Foreign Intelligence Surveillance Act ("FISA"), as amended in July 2008, impel some limited prior judicial supervision of electronic surveillance in the national security context.⁴⁶ Although a warrant rule may alter the pool of surveillance requests, evidence of recent changes to eavesdropping policy is hard to discern. Even under the

⁴³ 5 USC §§ 552 et seq.

⁴⁴ Remedies in national security detention cases will, however, be distorted by a selection effect because the executive will choose *ex ante* between legal forms of detention based on its estimation of the expected judicial response. To the extent that almost all forms of detention—criminal, administrative, and military—were tried in somewhat haphazard fashion after 9/11, this selection effect does not appear to preclude the comparative analysis proposed here.

⁴⁵ Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 Stan L Rev 755, 757–762 (2004). The canonical delineation of the property/liability rule distinction is Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability Rules: One View of the Cathedral*, 85 Harv L Rev 1089 (1972).

⁴⁶ See, for example, FISA Amendments Act of 2008, § 702 (b)(1)–(5), Pub L No 110-261, 122 Stat 2436 (2008).

pre-2001, more stringent iteration of FISA, few warrants were denied.⁴⁷ Federal courts also have rejected efforts to impose more rigorous ex ante regulation on electronic surveillance.⁴⁸

In non-criminal detention cases, ex ante remedies are vanishingly rare. No court has ever granted a remedy to an individual to prevent seizure or detention. Logistical difficulties obviously limit such remediation. Lawyers are scarce on the battlefield outside of law-school hypotheticals. In practical terms, government actors control and often can delay access to the courts for days or weeks. Despite the infrequency of ex ante intervention, the Supreme Court has in dicta disapproved of such relief. In *Hamdi v Rumsfeld*, a plurality singled out “initial captures,” which “need not receive ... process,” as distinct from the judicially regulated subsequent “determination[s] ... to *continue* to hold those who have been seized.”⁴⁹ Four years later, the Court underscored that same message to federal courts.⁵⁰ As a practical and as a legal matter, federal courts are not now nor have they ever been in the business of regulating the direct application of coercion.

By contrast, litigants who have been detained for some time do seek—and at one point fleetingly enjoyed—some ex ante relief from changes to the circumstances of ongoing confinement. But the availability of such relief is diminishing. Litigants detained at Guantánamo have sought relief from certain aspects of their confinement and from anticipated transfers to third countries. Citing fears of torture, some Guantánamo detainees from 2005 onward sought and sometimes secured judicial orders requiring the government to provide them with thirty days’ notice of any transfer from the base.⁵¹ However, more recent requests for notice have been denied on jurisdictional grounds.⁵² Similarly, requests for preliminary injunctive relief related to conditions of confinement and medical treatment have failed.⁵³

The Supreme Court’s 2008 decision in *Munaf v Geren* minimizes the likely availability of ex ante injunctions against transfers.⁵⁴ In *Munaf*, the Court consolidated review of habeas petitions from two U.S. citizens seized and detained in Iraq. In one case, the detainee

⁴⁷ Note, *Shifting the FISA Paradigm: Protecting Civil Liberties by Eliminating Ex Ante Judicial Approval*, 121 Harv L Rev 2200, 2205–06 (2008).

⁴⁸ *American Civil Liberties Union v National Security Agency*, 493 F3d 644 (6th Cir 2007).

⁴⁹ *Hamdi v Rumsfeld*, 542 US 507, 534 (2004) (plurality) (emphasis in original). *Hamdi*’s presumption is undertheorized. One of the challenges of regulating detention policy is the ample space for government circumvention and evasion. The more one locus or form of detention is regulated, that is, the more the regulated activity will shift to policy spaces with lower transaction costs. Allowing habeas jurisdiction to attach at the moment of capture is one way of mitigating the circumvention problem, whatever its other costs.

⁵⁰ *Boumediene v Bush*, 553 US --, 128 S Ct 2207, 2275–76 (2008).

⁵¹ See, for example, *al-Shareef v Bush*, No 05-2458, 2006 WL 3544736 (DDC Dec 8, 2006); *Kurnaz v Bush*, No 04-1135, 2005 WL 839542 (DDC Apr 12, 2005); *Al-Marri v Bush*, No 04-2035, 2005 WL 774843 (DDC Apr 4, 2005). Cf *Almurabi v Bush*, 366 F Supp 2d 72 (DDC 2005) (denying preliminary injunction but requiring notice). But see *O.K. v Bush*, 377 F Supp 2d 102 (DDC 2005) (denying preliminary injunction). As of March 2006, one commentator identified twenty-seven pro-detainee decisions and six pro-government decisions. Robert Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U Richmond L Rev 657, 667 (2006).

⁵² See, for example, *Zalita v Bush*, 2007 WL 1183910 (DDC Apr. 19, 2007).

⁵³ See *Al-Adahi v Obama*, 596 F Supp 2d 111 (DDC 2009) (force-feeding); *In re Guantanamo Bay Detainee Litigation*, 570 F Supp 2d 13 (DDC 2008) (intra-base transfers); *Al-Ghizzawi v Bush*, No 05-2378, 2008 WL 948337 (DDC Apr 8, 2008) (medical treatment).

⁵⁴ 128 S Ct 2207 (2008). Caveat lector: I was of counsel for habeas petitioners in this case,

successfully sought injunctive relief from lower courts against transfer to Iraqi criminal custody based on fears of torture.⁵⁵ A unanimous Supreme Court not only chastised the lower court for granting preliminary injunctive relief but found it “appropriate to proceed further” to the merits issues not adjudicated below to hold that “the Constitution [does not] preclude[e] the Executive from transferring a prisoner to a foreign country for prosecution in an allegedly unconstitutional trial.”⁵⁶ While *Munaf* does not directly concern transfers from Guantánamo Bay, its foreign-policy-based deference to the executive’s third-country dealings sounds in general terms. As applied by the D.C. Circuit, it renders extensive ex ante judicial supervision of transfers from Guantánamo or elsewhere nugatory.⁵⁷ Injunctive relief to prevent a harmful action, even long after an initial seizure, will thus likely remain a rarity.

A second variety of injunctive remedy is sought after the government has taken coercive action against an individual in circumstances where that coercive action persists in time. Detention, most obviously, endures over time and is remedied by an injunction. Detainees typically seek injunctive relief in the form of a writ of habeas corpus to dissolve ongoing detention and to secure release.

Despite the volume and rancor of political and legal debate over the availability of habeas corpus for detainees situated outside the territorial United States, individualized habeas relief as a direct result of a federal court order remains elusive. As of January 2010, federal courts had issued final judgments finding no lawful detention authority in thirty-two cases. But, only eleven detainees had been released.⁵⁸ A formal release order in a habeas case, therefore, is an uncertain predictor of *de facto* relief. Overall, 575 prisoners have been released from Guantánamo between 2002 and January 2010.⁵⁹ Final judgments in habeas cases were thus directly and proximately linked to relief in less than two percent of actual releases from Guantánamo. Implicitly recognizing this reality, district courts no longer direct release as a remedy but instead order “all necessary and appropriate diplomatic steps to facilitate ... release.”⁶⁰

Habeas’s individualized efficacy is unlikely to grow with the transition from the Bush to the Obama Administration. One of the central policy puzzles related to the closure of the Guantánamo detention operation is how to release detainees who are unable to return to their home countries due to a substantial risk of torture. After *Boumediene v. Bush*’s⁶¹ ruling on

⁵⁵ *Omar v. Harvey*, 416 F Supp 2d 19 (DDC 2006).

⁵⁶ *Munaf*, 128 S Ct at 2220.

⁵⁷ Accord *Kiyemba v. Obama*, 561 F3d 509 (DC Cir 2009) (denying injunctive relief against transfers of Guantánamo detainees to possible torture based on *Munaf*). The government’s brief in opposition, filed in the Supreme Court in this litigation, largely rests on *Munaf*, but the Court has yet to determine whether it will review the case. See text accompanying note 64 (describing grant of certiorari in related case).

⁵⁸ For data and further analysis see Aziz Z. Huq, *What Good is Habeas?*, -- Const Comm – (forthcoming 2010) (manuscript at 15). See also Chisun Lee, *An Examination of 31 Gitmo Detainee Lawsuits*, Propublica (Sept 29, 2009), online at <http://www.propublica.org/special/an-examination-of-31-gitmo-detainee-lawsuits-722> (visited Feb 15, 2010).

⁵⁹ *Transferred--The Guantanamo Docket*, N.Y. Times, online at <http://projects.nytimes.com/guantanamo/detainees/transferred> (visited Feb 15, 2010).

⁶⁰ See, for example, Order, *Al Rahiah v. Gates*, No 1:02-cv-00828-CKK (DDC Sept. 17, 2009), online at http://media.miamiherald.com/smedia/2009/09/17/22/rabia.source.prod_affiliate.56.pdf (visited Feb 17, 2010).

⁶¹ 128 S Ct 2229 (2008).

habeas's availability at Guantánamo, both Congress and the federal courts imposed new impediments to individual injunctive remediation via habeas involving release into the United States. In Congress, for example, riders attached to 2009 appropriations legislation bar certain transfers from Guantánamo to the United States, and impose fifteen-day notice rules for transfers to third countries.⁶² Complicating the picture further, the Court of Appeals for the D.C. Circuit has also rejected release into the United States as a habeas remedy for detainees who cannot be transferred to third countries for fear of torture.⁶³ That D.C. Circuit judgment may be reviewed by the Supreme Court in 2010.⁶⁴ In short, doctrinal and legislative hurdles mean that, even in cases where a district court finds no lawful basis for detention and orders release, the habeas judgment as individual remedy will remain under-realized.

2. "Structural" rulings

There is a class of habeas cases in which federal courts have granted relief that has had the expected and realized consequence of transforming the institutional structure of a national security program in dramatic and wide-ranging ways. Individual petitioners do not, however, always benefit. The causal vector is largely indirect. Three cases in particular have intervened in ongoing security operations and wrought significant changes in the constraints to which the Government is subject. The relief in these cases is somewhat akin to that achieved by a structural injunction.

The first of these cases is *Rasul v Bush*,⁶⁵ where the Court ruled that detainees seized at extraterritorial sites can challenge the legality of their detention in civilian courts and are not limited to the procedures that the military affords. (*Boumediene v Bush* merely reaffirmed the institutional rewiring achieved by *Rasul* and provided further specification of its geographic ambit.⁶⁶) In the same term as *Rasul*, the Court in *Hamdi* displaced the then-existing procedural mechanism used to sort detainees and ordered the use of a vaguely defined but presumably more robust alternative.⁶⁷ Whereas *Rasul* altered the institutional site of detainee screening, *Hamdi* prescribed details about the content of screening. The net effect of these two rulings was institutional transformation. Nine days after judgment in those cases, the Department of Defense announced a new, two-tier procedural apparatus at Guantánamo for the processing and designation of all detainees therein.⁶⁸ This procedural apparatus aimed to conform to *Hamdi*'s

⁶² See, for example, Supplemental Appropriations Act 2009, Pub L No 111-32, HR 2346, § 14104(a) (2009) ("None of the funds made available in this or any prior Act may be used to release an individual who is detained as of the date of enactment of this Act, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia.").

⁶³ *Kiyemba v Obama*, 555 F3d 1022 (DC Cir 2009).

⁶⁴ *Kiyemba v Obama*, -- S Ct -- (Oct. 20, 2009) (granting writ of certiorari).

⁶⁵ 542 US 466 (2004).

⁶⁶ 128 S Ct 2229, 2259–63 (2008). See also *Al Maqaleh v Gates*, 604 F Supp 2d 205 (DDC 2009) (allowing some detainees at Bagram, Afghanistan to seek habeas relief).

⁶⁷ 542 US 507, 527–34 (2004) (plurality).

⁶⁸ Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Gordon R. England, Sec'y of the Navy (July 7, 2004), online at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (visited Feb 17, 2010).

direction by supplying internal process. The perceived price of institutional autonomy from judicial scrutiny was procedural reform and the attendant risk of further releases.

In the third case, *Hamdan v Rumsfeld*,⁶⁹ the Court again used an individual habeas petition as a vehicle for institutional transformation. *Hamdan* extinguished a November 2001 executive initiative to establish military commissions for persons captured in overseas counterterrorism operations. In so doing, it set benchmarks for any new commission system. A pointed concurrence lingered on perceived democratic flaws in the commission's original creation.⁷⁰ The Court's critique of military commissions further "depend[ed] explicitly on substantive concerns" about fairness and accuracy.⁷¹ The *Hamdan* decision set in motion another institutional transformation. Less than four months after the judgment, Congress enacted the Military Commission Act of 2006, in part responding to the Court's critique with a rewired system of military tribunals.⁷² As with *Rasul* and *Hamdi*, an individual habeas action netted a significant institutional shake-up. But the *Hamdan* Court also went out of its way to stress the absence of individualized habeas relief.⁷³

The *Hamdan* Court's structural reform ambitions went further than mere reorganization of military commissions. The decision also addressed questions of detainee treatment that had been a focus of public and legislative debate since 2004. Its effects thus rippled beyond the military. In a holding collateral to its main result, the *Hamdan* Court decreed that Common Article 3 of the 1949 Geneva Conventions⁷⁴ extended to detainees at Guantánamo and beyond.⁷⁵ The majority likely knew that Common Article 3's prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment" had a direct bearing on interrogation and detention practices separate from the procedural issues at stake in *Hamdan*. As President Bush explained, the Court's reorientation of the benchmarks for interrogation "put in question" operations by diverse agencies, including the CIA, which had not been party to the *Hamdan* litigation.⁷⁶

Hamdan's Common Article 3 holding catalyzed further institutional transformation. Eight days after the judgment, the Deputy Secretary of Defense issued a memorandum directing

⁶⁹ 548 US 557 (2006).

⁷⁰ *Id.* at 613–35. See also *id.* at 637 (Breyer, with Kennedy, Souter, and Ginsburg, concurring).

⁷¹ Martinez, 108 Colum L Rev at 1056 (cited in note 40).

⁷² Pub L No 109-366, 120 Stat 2600 (2006) (codified in scattered sections of 10, 18, and 28 USC). New military commissions are authorized in § 3(a)(1) of the Act, codified at 10 USC § 948b(b).

⁷³ *Hamdan*, 548 US at 635 (noting "the Government's continued power to detain [Hamdan] for the duration of active hostilities").

⁷⁴ Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug 12, 1949, Art 3, 75 UNTS 135, 136. Each of the four 1949 Geneva Conventions uses common language to articulate a baseline set of norms for "conflicts not of an international character occurring in the territory of one of the High Contracting Parties." *Id.*

⁷⁵ *Hamdan*, 548 US at 632. The Court had already held that the military commissions at issue violated Articles 21 and 36 of the Uniform Code of Military Justice. *Id.* at 624–25.

⁷⁶ President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept 6, 2006), online at <http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html> (on file with author). The ambit of Common Article 3 had long been of concern to the Administration. See David J. Barron and Martin S. Lederman, *The Commander-In-Chief at the Lowest Ebb--Framing the Problem, Doctrine, and Original Understanding*, 121 Harv L Rev 689, 707 n 48 (2008) (describing 2002 Justice Department suggestion that application of Common Article 3 to counterterrorism operations might infringe Article II powers of the President).

all services to conform to Common Article 3.⁷⁷ A year later, this instruction was superseded by a presidential directive setting forth a more reticulated understanding of Common Article 3.⁷⁸ *Hamdan*, therefore, began an extended sequence of changes to the terms and conditions of detainee treatment and interrogation not only by the armed services at Guantánamo, but more broadly by all federal agencies at diverse geographic locations. An unexpected collateral effect has been to push interrogation operations into the hands of allied countries, such as Pakistan and Egypt, with fewer restraints on torture or illegal treatment.⁷⁹ This globalized displacement effect has been little analyzed.⁸⁰

3. *Damages*

Numerous suits for money damages have been lodged against the government in respect to non-criminal detentions after the 9/11 attacks. Several of these proceeded under the *Bivens* right of action.⁸¹ Others rested on statutory rights of action, including the Religious Freedom Restoration Act⁸² and the Torture Victim Protection Act.⁸³ No case to date has advanced under the generally available vehicle for federal tort liability, the Federal Tort Claims Act.⁸⁴ Almost all damages suits challenging extraterritorial detention operations failed. In the domestic arena, challenges to policies and patterns of detention and arrest also have failed, but some actions seeking damages for ambient abuse or discrimination by low-level officials have proceeded to discovery, or, in a couple of instances, have settled. At best, damages actions provide a means to challenge isolated acts of abuse, but no avenue for effecting larger programmatic change. The Supreme Court's judgment in *Iqbal* will have little effect on this basic picture.

⁷⁷ Memorandum from Gordon England, Deputy Secretary of Defense, on the Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense to Department of Defense Officials (July 7, 2006), online at <http://www.fas.org/sgp/othergov/dod/geneva070606.pdf> (visited Feb 17, 2010). Deputy Secretary England claimed that this involved no change in policy, which is a stretch.

⁷⁸ Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, Exec Order No 13340, 72 Fed Reg 40707 (2007).

⁷⁹ See Eric Schmitt and Mark Mazzetti, *US Relies More on Aid of Allies in Terrorism Cases*, NY Times (May 23, 2009).

⁸⁰ See Huq, -- Const Comm (cited in note 58) (discussing displacement effects).

⁸¹ See *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971). *Bivens* established a private right of action for damages under the Fourth Amendment.

⁸² 42 USC §§ 2000bb et seq. See, for example, *Rasul v Myers*, 563 F3d 527, 532–33 (DC Cir 2009) cert denied – S. Ct – (Dec 14, 2009).

⁸³ 28 USC §1350 note; see, for example, *Arar v Ashcroft*, 532 F3d 157, 162 (2d Cir 2008).

⁸⁴ The absence of claims under the Federal Tort Claims Act (“FTCA”), 28 USC §§ 1346(b), 2671–2680, is a result of statutory exceptions that encompass most national security-related torts, including “[a]ny claim arising out of the combatant activities of the military or naval forces during time of war,” §2680(j); many claims arising out of “assault, battery, false imprisonment [or] false arrest,” §2680(h); and “any claim arising in a foreign country,” §2680(k), and any claim based on “the exercise or performance or the failure to exercise or perform a discretionary function,” §2680(a), which shields most discretionary policy judgments. Individual suits are no substitute for actions against the United States because of the Federal Employees Liability Reform and Compensation Act, or Westfall Act, see Pub L No 100-694, 102 Stat.4563 (1988), which allows the United States to be substituted for individual officer defendants sued for actions taken within the scope of their employment, and thereafter channels suit into the FTCA.

Before *Iqbal*, damages actions arose in response to five different kinds of detention decisions. First, federal law enforcement authorities used the “material witness” statute to detain at least seventy suspects in relation to terrorism investigations across the United States.⁸⁵ Two sued. One, Brandon Mayfield, a Portland, Oregon, lawyer erroneously detained in relation to the March 2004 Madrid bombings, secured a two million dollar settlement after it emerged that forensic evidence upon which his arrest had been made was grossly flawed.⁸⁶ Another sought damages for his detention from federal and state officials, overcoming motions to dismiss by defendant former Attorney General John Ashcroft.⁸⁷ This result is arguably in some tension with the new and more stringent pleading rules specified in *Iqbal* and discussed below.

The second kind of domestic detention—in military custody via “enemy combatant” designation—was rare, even among the wave of first responses to 9/11. Among the three “enemy combatants” detained in the United States, one waived his right to sue as a condition of release.⁸⁸ The only one to sue for damages, Jose Padilla, aimed at a former government lawyer in one law suit based on allegations that the lawyer played an instrumental role in designing torturous interrogation protocols.⁸⁹ The action survived a post-*Iqbal* motion to dismiss based on the alleged insufficiency of the allegations.⁹⁰ The ensuing decision is a possibly vulnerable outlier. While citing *Iqbal*, the district court did not analyze extensively the effect of that case on pleading rules.

Third, the government used immigration powers in its post-9/11 investigation to detain at least 750 non-citizen suspects pending inquiry by the FBI. Immigrants detained in that period, whether clearly linked to the attacks or not, were ranked by varying degrees of “interest.” To enable continuing FBI investigations, some were subject to continued detention even after being cleared of immigration-related charges. Conditions of confinement were significantly harsher than those in routine immigration custody. During the ensuing detentions, some non-citizens endured physical or verbal abuse, as well as denials of access to legal counsel or medical care.⁹¹ Suits arising from this program of immigration detention challenged both policy decisions and discrete, dispersed, and individualized acts of discrimination and abuse. *Iqbal*, discussed further below, barred suits against policy-makers, but left open the possibility of suits against rank-and-

⁸⁵ 18 USC § 3144; Human Rights Watch, *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11* at 16 (June 2005).

⁸⁶ Eric Lichtblau, US Will Pay \$2 Million to Lawyer Wrongly Jailed, *NY Times* (Nov 30, 2006).

⁸⁷ See *Al-Kidd v Ashcroft*, -- F3d --, 2009 WL 2836448 (9th Cir Sept 4, 2009) (denying qualified immunity). See also *Al-Kidd v Gonzales*, No CV 05-093-EJL-MHW, 2006 WL 5429570 (D Id Sept 27, 2006); *Al-Kidd v Gonzales*, No CV 05-093-EJL-MHW, 2008 WL 2795137 (D Id July 17, 2008) (dismissing conditions claims).

⁸⁸ Motion of Defendant to Stay Proceedings, *Hamdi v Rumsfeld*, No. 2:02CV439 ¶ 13 (ED Va Sept 24, 2004), online at http://www.humanrightsfirst.org/us_law/inthecourts/hamdi_briefs/Hamdi_Agreement.pdf (visited Feb 17, 2010).

⁸⁹ See Complaint, *Padilla v Yoo*, No. 08-CV-0035 (ND Cal Jan 4, 2008), online at <http://jurist.law.pitt.edu/pdf/YooComplaint.pdf> (visited Feb 17, 2010).

⁹⁰ *Padilla v Yoo*, 633 F Supp 2d 1005 (ND Cal 2009).

⁹¹ See generally US Department 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* 2-5 (April 2003), online at <http://www.usdoj.gov/oig/special/0306/index.htm>.

file officials.⁹² A companion case concerning similarly unsanctioned abuse during confinement settled in part for \$300,000.⁹³ In another action, the federal courts dismissed challenges to the lawfulness of arrests—an issue going to investigative strategies—while allowing conditions claims to proceed to discovery.⁹⁴

Fourth, military operations outside the United States have generated a significant volume of long-term detainees. The latter are either held by the U.S. Government (e.g., in Guantánamo) or transferred to cooperating foreign governments. Detention operations at Guantánamo, in Iraq, and in Afghanistan have led to damages litigation. Unlike domestic actions, where challenges to conditions have gained some traction, these suits uniformly fail. Federal courts dismiss the complaints on the theory that plaintiff-detainees held overseas lack constitutional rights that can be vindicated via a damages action or because defendants benefit from qualified immunity.⁹⁵ The final and related category of suits involves detention that is outsourced to foreign sovereign proxies or moved to CIA “black sites.” Two actions against government officials based on detention in a CIA “black site” and in the proxy custody of another sovereign (Syria) have been rejected based respectively on the “state secrets” doctrine and the “special factors” exception to *Bivens* liability.⁹⁶ By contrast, a suit against private companies allegedly involved in the same program survived dismissal efforts grounded on the state secrets doctrine but will be subject to vigorous attack via appellate review.⁹⁷

The Supreme Court’s ruling in *Iqbal* will do little to change the daunting obstacles facing plaintiffs in these cases. *Iqbal* emerges from the third category: immigration detention. Javaid Iqbal, a Pakistani national, was arrested by FBI and immigration agents in November 2001 and detained in the Metropolitan Detention Center in Manhattan. In January 2002, he was transferred to a high-security unit called the Administrative Maximum Special Housing Unit (the “ADMAX SHU”), where he remained until July 2002. In April 2002, Iqbal pleaded guilty to federal criminal charges of conspiracy to defraud the United States and fraud in relation to identification documents. He was released in January 2003 and deported to Pakistan.⁹⁸ In May 2004, Iqbal filed damages actions against 34 current and former government officials. He did not challenge

⁹² *Ashcroft v Iqbal*, 129 S Ct 1937, 1952 (2009) (“Respondent’s account of his prison ordeal alleges serious official misconduct that we need not address here.”).

⁹³ *Iqbal v Hasty*, 490 F3d 143, 147 (2d Cir 2007) rev’d sub nom *Ashcroft v Iqbal*, 129 S Ct 1937 (2009).

⁹⁴ *Turkmen v Ashcroft*, No. 02-CV-2307, 2006 WL 1662663 *1 (EDNY June 14, 2006) aff’d in part and rev’d in part, 589 F3d 542 (2d Cir 2009) (per curiam). Under the Second Circuit’s ruling, the plaintiffs in the *Turkmen* case can pursue conditions challenges but not challenges to the duration of their confinement.

⁹⁵ See *Rasul v Myers*, 563 F3d 527 (D.C. Cir 2009) cert denied – S. Ct. – (Dec 14, 2009) (after vacatur of an earlier judgment by the Supreme Court in light of *Boumediene*, reinstalling dismissal of constitutional, international law, and statutory causes of actions lodged by former Guantánamo detainees); *In re: Iraq and Afghanistan Detainees Litigation*, 479 F Supp 2d 85 (DDC 2007) (same for military detainees in Iraq and Afghanistan). Suits against private contractors not operating under exclusive military control have prevailed against motions for summary judgment. See *Ibrahim v Titan Corp*, 556 F Supp 2d 1, 10 (DDC 2007) (distinguishing claims based on degree of military control).

⁹⁶ *El-Masri v Tenet*, 479 F3d 296, 308–11 (4th Cir 2007) (dismissal based on “state secrets” doctrine); *Arar v Ashcroft*, 585 F3d 559 (2d Cir 2009) (in banc) (dismissing suit based on insufficiency of allegations and absence of *Bivens* remedy).

⁹⁷ *Mohamed v Jeppeson Dataplan, Inc*, 563 F3d 992, 997, en banc review granted 586 F3d 1108 (9th Cir 2009).

⁹⁸ See *Iqbal v Hasty*, 490 F3d 143, 147–49 (2d Cir 2007).

the legality of his initial arrest. His complaint instead alleged discriminatory assignment to the ADMAX SHU and unconstitutional beatings and denial of medical care. By the time his case reached the Supreme Court, the district court had rejected statutory claims of religious discrimination and conspiracy,⁹⁹ while the court of appeals had knocked out Iqbal's due process claims.¹⁰⁰ The Supreme Court granted plenary review to former Attorney General John Ashcroft and FBI director Robert Muller.¹⁰¹

Writing for a five-Justice majority Justice Kennedy reversed the Second Circuit to hold that Iqbal had failed to plead sufficient facts to meet the pleading standard of Federal Rule of Civil Procedure 8(a)(2).¹⁰² Some background is necessary to understand this procedural ruling. Rule 8(a)(2) was long understood to establish notice pleading in federal civil practice.¹⁰³ Its drafters intended to "escape the complexities of fact pleading" under common law rules by opening wide the federal courthouse door and relying on post-discovery sorting to eliminate low-value suits.¹⁰⁴ The Court previously had rejected lower-court attempts to impose heightened pleading standards or new burdens of proof.¹⁰⁵ But in a 2007 antitrust action, the Court changed course. It held that district courts must ascertain whether a complaint supports a "plausible" inference of liability in antitrust actions.¹⁰⁶ Muddying the waters further, another decision weeks later flipped back to the familiar notice pleading formulation.¹⁰⁷ Summarizing the resulting guidance to lower courts, Judge Cabranes of the Second Circuit Court of Appeals decried the law of pleading as "less than crystal clear and fully deserv[ing] reconsideration by the Supreme Court at the earliest opportunity."¹⁰⁸

In response, the *Iqbal* Court held that the "plausibility" standard first suggested in 2007 was not confined to antitrust but applied generally to federal civil litigation. It established a two-stage test for "plausibility" presumptively applicable to all federal civil suits. First, a court should discard all "legal conclusions" and "mere conclusory statements" in a complaint. Second, it should ascertain if what remains "states a plausible claim of relief" in "context" by drawing on "judicial experience and common sense."¹⁰⁹ Applying this test, the Court reversed the court of

⁹⁹ *Elmaghraby v Ashcroft*, 04-CV-1409, 2005 US Dist LEXIS 21434 *95-*109 (EDNY Sept 27, 2005).

¹⁰⁰ *Iqbal*, 490 F3d at 160-68.

¹⁰¹ Compare *Ashcroft v Iqbal*, 554 US --, 128 S Ct 2931 (2008) (granting certiorari), with *Hasty v Iqbal*, 129 S Ct 2430 (2009) (granting and remanding in light of the Court's opinion in *Iqbal*).

¹⁰² Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief."

¹⁰³ See *Conley v Gibson*, 355 US 41 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

¹⁰⁴ Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum L Rev 433, 433, 437-40 (1986).

¹⁰⁵ See, for example, *Crawford-El v Miller*, 523 US 574, 593-95 (1998) .

¹⁰⁶ *Bell Atlantic Corp v Twombly*, 550 US 544, 556 (2007).

¹⁰⁷ *Erickson v Pardus*, 551 US 89, 93-94 (2007) (per curiam).

¹⁰⁸ *Iqbal v Hasty*, 490 F3d 143, 178 (2d Cir 2007) (Cabranes concurring).

¹⁰⁹ *Ashcroft v Iqbal*, 129 S Ct 1937, 1949-50 (2009).

appeals' judgment and remanded for determination whether *Iqbal* should be allowed to replead.¹¹⁰

Putatively a case about an emergency national security policy, *Iqbal* will not change any trend in national security damages litigation. Plaintiffs in such cases already face a thicket of procedural hurdles from categorical exceptions to *Bivens* liability to the "state secrets" privilege to qualified and absolute immunity. These threshold doctrines already direct dismissal before discovery. By raising pleading standards, *Iqbal* does not change even the timing of likely dismissal. It just endorses a new legal theory on which dismissal may be grounded.¹¹¹ The basic pattern will remain the same: Challenges against discrete, isolated, and unauthorized acts of abuse sometimes prevail, but suits targeting allegedly unconstitutional policies will be turned away at the courthouse door. As discussed in more detail below, *Iqbal*'s effect on general civil litigation, however, was immediate and dramatic, in striking contrast to its consequences for the local domain of national security cases.¹¹²

4. Conclusion

A pattern emerges from this survey of post-9/11 case law about detention programs. Private litigants prevail in actions for what are de facto structural injunctions (although they do not have that technical legal form), which catalyze significant structural change in national security programs but yield few proximate benefits for the named petitioners. But private litigants meet limited or no success in seeking more tailored ex ante or ex post retail injunctions. Damages actions also are generally unavailing, except in a scattering of cases challenging discrete, isolated, and unauthorized acts of abuse or discrimination. *Iqbal* may render damages actions incrementally less likely to prevail. It is hard to see, though, this difference having much practical significance in the national security domain.

¹¹⁰ Before reaching the pleading question, the Court also confirmed the availability of interlocutory jurisdiction. *Ashcroft v Iqbal*, 129 S Ct 1937, 1945–49 (2009). It then held that supervisory liability based on a defendant's "knowledge and acquiescence" was not available, at least for intentional government torts, an argument that prompted a lengthy reply by Justice Souter, who argued that the majority had overlooked the defendants' concession on this point. Compare *id* at 1948 with *id* at 1955–58 (Souter dissenting).

¹¹¹ Seemingly contrary to this view are the results in both *Al-Kidd* and *Padilla*. But these cases do not alter the basic fact of *Iqbal*'s inconsequentiality for national security. As an initial matter, it is unclear how to count decisions, such as *Al-Kidd* and *Padilla*, which do not grapple seriously with *Iqbal*'s reformulation of the pleading standard. Even if these cases are indicative of future trends—which seems doubtful—they are evidence that *Iqbal* is opaque and that its two-stage doctrinal rule is easy to circumvent. Just as some lower courts for years resisted the Supreme Court's direction to hew to notice pleading, see Christopher M. Fairman, *Heightened Pleading*, 81 Tex L Rev 551, 552 (2002), so now that the Court has pivoted to fact pleading other lower courts will resist the transition. It is not only that the judiciary is "a they, not an it," but that the "they" is saddled with imperfect mechanisms of internal doctrinal discipline. Cf Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J Contemp L Issues 549, 554 (2005) ("Empirically, it is often costly or simply infeasible for the judiciary to coordinate upon a particular course of action, and to sustain that coordination to the degree necessary to affect the behavior of other institutions and actors.").

¹¹² See text accompanying notes 189 to 196.

C.

What can be learned from a comparison of the observed consequences of judicial intervention in exigent non-criminal detention policies with the patterns of judicial action described in or extrapolated from the five, largely normative theories above? A faithful explanation of the federal courts' role in national security must explain both judicial parsimony in ex ante injunctions and damages actions and also the more ample role of courts in issuing de facto "structural" injunctions that affect whole national security programs. If one of the five descriptive accounts outlined in Part I.A captured the observed distribution of results, this would be evidence it had isolated a distinctive dynamic motivating judicial outcomes in these particular national security cases. But none of the theories achieves this goal.

1. *The social learning thesis*

The social learning thesis does not easily cash out into any expected pattern of remedial outcomes. It operates across history and does not select between contemporary remedial options. It predicts synchronic variance between judicial and elite consensus will be small. Courts, therefore, will generally accord deference to claims of necessity but resist claims of government power that track or echo historically discredited models. Taking social learning seriously, courts after 9/11 would resist measures that resembled past discredited security efforts, while accepting innovations. Dissents from today's decisions that endorse novel security responses would one day be celebrated as prescient when new information emerges about the flaws in current security programs.

But, this account does not describe well the actual outcomes and it casts little light on the differential treatment of narrow versus broad-gauge remedies. As the basis for the claim that national security jurisprudence is exceptional, that is, the social learning thesis provides scant support. To the contrary, the Supreme Court has done little to cabin the use of race-based or ethnicity-based criteria as proxies for dangerousness, despite the aversive precedent of *Korematsu*. To be sure, the absence of a post-9/11 mass internment of Muslim-Americans might be credited to the "social learning" of *Korematsu*. Another explanation would focus on differences in political economy. In the World War II internment, rival agricultural interests eager for land were an important motivating force for a round-up of ethnic Japanese living on the west coast.¹¹³ The absence of similar interest group pressure on the east coast explains the absence of German or Italian internment later in World War II, and may also better explain the absence of Muslim-American internment today.

Nor does *Iqbal* fit the social learning thesis. In hindsight, *Korematsu* at a minimum suggests that governments, after a security crisis, often act on the basis of invidious or inaccurate generalizations about disfavored minorities. Yet the *Iqbal* Court not only makes bias significantly harder to police, it also rests on carelessly racialized reasoning that even the

¹¹³ Stone, *Perilous Times*, at 292–93 (cited in note 7).

government as litigator eschewed. As an initial matter, the *Iqbal* majority was cavalier about the risk of ambient animus distorting discrete outcomes in a national crisis. Leaning on his “experience and common sense,” Justice Kennedy rejected out of hand circumstantial evidence of discriminatory intent in *Iqbal*’s case. Noting that the 9/11 attacks were “perpetrated by 19 Arab Muslim hijackers ... members in good standing of al Qaeda, an Islamic fundamentalist group ... headed by another Arab Muslim,” he asserted that it came as “no surprise” that responsive policies had “a disparate, incidental impact on Arab Muslims.”¹¹⁴ “Common sense and experience” here served to deny *Iqbal* even the opportunity to identify bias through discovery.

Further, Justice Kennedy’s logic is itself based on dubious premises about ethnicity and religion. As Judge Jon O. Newman explained in his opinion for the Second Circuit, “*Iqbal* is a Muslim and a Pakistani but not an Arab.... [H]is claim is fairly to be understood as alleging unlawful treatment ... because officials believed, perhaps because of his appearance and his ethnicity, that he was an Arab.”¹¹⁵ Categorizing a Pakistani as an Arab, as Justice Kennedy does, is about as accurate as calling an American “European” based on a perception of shared ethnic heritage.¹¹⁶ The Court’s opinion thus rests on the very act of plainly erroneous racial mis-categorization that *Iqbal* attacked as invidious. In short, it is not only that the “social learning” thesis provides little basis for predicting or understanding observed results in the case law but that *Iqbal* in particular casts doubt on whether the Court has learned much from its less noble history.

2. *The heroic model*

The heroic model is typically more aspirational than descriptive. If the heroic model is understood to rest on the assumption that democratic decision-making under emergency pressure will tilt toward animus-inflected error, either along racial or ideological lines, then federal courts should police resulting policies vigorously, applying searching scrutiny to check their rationality. Recognizing that money damages fall short as a substitute for incommensurable constitutional entitlements,¹¹⁷ at a minimum because of valuation difficulties, advocates of the heroic model might tilt toward ex ante solutions without abandoning residual judicial review via damages actions. The most insightful advocates of the heroic model, of course, are not Pollyannaish. They recognize that political constraints bind judges and that emergencies raise hard policy

¹¹⁴ *Ashcroft v Iqbal*, 129 S Ct 1937, 1951 (2009).

¹¹⁵ *Id.* *Iqbal v Hasty*, 490 F3d 143, 148 n 2 (2d Cir 2007).

¹¹⁶ Justice Kennedy may be implying that possession of a religious identity—Muslim—suffices to warrant suspicion when it comes to terrorism today. But even the government’s brief is careful to reject so sweeping a claim about religious identity. See Br For Pet’rs’ in *Ashcroft v Iqbal*, No 07-1015, *Ashcroft v Iqbal*, 129 S Ct 1937 (2009), at 31 (carefully refusing to contend that religious identity is a trait legitimately useful in investigations).

¹¹⁷ Cf *Carey v Phipus*, 435 US 247 (1978) (allowing award of nominal damages for procedural due process violation); see also *Memphis Community School District v Stachura*, 477 US 299 (1986) (rejecting valuation of abstract value of constitutional right).

questions.¹¹⁸ As a result, they may endorse some judicial hesitation to intervene by ex ante or even in media res injunctions.

But the result and reasoning of *Iqbal*, alongside the larger vacuum in damages actions, are difficult to square with a counter-majoritarian thesis. Reliance on structural injunctions alone seems radically underinclusive of the heroic model's goals. That model also struggles with the absence of individualized injunctive relief. It thus may well be that the heroic model identifies one important feature of judicial thinking and strategy, but it also underplays the complex influence and interaction of other factors. The heroic model therefore cannot underwrite a descriptive claim of national security exceptionalism.

3. *The executive accommodation model*

Executive accommodationists favor roughly the opposite distribution of remedial outcomes from the heroic model. They will reject out of hand ex ante or in media res judicial interventions. They also will be leery of constitutional tort litigation to the extent it limits future options by articulating new constitutional norms to constrain subsequent executives. Emergencies are unpredictable along multiple axes; it is impossible ex ante to determine what rules will be bent in the next one.¹¹⁹ Yet accommodationists may also see utility in compensation if it can be separated from the norm-enunciation function of constitutional tort. They “fully agree” that “decisionmakers should at minimum take pains to commemorate the values or rights or interests that [were] overridden in the service of other commitments.”¹²⁰ Indeed, if courts adjudicate damages actions after some lapse of time—which is inevitable given the glacial pace of civil litigation in federal courts¹²¹—then information asymmetries and the comparative cost of judicial examination and correction may have waned in the interim. The emergency itself is also more likely to have expired.¹²²

The outcomes of cases decided since 9/11 do not converge on this pattern. To be sure, the observed pattern of remedies and their consequences illustrates federal courts' identification and insulation of a zone of discretion at the point of first contact between government and a threat. This explains the absence of ex ante remedies and the courts' reluctance, so manifest in *Iqbal*, to chill front-end discretionary decision-making.¹²³ To the extent that the executive accommodation theory suggests that the role of courts trends stronger as time elapses after an emergency, that

¹¹⁸ See Stone, *Perilous Times* at 544 (cited in note 8); David Cole, “Strategies of the Weak”: Thinking Globally and Acting Locally Toward a Progressive Constitutional Vision, in J.M. Balkin and R. B. Siegel, eds, *The Constitution in 2020* at 297, 299–300, 306 (Oxford 2009).

¹¹⁹ Cf Posner and Vermeule, *Terror in the Balance* at 18, 169 (cited in note 8) (noting that Congress may have “little information about the nature of future emergencies”).

¹²⁰ *Id.* at 296 n 9.

¹²¹ See *Nken v Holder*, 129 S Ct 1749, 1754 (2009).

¹²² See Adrian Vermeule, *Holmes on Emergencies*, 61 Stan L Rev 163, 191 (2008). Since damages actions look back to past actions temporally proximate to the emergency, rather than examining continuing policies, they are not a form of “ex post sunset” whereby judges rescind emergency powers once they determine that as a matter of fact the emergency has elapsed. *Id.*

¹²³ *Ashcroft v Iqbal*, 129 S Ct 1937, 1953 (2009).

theory finds little support in the judicial treatment of damages liability. Also, judicial remediation to date has clustered around the most invasive form of intervention—structural injunctions—while more tailored options have been slighted. That result obviously cannot be accounted for by a thesis of deference.

4. *National security minimalism*

In its tripartite form of clear statement rule, hearing rights, and decisional thinness, minimalism is offered as a template that “to a remarkable degree, captures the practices of the American courts when national security is threatened.”¹²⁴ National security minimalism does not, however, predict well the overall pattern of remedies in national security cases. Courts have foregone tailored individual remedies, whether *ex ante* or *ex post*, in favor of quasi-structural injunctions in *Hamdi*, *Hamdan*, *Rasul*, and *Boumediene*. Rather than just changing conditions for one litigant, these decisions have each prompted institutional transformation in large national security programs. *Hamdan*’s Common Article 3 holding in particular rewired not only military commission policy but also interrogation policy. The Court thus opted for wide-bore remedial strategies over a narrow approach. Its interventions disrupted government operations beyond the case at hand. Judicial responses in the national security context, that is, have been maximalist in important ways.

The ruling in *Iqbal* is also hard to square with minimalism along several dimensions. First, the Court’s grant of certiorari was unusual¹²⁵ insofar as there was no clear conflict among the circuits on either question presented,¹²⁶ and the second question challenged a theory of government tort liability—supervisory liability by constructive notice—that had not been raised by the plaintiffs or decided below.¹²⁷ A truly minimalist Court would rather incline against review where legal issues do not cleanly fit Supreme Court Rule 10’s criteria for review.¹²⁸ The votes for certiorari review in *Iqbal*, indeed, seemed driven less by the legal issues presented than by the identity of the petitioners.¹²⁹ Second, the majority opinion cannot be described as minimalist. It swept broadly by possibly eliminating supervisory liability in damages actions against government officials for violations of constitutional rights.¹³⁰ Even more significantly, it

¹²⁴ Sunstein, 2004 Sup Ct Rev at 50–51 (cited in note 11).

¹²⁵ A grant of certiorari is always unusual: In the 2007 Term, only 1.1% of the 8374 petitions filed led to review. *The Statistics*, 122 Harv L Rev 522, 523 (2008).

¹²⁶ Compare Pet for Cert No 01-1015, *Ashcroft v Iqbal*, 129 S Ct 1937 (2009) at i (listing questions presented) with, Sup Ct R 10 (listing grounds for review by certiorari). The petition strained to identify a conflict in the circuits on the pleading standard and did not assert that the conflict was the primary ground for granting review. See Pet for Cert at 18–21.

¹²⁷ See Br in Opp No. 01-1015, *Ashcroft v Iqbal*, 129 S Ct 1937 (2009) at 28–29.

¹²⁸ Rule 10(a) and 10(b) refer to divisions of opinion between courts the Supreme Court supervises respecting federal law; 10(c) covers “important question[s] of federal law.”

¹²⁹ The petition is larded with references to the petitioners’ ranks and the importance of being “a cabinet-level official or other high-ranking official.” Pet for Cert in *Ashcroft v Iqbal*, No. 07-1015, 129 S Ct 1937 (2009), at i.

¹³⁰ See *supra* note 110. Justice Kennedy’s opinion is not wholly clear on this. But see *Ashcroft v Iqbal*, 129 S Ct 1937, 1957 (2009) (Souter dissenting) (“Lest there be any mistake ... the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely.”).

reordered pleading rules for federal civil actions in a manner that likely will generate future uncertainty and disparities between district courts. Third, the *Iqbal* Court resolved the pleading dispute on broader factual and legal grounds than those suggested by defendant-petitioners. The Court could have side-stepped the problem of racial or religious bias in law enforcement by picking up on the uncontested fact, raised by defendants' brief, that 578 of the 762 detainees targeted by the investigation were not identified as being of "high interest" or placed in the ADMAX SHU.¹³¹ That is, it could have looked to uncontested facts as a means to respond to *Iqbal*'s claim of bias. Despite its claims to descriptive success in the national security domain, minimalism thus fails to provide an accurate characterization of either the overall pattern of outcomes or specific results such as *Iqbal*.

5. *Bilateral institutional endorsement*

Like other accounts, bilateral institutional endorsement is presented as both descriptively accurate and normatively appealing.¹³² Indeed, in his separate *Hamdan* concurrence, Justice Breyer invited renewed democratic deliberation in terms that echo this theory's logic.¹³³ Yet, as with the other dominant theoretical accounts, bilateral institutional endorsement does not generate sound predictions for two reasons. First, democratic deliberation has not been the touchstone that the theory suggests. Second, the theory itself lacks predictive force because it contains no account of when or why courts should find democratic deliberation inadequate.

The first problem is that bilateral institutional endorsement does not well explain constitutional rulings in cases such as *Hamdi* and *Boumediene*. The theory's proponents claim that *Boumediene* can be assimilated into this model as "an explication of the structural mechanisms that preserve" rights.¹³⁴ Yet the *Boumediene* Court rejected the twice-considered judgment of Congress that plenary habeas jurisdiction over Guantánamo was neither wise nor necessary. The Court not only found inadequate the jurisdictional scheme designed by the political branches but did so without even allowing that scheme to be tested and found wanting. Extending rights under the Suspension Clause and the Due Process Clause to detainees, the Court materially reduced the policy space of the political branches in the teeth of considered and repeated deliberative exercises of the democratic will.

The second, more serious, concern with bilateral institutional endorsement's descriptive claim is its indeterminacy. Many cases in the national security domain, including *Hamdi*, *Hamdan*, and *Rasul*, hinge on whether a long-standing statute authorizes the executive branch to establish a novel policy that could not have been anticipated by the enacting Congress. The Court on occasion finds bilateral endorsement in statutory ambiguity.¹³⁵ Other times, it rejects innovation based on the absence of sufficient endorsement. Bilateral institutional endorsement

¹³¹ Br for Petrs in *Ashcroft v Iqbal*, 129 S Ct 1937 (2009) at 33 n 4.

¹³² Issacharoff and Pildes, 5 Theoretical Inq L 1 at 5 (cited in note 10).

¹³³ *Hamdan v Rumsfeld*, 548 US 557, 636 (2006) (Breyer concurring).

¹³⁴ Issacharoff 29 Oxford J Legal Stud at 211 (cited in note 35).

¹³⁵ See, for example, *Hamdi v Rumsfeld*, 542 US 507, 518 (2004) (plurality).

supplies no theory to explain when and how the Court should read ambiguous statutes to support an innovative policy. Without this baseline, it cannot generate predictions in the large number of cases in which the Court is confronted by a claim of bilateral action grounded in legislative language of uncertain relevance.¹³⁶ Nor does the theory well explain what the Court has in fact done in the face of an ambiguous statute. In *Hamdi*, the relevant baseline seemed to be built of “fundamental and accepted ... incident[s] of war.”¹³⁷ But this term is far more opaque than district courts or commentators have recognized.¹³⁸ In *Hamdan*, the Court looked to a complex, and not entirely pellucid, blend of historical practice and statutory authorization. The Court may have a baseline in mind, in other words, but it may be a mutable and only partially conceptualized one that bilateral institutional endorsement does little to illuminate.

Analysis of *Iqbal* and the damages cases through the lens of bilateral institutional endorsement suffers from the same drawback: It is impossible to determine what the baseline is against which the Court should view the availability of a *Bivens* damages remedy. On the one hand, the Court might believe that Congress has acquiesced to the availability of a *Bivens* remedy because “where federally protected rights have been invaded it has been the rule from the beginning that courts will be alert to adjust their remedies.”¹³⁹ On the other hand, Congress might be presumed to recognize that today “the Court is reluctant to extend *Bivens* liability.”¹⁴⁰ Absent some account of what the appropriate baseline is in damages actions, bilateral institutional endorsement cannot generate a meaningful prediction of results in damages cases any more than it yields forecasts of judicial responses to executive action resting on other marginal claims to statutory authority.

D.

To summarize, five accounts of judicial responses to new national security policies can be identified in the current literature. Each makes a claim of descriptive fit as well as normative persuasion. Each singles out a unique judicial response to national security emergencies based on its understanding of what makes the policy environment after such an emergency distinct. But, a review of the federal courts’ remedial decisions in post-9/11 non-criminal detention cases suggests that none of these accounts yields a fully satisfying explanation of what courts are

¹³⁶ Issacharoff and Pildes do not miss this problem; they implicitly recognize it when they discuss whether to treat an ambiguous statute as authorization for a contentious executive action. See Issacharoff and Pildes, 5 Theoretical Inq L 1 at 38–39 (cited in note 10).

¹³⁷ *Hamdi*, 542 US at 518 (plurality).

¹³⁸ The baseline is explored in Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv L Rev 2047 (2005).

¹³⁹ *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388, 392 (1971) (quoting *Bell v Hood*, 327 US 678, 684 (1946)).

¹⁴⁰ *Ashcroft v Iqbal*, 129 S Ct 1937, 1948 (2009). This was as true of the Rehnquist Court as the Roberts Court.

doing. This result provides a first reason for doubting the descriptive power of national security exceptionalism.¹⁴¹

II.

This Part develops a second reason for skepticism about national security exceptionalism. I argue first that the gap between judicial responses to national security emergencies and other problems of constitutional compliance within complex institutions and policies has been overstated. To a surprising degree, remedies in national security cases correspond to remedies in other areas of public law where federal courts have grappled with complex state institutions. I then examine one set of judicial responses to the financial crisis of 2008–09 to see whether courts behave differently in security and non-security emergencies.

A.

Federal courts have developed a distinctive set of rules and remedies in enforcing constitutional entitlements in policing, prisons, mental institutions, and education. While generalized accounts of this particular body of public law are sparse, some regularities are evident. In the larger corpus of public law, it is possible to discern trends in *ex ante* injunctions, *ex post* release via habeas, damages liability, and structural remedies. Examination of each of these four areas suggests that the judicial approach to national security is not as distinct as is generally believed from other public law domains. In both national security and general public law, there is an asymmetry between scarce-on-the-ground individual remedies and structural judicial orders that effectively re-organize government institutions. Benefiting a discrete litigant at bar is of secondary concern in both domains. Thus, common explanations may underlie judicial responses to exigent government programs in both national security and other public law domains.

Why are there such strong similarities between the remedies in national security cases and those in other public law cases? There are several possible explanations. It may be that judges model, either consciously or instinctively, their remedial strategies on familiar approaches in public law (an effect amplified perhaps via precedential learning). Or it may be that screening devices at the courthouse door select for similar kinds of cases in the two domains. Alternatively, and more promisingly in my view, the correlation may be explained by reputational or other judicial motivations that reach across substantive doctrinal boundaries. But construction of a

¹⁴¹ One possible response to this argument might go as follows. Even if taken individually none of these theories has explanatory power alone, in the *aggregate* they encompass all the reasons courts have to act. Hence, their cumulative force is explanatory. I am not convinced. In the absence of some algorithm to assign weights to and then aggregate these competing and irreconcilable accounts, the argument from aggregation is question-begging. I do not doubt that different judges are responding in different ways to the concerns raised by the five theories, or that collegial decision-making might be characterized by cycling or unstable outcomes. I am merely suggesting here that the five theories alone do not help us while bracketing the more intractable question of how best to explain how judges behave.

larger model of judicial motivation and behavior is beyond my aims here. My goal rather is solely to show that national security cases are not sharply different from other lines of public law jurisprudence.

Consider first the absence of *ex ante* injunctive relief in national security case law, identified in Part I.B. *Ex ante* prevention of potentially unconstitutional government action, especially involving coercion, is almost always the exception in other areas of public law. Doctrinal barriers from abstention rules to “political question” constraints to standing doctrine generally push judicial intervention away from the front-end of government action. Plaintiffs cannot seek preemptive relief against anticipated government coercion without evidence that they specifically will be targeted.¹⁴² In one area of police-citizenry contact frequently litigated in the Supreme Court—automotive stops—the Justices have stayed on the margins. “Officer safety” is the dominant concern of Fourth Amendment cases concerning the rules for encounters between police and drivers.¹⁴³ Even at the apogee of the Warren Court’s criminal procedure jurisprudence, the “more immediate interest” that the Court recognized, documented, and protected was the protection of police against “unnecessary risk.”¹⁴⁴ In its recent narrowing of the scope of permissible car searches incident to arrest, the Court still followed officer safety as its lodestar.¹⁴⁵ Current regulation of the use of police deadly force is also weak and *ex post*.¹⁴⁶ The regulatory vacuum at the sharp edge of national security policy, in other words, is not distinct from the situation in analogous areas of social control. Rather, the national security case law is close to the norm rather than exceptional.

Second, the absence of individual release via habeas corpus in national security cases is in line with trends in relief when habeas is used as a post-conviction remedy under 28 U.S.C § 2254. In the national security context, even named habeas petitions in landmark cases win minimal individualized relief and do not secure release. For the habeas petitioner, victory on procedural grounds instead generally leads to more process, more delay, and thus more detention. Winning in the Supreme Court, for example, meant Hamdan risked at worst indefinite detention and at best protracted delay until the reconstitution of new military tribunals. Hamdi and the *Rasul* petitioners also won Pyrrhic remands and the prospect of extended future litigation. Like petitioners under the Administrative Procedure Act seeking reconsideration of a feeble agency rule, detainees often found that success had the practical result of deferring a

¹⁴² *City of Los Angeles v Lyons*, 471 US 95 (1983); *Laird v Tatum*, 408 US 1 (1972); cf *United States v Richardson*, 418 US 166 (1974).

¹⁴³ See, for example, *Thornton v United States*, 541 US 615, 621 (2004). Even this Term’s narrowing of auto stop search authority was careful to endorse officer safety as a trumping concern. *Arizona v Gant*, 129 S Ct 1710, 1716 (2009).

¹⁴⁴ *Terry v Ohio*, 392 US 1, 23 (1968). Chief Justice Warren included a detailed footnote documenting the risk to officers in police stops. *Id* at 24 n 21.

¹⁴⁵ See *Arizona v Gant*, 129 S Ct 1710, 1716 (2009).

¹⁴⁶ See Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 Geo Wash L Rev 453, 466–478 (2004) (describing absence of criminal or civil remedies against officers or institutional for police use of excessive force).

desired goal.¹⁴⁷ Although *Rasul*, *Hamdi*, and *Boumediene* did lead to releases, these followed indirectly from changes in policy and not directly from compliance with specific judgments. Detainees acquitted in new military commission proceedings also do not thereby gain freedom. To the contrary, in July 2009 the general counsel of the Department of Defense emphasized that the Government reserved the right to continue to hold terrorism-related detainees after an acquittal under a claim of wartime detention authority.¹⁴⁸

The situation is strikingly similar to quotidian federal habeas review of state court criminal convictions. Federal postconviction review of state criminal judgments today yields vanishingly small returns. A 2007 study found that of 2,384 noncapital habeas cases sampled, only *eight* resulted in a grant of habeas relief, and one was reversed on appeal.¹⁴⁹ One account of the 2007 study concluded that “as a means of correcting or deterring routine case-specific constitutional errors, habeas is completely ineffective.”¹⁵⁰ The parallel remedial lacuna in two very different contests does not necessarily prove that the underlying frequency of meritorious claims is similar in the two areas. Such a claim would be hard to sustain not least because the notion of a “meritorious” claim is endogenous to evolving procedural standards under the different sections of the federal habeas statute implicated by collateral review and executive detention cases.¹⁵¹ Rather, the parallel shows simply that federal courts are equally unwilling or unable in two disparate applications of habeas to indulge in the individualized remedy of release.

Third, the difficulty of recovering money damages under *Iqbal* and its ilk is familiar from *Bivens* and constitutional tort jurisprudence more generally.¹⁵² Reformers have long advocated a

¹⁴⁷ For the asymmetry in the administrative law context, see Richard L. Revesz and Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* 159–61 (Oxford, 2008).

¹⁴⁸ See Spencer Ackerman, *Obama Military Commissions Vision Takes Shape*, Wash Indep (July 7, 2009), online at <http://washingtonindependent.com/49966/obama-military-commissions-vision-takes-shape> (visited Feb 17, 2010). See also Testimony of Jeh Johnson, General Counsel, Department of Defense to United States Senate Committee on the Judiciary, July 28, 2009, online at http://judiciary.senate.gov/hearings/testimony.cfm?id=4002&wit_id=8157 (visited Feb 17, 2010).

¹⁴⁹ Nancy J. King et al, *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty* 52, 58, 116 (2007), online at <http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf> (visited Feb 17, 2010). Success rates are slightly higher in state court habeas actions. See Anup Malani, *Habeas Settlements*, 92 Va L Rev 1, 64–65 (2006).

¹⁵⁰ Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 NYU L Rev 791, 793 (2009).

¹⁵¹ See, for example, *Brecht v Abrahamson*, 507 US 619, 623 (1993) (announcing “substantial and injurious effect” test for certain constitutional errors in habeas).

¹⁵² More recent empirical research suggests that prospects for *Bivens* plaintiffs are more sanguine. One study sampled cases from five federal district courts. It suggested that *Bivens* litigants prevail in roughly the same proportion of cases (16%) as other civil rights claimants, without controlling for clearly frivolous cases that are dismissed *sua sponte*. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 Stan L Rev -- (forthcoming 2010), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475356 (visited Feb 17, 2010). This is not inconsistent with the pattern of limited success observed in national security cases. Rather, the Supreme Court’s disapproving view of *Bivens* claims persists across both national security and non-national security cases. See, for example, *Wilkie v Robbins*, 127 S Ct 2588 (2007); *Correctional Servs Corp v Malesko*, 534 US 61 (2001).

transition from individual to government liability,¹⁵³ even as others scholars evince skepticism about constitutional tort's deterrence value.¹⁵⁴ *Iqbal* adds little novel to the familiar moves in constitutional tort law. Rather, *Iqbal* merely replays the Court's longstanding efforts to find some equilibrium between compensatory and expressive aims on the one hand, and the mitigation of disfavored deterrence effects on the other.¹⁵⁵ But the Court is not trading off between these two goals in any coherent way. The Court in *Iqbal* demoted tort's compensatory function. In another case the same Term, a unanimous Court marginalized constitutional tort's expressive function.¹⁵⁶ The net result is entrenchment of a regime of *de minimis* liability with no correlative expansion of the expressive or norm-clarification function. This regime is stable only because an elusive residual possibility of remediation suffices to deflate interest-group mobilization for congressional modifications.¹⁵⁷ Outright judicial repudiation of constitutional tort—so far a move the Court has not intimated—would probably be needed now to reset policy in any meaningful way.¹⁵⁸

Further, it is not clear that the magnitude of deterrence effects from government tort liability would differ between the national security context and the larger public law context, and in which direction any variance from the mean would be.¹⁵⁹ The scale of any overdeterrence from damages awards (under *Bivens* but also under 42 USC §1983) is not known. In part this is because the government often (but not always) provides defendants in individual liability suits with representation and pays settlements or judgments.¹⁶⁰ It is also not clear whether the risk of

¹⁵³ Peter H. Schuck, *Suing Our Servants: The Courts, Congress, and the Liability of Public Officials for Damages*, 1980 Sup Ct Rev 281, 307–10, 345–51 (making deterrence argument and commending entity liability). See also Larry Kramer & Alan O. Styles, *Municipal Liability under §1983: A Legal and Economic Analysis*, 1988 Sup Ct Rev 249, 290–94 (positing a negligence rule for municipal liability, as not eliminating personal liability where doing so would insulate potential tortfeasors, while isolating cases in which entities have cost-effective tools for minimizing malfeasance).

¹⁵⁴ See Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U Chi L Rev 345, 370–71 (2000). But see David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricting Remedies*, 2005 U Ill L Rev 1119, 1125 (2005) (arguing that damages do deter).

¹⁵⁵ Compensation awards depend on a finding of liability, and hence have an asymmetrical deterrence effect on officials, who are focused to internalize the cost of mistakes even though they do not internalize the full benefit of their actions.

¹⁵⁶ See *Pearson v Callahan*, 129 S Ct 808 (2009) (rejecting the rule of *Saucier v Katz*, 533 US 194 (2001), that courts adjudicating qualified immunity defenses must ascertain whether a constitutional rule was violated before determining whether it was clearly established at the time of the alleged tort). *Pearson* saps the justification of qualified immunity as a means of reducing the transaction cost of innovation in constitutional norms. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L J 87, 92 (1999).

¹⁵⁷ See Cornelia T L Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under Bivens*, 88 Geo L J 65, 68 (1999) (observing status quote in mid-1990s legislative efforts). In any case, it is hardly clear how the diffuse class of possible constitutional tort plaintiffs could overcome evident transaction costs to collective actions to seek legislated change.

¹⁵⁸ Cf Eric A. Posner and Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum L Rev 689, 693 (2003).

¹⁵⁹ Daryl Levinson has questioned both deterrence effects and deterrence-based rationales. See Levinson, 67 U Chi L Rev at 370–71 (cited in note 154).

¹⁶⁰ See 28 CFR § 50.15(a), (b) (indemnification regulations for Department of Justice employees); see Pillard, 88 Geo L J at 77, n 54 (cited in note 157) (listing indemnification regulations for other agencies and departments). Pillard suggests that generally “indemnification is a virtual certainty.” Id at 76–77.

overdeterrence is greater or less in national security cases. It may be less because “[f]ear compels people”—including government officials—“to devote resources to solving a problem that for a dispassionate and uninvolved person may be interesting but not compelling.”¹⁶¹ Alternatively, the prospect of compensation for errors may ease conscientious officials’ discomfort, making more stringent exigent responses less costly and hence more frequent. Absent empirical evidence about the motivations of government officials, it is impossible to know whether or how deterrence operates differently in national security and in general constitutional tort law. Functionally as well as doctrinally, it is therefore hard to segregate national security from the larger domain of public law when it comes to damages.

The final trend that demands explanation is the surprising incidence of de facto “structural” injunctions in national security law. Here again, there is a correlation with trends in public law. Federal courts have grappled now for decades with allegations of pervasive constitutional violations within “large-scale organizations, particularly government bureaucracies [that] define to a substantial degree our social existence.”¹⁶² In these contexts, just as in national security, there is a persistent “large gap between executive discretion and judicial capacities.”¹⁶³ Individual remediation, from the judiciary’s perspective, is a suboptimal strategy because it has little dampening effect on the rate of future violations. The close link between right and remedy typifying private-law adjudication breaks down in complex environments, precipitating judicial experiments with broader, process-based remedies.¹⁶⁴ In a range of areas of social policy, from prisons to policing and from psychiatric institutions to education, courts instead select interventions that ramify beyond an individual case “to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.”¹⁶⁵ Although structural injunctions common in the 1960s and 1970s are no longer frequent, similar remedial forms obtain today. These do not always take the form *sensu stricto* of structural injunctions celebrated by previous generations of legal scholars, but they are nonetheless orders that “see[k] to effectuate the reorganization of a social institution.”¹⁶⁶ In a recent survey of de facto structural public law remedies, numerous judicial actions were identified in several areas of public policy that tended to “disentrench or unsettle a public institution when, first, it is failing to satisfy minimum standards of adequate performance and, second, it is substantially immune from conventional political mechanisms of correction.”¹⁶⁷

Interventions with structural consequences in the post-9/11 national security detention domain are analogous to public law remedies. General public law remediation of defective

¹⁶¹ Posner and Vermeule, *Terror in the Balance* at 63 (cited in note 8).

¹⁶² Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 Geo L J 1355, 1386 (1991).

¹⁶³ Eric Posner and Adrian Vermeule, *The Credible Executive*, 74 U Chi L Rev 893 (2007); id at 890–93 (cataloging reasons why judicial oversight may fall short, even if not “a total failure”).

¹⁶⁴ Sturm, 79 Geo L J at 1377, 1388 (cited in note 162) (listing distinctive features of public law remedies).

¹⁶⁵ Charles F. Sabel and William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv L Rev 1015, 1020 (2004).

¹⁶⁶ Owen Fiss, *The Civil Rights Injunction* 7 (Indiana 1978).

¹⁶⁷ Sabel & Simon, 117 Harv L Rev at 1062 (cited in note 165).

institutions aims to include previously excluded voices, force systemic reform by imposing new standards of conduct drawn from other fields, and generate transparency mandates to “induc[e] the institution to reform itself.”¹⁶⁸ Analogously, rulings adverse to the executive in national security detention have opened the policy-making field not only to the federal courts and Congress, but also to detainees via counsel. Against the executive’s urgings, the Court imposes exogenous standards derived from international humanitarian law “to define minimum performance.”¹⁶⁹ Merely by allowing cases to move forward, the federal courts additionally force transparency via attorney access and the availability of discovery. Repeated resort to orders with structural repercussions in national security case law is thus of a piece with federal courts’ strategies in other areas of public law.

One especially intriguing parallel turns on the federal courts’ use of the habeas remedy as part of a strategy of structural change in two quite distinct contexts. Federal court remediation of errors in state criminal adjudications is a relatively recent phenomenon.¹⁷⁰ Only after the 1953 judgment in *Brown v Allen*¹⁷¹ did habeas review of state criminal adjudication systems become a tool in the restructuring of state criminal justice processes. Habeas’s shift was not an isolated event. It occurred at a time that the Court was simultaneously “radically transform[ing] the role of federal constitutional law in state criminal cases.”¹⁷² Habeas was a means “to retry new cases applying the newly created rules,”¹⁷³ one tool in the larger Due Process revolution that swept state criminal procedure during the Warren Court. Hence, whereas *Hamdan*, *Hamdi*, and *Boumediene* aim to bring military detention into procedural conformity with the Justices’ ideal of due process, the post-*Brown* incarnation of habeas (which did not endure long past the Warren Court) was a way of bring state criminal justice systems into conformity with another due process ideal. Far from being a tool of individual liberation one case at a time, perhaps the central purpose of twentieth-century and early twenty-first-century habeas has been justice at a systemic, aggregated level.¹⁷⁴

One way of explaining the Court’s willingness to grant sweeping structural remedies may be as a response to public and elite expectations of judges fostered by a heroic counter-majoritarian narrative of the judicial role born in the second half of the twentieth century. On this account, Justices inherit and apply a heroic model of the federal courts exemplified best by

¹⁶⁸ Id at 1056, 1062–73.

¹⁶⁹ Id at 1063.

¹⁷⁰ See Joseph L. Hoffman and William J. Stuntz, *Habeas after the Revolution*, 1993 Sup Ct Rev 65, 73–76.

¹⁷¹ 344 US 443 (1953) (holding that federal habeas courts were not precluded by state rulings on matters of constitutional right). Also significant was *Fay v Noia*, 372 US 391 (1963), which limited for a time the effect of state court procedural defaults.

¹⁷² Hoffman and Stuntz, 1993 Sup Ct Rev at 77 (cited in note 170). Even Gerald Rosenberg, who is otherwise skeptical of the efficacy of judicial action, attributes significance to decisions about the right to counsel. See Gerald D. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 330–31 (Chicago 1991).

¹⁷³ Lucas A. Powe, Jr., *The Warren Court and American Politics* 424 (Harvard, 2000). Powe properly cautions that many new rights were not retroactively applied. Id at 425–29.

¹⁷⁴ I do not mean to suggest, however, any conclusion about *how* effective quasi-structural injunctive litigation has been. This seems to me that is a hard, and properly contested, question.

Brown v Board of Education.¹⁷⁵ If Justices' role-conception and sense of prestige entails a commitment to a heroic model, they may prefer to channel interventions into high-profile cases in which their stance will be observed and celebrated, further enhancing their prestige.¹⁷⁶ Individual remediation, notwithstanding periodic judicial verbiage about the value of individual rights,¹⁷⁷ secures the courts little political or reputational capital. It is thus slighted. More cynically, this account might be supplemented by the suggestion that the Justices' reputational motivations are constrained by the possibility, however remote, of the public backlash that would ensue if an individual who gains individual relief later goes on to participate in a terrorist conspiracy. Here, the Justices' beliefs about the public reception of decisions play a large role. A less cynical account would posit that the Justices are allocating scarce judicial time and public support to maximize their constitutional goals. On this account, the emphasis on structural interventions is simply a way to secure maximal policy change with limited tools under conditions of constraining political opposition.

There is, in sum, a correlation between courts' remedial strategies in national security law and in public law. Plausible accounts of the causal mechanisms behind this correlation can be imagined. Exploration of these causal accounts would demand further scrutiny beyond the scope of this paper. The important point here is that the similarity between national security cases and the general public law is a second source of evidence that the national security exceptionalism hypothesis is flawed.

B.

The mine run of public law cases is not the only body of jurisprudence against which judicial responses to national security emergencies might be compared. A second way of testing the exceptionalism thesis may be to look at judicial responses to crises that lack a national security dimension. By way of example, the financial crisis of 2008–09 precipitated numerous extraordinary legislative and executive initiatives designed to stave off an economic depression.¹⁷⁸ Despite claims that government responses overstepped constitutional bounds,¹⁷⁹ judicial challenges to the diverse regulatory reactions to the financial sector's failure¹⁸⁰ have

¹⁷⁵ 347 US 483 (1954).

¹⁷⁶ Cf Richard A. Posner, *What do Judges and Justices Maximize? (The same thing everyone else does)*, 3 Sup Ct Econ Rev 1, 13–14, 31–32 (1993) (suggesting prestige and reputation, as part of judges' utility function).

¹⁷⁷ See, for example, *Lujan v Defenders of Wildlife*, 504 US 555, 576–77 (1992) (justifying denial of stranding on the principle, drawn from *Marbury v Madison*, 5 US (1 Cranch) 137, 170 (1803), that the role of the federal courts "is, solely, to decide on the rights of individuals").

¹⁷⁸ See, for example, Edmund L. Andrews, *Fed in an \$85 Billion Rescue of an Insurer Near Failure*, NY Times (Sept. 17, 2008) at A1 (calling AIG bailout "the most radical intervention in private business in the central bank's history"); Stephen Labaton, *Agency's '04 Rule Let Banks Pile Up New Debt, and Risk*, NY Times (Oct 3, 2008) at A1 (describing investment bank bailout as "the most serious financial crisis since the 1930s"); see also Andrew Ross Sorkin, *Too Big to Fail* 292–408 (Viking, 2009) (describing AIG bailout).

¹⁷⁹ John Schwartz, *Some Ask if Bailout Is Unconstitutional*, NY Times (Jan 15, 2009) at A8 (describing some potential separation of powers concerns related to the government's response to the financial crisis).

¹⁸⁰ See Mark Zandi, *Financial Shock: Global Panic and Government Bailouts—How We Got Here and What Must Be Done to Fix It* 201–09 (Financial Times Press, 2009) (listing measures taken before stimulus legislation enacted).

been few and far between. The one exception to this pattern—the challenge to the bankruptcy sale of the auto-maker Chrysler’s assets from Indiana-based pension and retirement funds—does not support the proposition that federal courts behave differently in national security emergencies than in non-national security crises.

In April 2009, Chrysler filed a pre-packaged Chapter 11 bankruptcy petition in the Southern District of New York with the support and involvement of the federal government. The petition proposed the transfer of substantially all of Chrysler’s operating assets to a new entity to be part-owned by the Italian firm Fiat.¹⁸¹ Indiana pension and retirement funds attacked the sale as, among other things, a sub rosa reorganization.¹⁸² After the bankruptcy judge and the Second Circuit signed off on the proposed bidding procedures and sale, the Second Circuit nevertheless temporarily stayed the sale so as to allow Supreme Court review.¹⁸³ Despite urgent pleas to enjoin the sale, and even though a sale would have been very hard subsequently to unwind, the Supreme Court declined to intervene via its emergency stay power.¹⁸⁴

Two aspects of this complex litigation are salient here. First, as in the national security context, the federal courts identified “consequential and vexed”¹⁸⁵ constitutional issues in the asset sale but nonetheless declined an invitation to ex ante intervention. The Roberts Court resisted any temptation to follow the example of the Chase Court’s short-lived and ill-fated effort, one hundred and fifty years previously, to regulate the Lincoln Administration’s emergency resort to paper money in response to the fiscal crisis created by the Civil War.¹⁸⁶ The absence of ex ante judicial regulation in this case echoes the pattern observed in public law more generally. Second, the mechanism of an asset sale used to reconstitute Chrysler in its “basic structure” is “increasingly ... the norm.”¹⁸⁷ That is, in its details as well as in the overall shape of judicial supervision, the federal courts’ response to this part of the financial crisis did not break new ground but mimicked a pattern emerging under non-emergent conditions.¹⁸⁸ In sum, while this snapshot of judicial responses to the financial crisis is no doubt incomplete, it does provide

¹⁸¹ See *In re Chrysler*, 576 F3d 108, 111–12 (2d Cir 2009), vacated as moot – S Ct – (Dec 14, 2009)

¹⁸² See Douglas G. Baird, *Car Trouble* *12–17 (unpublished manuscript, December 2009) (on file with author) (discussing challenges to the sale of Chrysler’s assets under 11 USC §363). Cf Todd Zywicki, *Chrysler and the Rule of Law*, Wall St J (May 13, 2009) (challenging Chrysler sale under Contacts Clause).

¹⁸³ *Chrysler*, 576 F3d at 112.

¹⁸⁴ *Indiana State Police Pension Trust v Chrysler LLC*, 129 S Ct 2275 (2009) (per curiam) (vacating temporary stay granted by Justice Ginsburg and denying stay).

¹⁸⁵ *Chrysler*, 576 F3d at 122.

¹⁸⁶ In *Hepburn v Griswold*, 5 US (8 Wall) 603 (1870), the Court invalidated the Legal Tender Act of 1862. *Hepburn* was overruled the following year by *Knox v Lee*, 79 US (12 Wall) 457 (1871); accord *Juilliard v Greenman*, 110 US 421 (1884).

¹⁸⁷ Baird, *Car Trouble* at 18–19 (cited in note 182).

¹⁸⁸ But will courts intervene with restructuring aspirations somewhere down the road, as they have done in other areas of public law? Consider an intriguing parallel: The 2002 Sarbanes Oxley Act, 15 USC §§ 7211–19, was another response to a (milder) financial crisis. Only in 2009, long after the accounting scandals of Enron and Worldcom had faded from the news cycle and the policy debate, was a systemic challenge to its institutional architecture being aired in the Supreme Court. See *Free Enterprise Fund v Public Co. Accounting Oversight Bd*, 537 F3d 667 (DC Cir 2008), cert granted 129 S Ct 2378 (2009). The *Free Enterprise Fund* suit is in effect a request for modification of government structure, just like the remedies sought and obtained in other areas of public law.

an additional datum in support of the thesis of commonality in judicial responses across policy areas.

III.

What is the significance of this continuity between remedial strategies in national security cases on the one hand and in public law generally on the other? If national security exceptionalism is either overstated or untenable, what follows for our accounts of judicial behavior in the national security domain? In the balance of this essay, I identify two possible lines of further exploration. One is analytic, the other normative.

The first possible lesson is analytic: To understand judicial responses in the national security domain, it is necessary to look at interactions between that area and transsubstantive bodies of rules concerning procedures and remedies. This interaction can have implications both for substantive bodies of law—e.g., the direction of national security law—and for transsubstantive procedural and remedial rules. At the moment, however, interaction effects between substantive law and procedural rules are insufficiently studied.

Iqbal furnishes an example of this interaction. Consider the result in *Iqbal* from two different points of view: the decision's effect on national security law and its impact on general civil litigation. As national security litigation goes, *Iqbal* was a damp squib. It will not have a significant effect on damages litigation in the area because few cases prevail anyway.¹⁸⁹ But, *Iqbal* works a sea change in the general federal civil litigation landscape.¹⁹⁰ *Iqbal* “has exponentially expanded the reach of fact pleading” and repudiated the notice pleading rule applied for more than fifty years.¹⁹¹ In even the first two months after it was handed down, *Iqbal* was cited in 603 district court and court of appeals decisions¹⁹²; it also triggered a movement for legislative reform.¹⁹³ Anecdotal data suggest that the elevated citation rate reflects new decision costs that flow from heightened uncertainty about an elemental pleading rule.¹⁹⁴

The odd combination of local inconsequentiality and global significance is the result of an interaction between a substantive field of law and transsubstantive rules. The opinion manages this feat because the Court's opinion muddies the distinction between national security concerns and transsubstantive procedural questions. Justice Kennedy warned of the “heavy costs” exacted when government officials are sued, costs present whenever the government is restrained¹⁹⁵ but

¹⁸⁹ See *supra* Part I.B.

¹⁹⁰ Note that this is consistent with the claim in Part II that transsubstantive law *correlates* with the law of national security.

¹⁹¹ Arthur R. Miller, *Access v Efficiency: Reflections on the Consequences of Twombly and Iqbal*, GCP (July 2009), Release Two at 2.

¹⁹² Based on a search of the “ALLFEDS” database in Westlaw for “*Iqbal* /3 *Ashcroft*” between May 19, 2009 and July 19, 2009.

¹⁹³ Tony Mauro, *Plaintiff Groups Mount Effort to Undo ‘Iqbal,’* Nat'l L J (Sept. 21, 2009).

¹⁹⁴ See Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Cases*, NY Times (July 20, 2009).

¹⁹⁵ To the contrary, the same theme sounds in similar terms in other decisions insulating prosecutorial decisions in criminal and immigration law from judicial inquiry. *Reno v American-Arab Anti-Discrimination Comm.*, 525 US

“magnified” in the national security context.¹⁹⁶ Justice Kennedy then implicitly reasoned from this local diagnosis to a transsubstantive result.

Iqbal is not unique in this regard. In 1949, Judge Learned Hand wrote a path-marking opinion on official immunity in *Gregoire v Biddle*, which concerned the arrest and prolonged detention of a French national erroneously believed to be an enemy alien during the Cold War.¹⁹⁷ *Gregoire* provided the basis for the Supreme Court’s twentieth-century resurrection of immunity doctrines based on concern about the possible chilling of official action in all areas, not just national security.¹⁹⁸ As in *Iqbal*, analysis of an issue apparently local to the national security context motivated a larger transsubstantive change. Both *Gregoire* and *Iqbal* illustrate a mechanism beneath the oft-overlooked truism that “each dispute ... affects others and reshapes the political landscape, inhibiting some behaviors and enabling others.”¹⁹⁹ While some consequences of the efflorescence of a federal common law of official immunity are reasonably clear, it remains to be seen how *Iqbal*’s change in pleading rules will alter the pool of civil cases filed, especially in the national security domain, and how this change will in turn stimulate further shifts in the federal civil pleading regime or other transsubstantive rules.

This kind of interaction may be frequent, even if not pervasive, in legal doctrine. Consider the interaction between the Court’s changing attitude to the death penalty on the one hand and its adjustment of habeas rules, or the interaction of standing doctrine with environmental law.²⁰⁰ There is no reason national security law would be free of it. This dynamic also raises important institutional design questions. Consider, for example, the optimal approach to changing transsubstantive procedural rules. On one account, *Iqbal* achieved this with low decision costs: Reliance on national security-specific reasons eased the adoption of the new transsubstantive rule. From a wider perspective though, the wisdom of changing transsubstantive rules through reasoning rooted in one substantive area of law may be doubted. Even if a more robust pleading rule were needed—a matter about which I express no view here²⁰¹—it is difficult to defend the manner in which the *Iqbal* Court chose to rewrite that rule. There is a statutorily designated avenue for reconsideration of procedural rules: a multi-stage rule-making procedure set forth in the Rules Enabling Act. Rule-making under the Act likely would have generated

471, 488 (1999) (rejecting judicial inquiry into selective enforcement in immigration law); *United States v Armstrong*, 517 US 456, 463–65 (1996); see also *McCleskey v Kemp*, 481 US 279 (1987).

¹⁹⁶ *Ashcroft v Iqbal*, 129 S Ct 137, 153 (2009).

¹⁹⁷ *Gregoire v Biddle*, 177 F2d 579, 579 (2d Cir 1949).

¹⁹⁸ See *Barr v Mateo*, 360 US 564, 572 (1959) (citing *Gregoire*, 177 at 579); Jerry L. Mashaw, *Civil Liability of Government Officer: Property Rights and Official Accountability*, 42 L & Contemp Probs 8, 15 (1978).

¹⁹⁹ Robert Jervis, *System Effects: Complexity in Political and Social Life* 50 (Princeton, 1997).

²⁰⁰ For one analysis linking changes in procedural rules to substantive norms, see Jody Freeman and Adrian Vermeule, *Massachusetts v EPA: From Politics to Expertise*, 2007 Sup Ct Rev 51.

²⁰¹ Is the pleading standard in *Iqbal* too harsh? This question concerns the economy of federal civil litigation and is beyond the scope of this paper. But it is plausible to view *Iqbal* as the Justices’ overreaction to periodic problems that can be dealt with by district court control of discovery. The Justices, after all, are far removed from the realities of district court litigation and may be biased by the sample of cases that come before the Court. Even this judgment, though, depends on a contestable normative claim about the optimal constraints on access to federal court. It also rests on an empirical question about how significant an effect *Iqbal* has had, and in which areas of law. It would seem that the latter is a question ripe for empirical testing.

information and clarity,²⁰² but it was not used. As a result, the scope of *Iqbal* is unclear.²⁰³ Moreover, the resulting rule is costly to apply. For fifty years, Rule 8 had been applied in a clear, if arguably generous,²⁰⁴ manner. Displacing a well-known and fully explored rule, *Iqbal* propounds a vague, open-textured, and subjective standard. The stability benefits of fifty years' precedent were, at a stroke, eviscerated.²⁰⁵ Justice Kennedy's opinion leaves tantalizing clues as to how it should be applied without attaining precision or clarity. The Court's emphasis on "context," for example, hints that the Justices have in mind some taxonomy of issue-specific pleading rules.²⁰⁶ But *Iqbal* gives no guidance as to how to classify and organize complaints by "context."²⁰⁷ Instead, the decision invites 680-plus district judges to conjure rules on the fly by applying 680-plus distinct bodies of "judicial experience and common sense" to assess "plausibility."

To summarize, interactions between substantive bodies of law and transubstantive rules change the way that judicial decision rules are adopted and amended. They are thus important independent objects of study. Future longitudinal studies of the development of national security programs via interactions between courts, legislative institutions, public opinion, and the executive may reveal other causal mechanisms, such as feedback loops,²⁰⁸ and variables with predictive value that until now have been overlooked.

Rejection of the descriptive claim of national security exceptionalism has a second consequence, one related to normative theorizing about the judicial role in emergencies. Specifically, the rejection of national security exceptionalism may be welcomed or condemned depending on its net effects, which have until now not been carefully considered. Begin with the implications of my argument for a civil libertarian who views the federal courts as a bulwark for individual rights. On the one hand, a finding of invariance between judicial responses to national

²⁰² Amendments to the rules are proposed by an Advisory Committee on Civil Rules, and reviewed by a Standing Committee, the Judicial Conference, and the Supreme Court. See 28 USC §§ 2072–2073. Note that the Court plays a significant catalytic role in this process. So it cannot be said that reform by case law was necessitated by the failure of congressional action.

²⁰³ The precise mischief to which *Iqbal* responds is also murky. The 2007 case on pleading rules, *Bell Atlantic v Twombly*, cited two (non-empirical) law review articles, one critical of notice pleading, and one supportive. See *Bell Atlantic Corp. v Twombly*, 550 US 544, 562 (2007). *Iqbal* itself adduced no evidence about pleading's dysfunction.

²⁰⁴ The Federal Rules of Civil Procedure were adopted in 1938, an era when the mix of federal-court litigation was significantly different. See Richard A. Epstein, *Bell Atlantic v Twombly: How Motions to Dismiss Became (Disguised) Summary Judgments*, 25 Wash U J L & Policy 61, 62 (2007).

²⁰⁵ It is impossible not to observe the striking contrast between this fluid and unpredictable standard and the concern expressed by four of the Justices who comprised the *Iqbal* majority about open-ended standards in other areas of litigation management. See *Caperton v AT Massey Coal Co Inc*, 129 S Ct 2252, 2268–72 (2009) (Roberts dissenting).

²⁰⁶ *Leatherman v Tarrant County Narcotics Intelligence & Coordination Unit*, 507 US 163, 164–69 (1993) (rejecting a heightened pleading rule for municipal liability); see also *Swierkiewicz v Sorema, N.A.*, 534 US 506 (2002).

²⁰⁷ Courts could, for example, divide the litigation universe by policy area, by type of defendant (government v private), by the kind of claim (constitutional or statutory), or by the particular evidentiary problems raised by certain causes of action. See Epstein, 25 Wash U L J & Policy at 67–68 (cited in note 204) (noting difficulties of drawing inferences from parallel context in the antitrust context).

²⁰⁸ For a general specification of feedback mechanisms see Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 Am Pol Sci Rev 251, 260–62 (2000).

security and larger dynamics in public law may be troubling. Spillover effects that result from the convergence of national security with general public law, such as in *Iqbal*, may create an incrementalist avenue to across-the-board abrogation of the federal courts' liberty-protecting function.²⁰⁹ Routinized emergencies, or even a persistent flow of cases arising from one emergency, may therefore have broadly corrosive effects. On the other hand, continuity between national security law and other domains may strengthen the prophylactic effect of the federal judiciary's presence. The belief that judges have a stable disposition or follow constant rules may induce beliefs on the part of other governmental actors that minimize rights violation.²¹⁰ The net effect of the analysis, in short, is uncertain from a civil libertarian perspective.

Another normative consequence of the rejection of national security exceptionalism for civil libertarians may be the need to rethink the role of democratic politics in setting emergency responses. The trajectory of national security programs is thought to be wholly fixed in the "red hot" furnace of emergency.²¹¹ This emphasis on emergency can be generalized into a model of sovereignty as "unitary and decisive, committed to its own invulnerability" and insulated from democratically determined legal rules.²¹² But, the rejection of national security exceptionalism turns attention away from a narrow focus upon how best to respond to specific emergencies, and toward the matter of how a democracy "surviv[es] the emergency situation with integrity as a democracy."²¹³ That is, how should doctrinal and judicial incentives be structured to ensure the continuity of rules, procedures, and remedies across emergencies and other times? If this kind of integrity is valued—and, of course, many reject its significance—courts might be institutional mechanisms for the preservation of a larger public "culture of civil liberties."²¹⁴ Alternatively, it may be that emergencies are moments at which such a culture is abandoned or incrementally sapped. From an alternative normative perspective more concerned with security, similar questions arise about the judicial role in national security and its effect on the broader operation of the federal judiciary.

One final consequence is worth noting. "National security law" is fast becoming a sub-discipline within the legal academy with a paraphernalia of case books, specialists, central questions, and well-defined camps. In the early stages of this development, there may be an understandable tendency to make claims on behalf of the sub-discipline's insulation from other legal debates. My analysis of national security exceptionalism suggests this would be an error.

²⁰⁹ See Jervis, at 287 (cited in note 199) ("Understanding feedbacks ... may allow actors to follow indirect routes to their goals, especially when information and beliefs are not fully shared."). *Iqbal*, by making civil suits more difficult to file, is a significant step on such a road.

²¹⁰ *Id.* at 23. For a related argument urging courts to look to administrative law rules as constraints on national security actions, see Jonathan Masur, *A Hard Look or a Blind Eye? Administrative Law and Military Deference*, 56 Hastings L J 441, 501–19 (2005) (examining and rejecting arguments for a distinction between the two fields of law).

²¹¹ Posner and Vermeule, *Terror in the Balance* at 44 (cited in note 8).

²¹² Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* 2 (Princeton, 2009). This model has been extended from the emergency context to general administrative law in Adrian Vermeule, *Our Schmittian Administrative Law*, 122 Harv L Rev 1095, 1103–04 (2009).

²¹³ Honig at 9 (cited at note 212).

²¹⁴ Stone, *Perilous Times* at 537 (cited in note 7) (emphasis in original).

Scholars of national security law will learn more by comparative glances across disciplinary lines than by the construction of distinguishing walls or isolating moats.

CONCLUSION

National security exceptionalism does not find substantial support in the behavior of courts in post-9/11 non-criminal detention cases. The remedies that courts provide in these cases are surprisingly consistent, however, with the approach taken in other domains of public law. Taken together, these results provide some reason to view judicial responses to exigent national security policies not as exceptional but as thoroughly imbricated in the larger texture of American public law.

Readers with comments may address them to:

Professor Aziz Huq
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
huq@uchicago.edu

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