3-1-2010

Judging in the Time of the Extraordinary

Samuel Issacharoff
New York University School of Law, Issacharoff@exchange.law.nyu.edu

Follow this and additional works at: http://lsr.nellco.org/nyu_pllttpw
Part of the Constitutional Law Commons, and the Public Law and Legal Theory Commons

Recommended Citation
http://lsr.nellco.org/nyu_pllttpw/183

This Article is brought to you for free and open access by the New York University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Public Law and Legal Theory Working Papers by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.
LECTURE

JUDGING IN THE TIME OF THE EXTRAORDINARY

Samuel Issacharoff*

TABLE OF CONTENTS

I. INTRODUCTION .................................................................533

II. THE JUDICIARY IN OPPOSITION ........................................535

III. COURTS AND INSTITUTIONAL FAILURE
    IN CONTEMPORARY AMERICA ............................................539
    A. Bush v. Gore ............................................................540
    B. Post-September 11th .................................................542

IV. GOING TO THE WELL ..........................................................544

V. CONCLUSION ...........................................................................552

I. INTRODUCTION

It is a great honor to give this memorial lecture honoring the centenary of the birth of Judge John R. Brown. I am pleased that my friend, Dean Klonoff, can give more personal insights because I did not have the privilege to know Judge Brown personally. Yet if we all live on by those we inspire, I cannot help but be struck by the fierce loyalty and admiration of the man by his former clerks, an all-star assembly of distinguished

* Reiss Professor of Constitutional Law, New York University School of Law. I received valuable comments from Anthony Barkow, Rachel Barkow, Cynthia Estlund, and Robert Klonoff. Matt Brown and Peter Ross provided the indispensable research assistance for this Lecture while leaving responsibility for the positions taken with the author alone.
leaders of the bench, bar, and academy. If these are the intellectual offspring of Judge Brown, the original must have been indeed formidable, or in the colloquialism of the day, awesome.

Preparing this Lecture has brought to me the joy of rediscovery. I began law school thirty years ago this fall. At the time, my knowledge of law, courts, judges, and even the history of our profession was at best spotty. I recall reading Jack Bass's *Unlikely Heroes,* when it came out while I was in law school, and being thrust into a world of seemingly boundless capacities for legal transformation. I had not had occasion to return to the judicial biographies of that era until now. But I remember the powerful sense that this was heady stuff and how it had led me to confront the perplexing issues of the role played by courts. Even more so, reading these biographies led me to wonder, what it is about being a judge that permits these individuals to rise to such occasion.

One of the frequently asked questions about Judge Brown and his contemporaries on the Fifth Circuit is the source of their trailblazing ardor. They all seemed such stalwarts of an established order, hardly swashbuckling radicals at war with the society about them. Yet, collectively, Judges Brown, Rives, Tuttle, and Wisdom became the four horsemen of the southern judiciary. Their opinions opened the doors to the institutions that had defined the worlds in which they had been raised and did so across the racial divide that so defined southern society of the day.

Some of these figures were consummate insiders, deeply rooted within the world they presided over. Judge Tuttle, for example, was a leader of the Atlanta legal establishment who nonetheless ordered the integration of the University of Georgia. Judge Wisdom was a towering figure in New Orleans society. Judge Brown was a native of Nebraska and a graduate of the University of Michigan Law School. By the time he assumed the bench, however, he was an eminently admired admiralty lawyer from Houston and, although a Republican at a time when local politics were still dominated by the Democratic Party, one who moved with ease in the ranks of the successful bar. Before his

2. Id. at 23.
5. Id. at 101.
6. Id. at 24.
prominence in the civil rights era, he was regarded as the leading admiralty lawyer of his generation and one of the greats of all
time.\(^7\)

Indeed, were it not for the way in which race came to define the legal landscape, one could imagine a world in which admiralty and the common law would continue to claim Judge Brown's primary attention. Even as his civil rights opinions claimed the national stage, his love of admiralty persisted, and some of his most memorable lines of judicial craftsmanship came from these maritime cases. For instance, it was in the "soda pop unloading" case that he wrote "Pepsi Cola Hits the Spot—On the Pavement" and of how "42,120 cans of soft drinks crashed to the ground, never a thirst to quench."\(^8\) And it was to the field of maritime law that he returned each year, speaking to maritime law students at the University of Houston Law Center.\(^9\)

Nonetheless, on the pivotal matters of equal protection and civil rights, it turns out that this question of how insiders become the agents of change misses the point. It is precisely the fact of being internal to this world that allows such historic figures to realize, perhaps ahead of their less enlightened fellow citizens, when the current ways and practices can no longer be sustained.

In the great plays of Anton Chekhov, there is always one character stuck in a decaying aristocratic setting who sees what no one else can fathom.\(^10\) Change is upon them and folding up the frayed edges of the tablecloth cannot hide the inevitable from the dinner guests. The interesting figure in the play is never the outsider who arrives for the weekend and who stridently asserts that the future is upon them, but the internal figure who begins to understand what is going to happen, or perhaps even what needs to happen.

II. THE JUDICIARY IN OPPOSITION

Let me give an example from an opinion of Judge Brown. There are many I could pick from. Perhaps no opinion more


\(^8\) Croft & Scully Co. v. M/V Skulptor Vuchetich, 664 F.2d 1277, 1279 (5th Cir. 1982).


\(^10\) See, e.g., Zinovii S. Paperny, Microsubjects in The Seagull, in CRITICAL ESSAYS ON ANTON CHEKHOV 160, 161 (Thomas A. Eekman ed., 1989) (observing how the schoolteacher Medvedenko seeks to "tell everything as it really is, to reveal life in its reality"); Maurice Valency, The Three Sisters, in CRITICAL ESSAYS ON ANTON CHEKHOV, supra, at 186, 188 (stating that the "old skeptic" Chebutykin believes that "it is all nonsense, the past, the future, and the present").
exemplified the galvanizing role of the courts in the legal transformation of the South than the dramatic order compelling the admission of James Meredith to integrate Ole Miss.\textsuperscript{11}

But I pick instead his dissent in \textit{Gomillion v. Lightfoot}.\textsuperscript{12} I pick this not only because it is from the domain of voting that I am particularly attentive to, but also because I learned at a Fifth Circuit conference a few years back that your Circuit Justice, Justice Scalia, annually honors the district judges who were overturned by the Fifth Circuit, only to see the Circuit in turn overturned by the Supreme Court. Not only does \textit{Gomillion} represent a case in which Judge Brown was in dissent yet ultimately vindicated by the Supreme Court, but it also turns out that Judge Brown thought his dissent in \textit{Gomillion} to have been his most significant opinion.\textsuperscript{13}

\textit{Gomillion} involved the redrawing of the city lines of Tuskegee, Alabama, through what Justice Frankfurter would come to call "an uncouth twenty-eight-sided figure."\textsuperscript{14} (Can you remember the last time you saw a congressional district with less than twenty-eight sides?) The Fifth Circuit, following fairly well-trodden Supreme Court pathways, held the issue non-justiciable, finding the matter a political question and that lines on a map bore no distinct racial imprint.\textsuperscript{15}

Anticipating what would subsequently emerge in the Supreme Court, Judge Brown dispensed with any claim that the fencing out of all but a handful of black residents had any other purpose and effect than the reconfiguration of Tuskegee effectively to disenfranchise a portion of the populace. For Judge Brown, no court worthy of its name ignores the reality of the society it inhabits, even if that forces an uncomfortable confrontation with grave wrongs. "We need not be that 'blind' Court that Mr. Chief Justice Taft described as unable to see what 'all others can see and understand.'"\textsuperscript{16} To the contrary, Judge Brown insists:

If a Court may strike down a law which with brazen frankness expressly purposes a rank discrimination for race, it has—and must have—the same power to pierce the

\begin{thebibliography}{16}
\bibitem{11} See Meredith v. Fair, 306 F.2d 374, 378–79 (5th Cir. 1962) (issuing a detailed order to allow Meredith admission to Ole Miss). Judge Brown joined the opinion authored by Judge Wisdom, and Judge DeVane concurred in the result. \textit{Id.} at 375, 379.
\bibitem{13} Schill, \textit{supra} note 9, at 242.
\bibitem{15} \textit{Gomillion}, 270 F.2d at 596–99.
\bibitem{16} \textit{Id.} at 608 (Brown, J., dissenting) (quoting Bailey v. Drexel Furniture Co. (\textit{Child Labor Tax Case}), 259 U.S. 20, 37 (1922)).
\end{thebibliography}
veil of sham and, in that process, judicially ascertain whether there is a proper, rather than an unconstitutional, purpose for the act in question.

....

In such times the Courts are the only haven for those citizens in the minority. I believe this is such a time.17

What Gomillion addressed was not an isolated incident, but the legacy of Jim Crow, which stared back from every major institution then under the jurisdiction of the Fifth Circuit. It took another insider from Texas of that time, Professor Charles Black, to articulate the importance of confronting an obvious reality no matter how uncomfortable. In responding forcefully to Herbert Wechsler's invocation of neutral principles to challenge the legacy of Brown v. Board of Education,18 Professor Black wrote:

[If a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.]19

As important as it is to see straight, clarity of perception is not enough. What defined the judges of the heroic period of the Fifth Circuit was not simply their wisdom or their humanity or their common sense. Rather, it was a sense of rising to the demands of an extraordinary time. And it is to that conception of what it means to judge in the time of the extraordinary that I wish to address myself.

For these purposes, I will define an extraordinary time for judges as one in which the core operations of central institutions of the society are called into question. These are the most troubling moments for judges not so much because they force a confrontation with the boundaries for proper judicial review—the ever-present concern for the antimajoritarian dilemma—but because of the stakes presented. Alexis de Tocqueville only saw part of the picture when he remarked that little goes forward in American society that does not eventually wend its way into the courts.20 What he missed, perhaps because of the relative youth of

17. Id. at 611.
the Republic at the time, was the exceptional reliance of American political culture on the judiciary to intercede precisely when other institutional actors were failing. What is distinctive in American history is not only the range of quotidian disputes that are routinely resolved through the legal system, but the extraordinary cases involving deeply contested social issues that are delegated to the judiciary as well.

This is what defined the jurisprudence of the Fifth Circuit in this dramatic period. Judge Brown addressed this forthrightly: “One would be hard-pressed to find an area of 'exclusive state action' which has or could not, in some way, by legislative design or administrative execution, be found to be violative of some constitutional provision.”2 Then in a remarkable passage, Judge Brown sets out how the presumption of public spiritedness that must be afforded the political institutions of society could not be sustained under the legal challenges of the time:

A mere cursory examination of the following areas will show that they are all typically thought of as matters of nearly exclusive local control. And yet the [reported decisions] indicate some of the familiar cases in which it was determined that, for some reason, the state or local government's treatment was weighed and found constitutionally wanting: local education, transportation, and recreation facilities; athletic contests control; local housing developments; state taxation and educational institutions; what are essentially state judicial procedure matters like admission to the state bar, appointment of counsel, enforcement of restrictive covenants, payment of filing fees and furnishing of transcripts for appeal, and the selection of jurors; and even a governor's control of his state's militia, and control of highway safety.22

The suspicion regarding the structures of the primary institutions of government extended across all parts of the Fifth Circuit's work in those days. It is not merely the formal cases involving the constitutionality of segregation that stand out in retrospect. It is the breadth of the judicial condemnation in fields as diverse as criminal procedure, standing, the pioneering of the structural injunction, appealability of lower court orders, access to the courts, and even the ability to impose interim injunctions pending appeal.23

---

22. Id. at 602-03 (footnotes omitted).
23. In *Unlikely Heroes*, Jack Bass gives the example of the case involving the desegregation of the University of Georgia. When the demand of the black applicants for an immediate injunction was denied, Judge Tuttle directed plaintiffs' counsel (future
Much as we may look back and marvel, there is little in either the nature of the judiciary or the general posture of American courts over our history that would suggest that such a state of protracted distrust of major social institutions is viable. The Fifth Circuit’s activism across so many dimensions of law stemmed from its broad condemnation of Jim Crow’s presence in all aspects that governed life in the South from cradle to grave.

Today, critics may note some points of apparent disagreement between the current Fifth Circuit and the commanding court of Judge Brown’s day. Differences abound, no doubt. But I think we do everyone a disservice by not recognizing the exceptional quality of the times, and how impossible and indeed undesirable it would be for a stable democracy to have its court system in such persistent opposition to its elected institutions. I say this not to endorse every decision of the Fifth Circuit—some of the wounds I have suffered in that Court have yet to heal. But we look around at a very different Texas from that of Judge Brown’s era. An African-American now serves as the Chief Justice of the Texas Supreme Court. We sit here today in Houston, the largest city in America with an openly gay mayor. This is a world quite different from the suffocating domain of Jim Crow that drove the judiciary to take on society’s dirty work.

III. COURTS AND INSTITUTIONAL FAILURE IN CONTEMPORARY AMERICA

If we turn to more contemporary events, we can again see the judiciary accepting the challenge of confronting institutional
failure. I want to give two examples that are in some sense familiar to all, but perhaps not thought of in this way.

A. Bush v. Gore

In Florida ten years ago, we experienced an electoral meltdown. I address not so much the opinion of the Supreme Court in Bush v. Gore, but the dramatic confrontation with the frailties of how we actually conduct elections. Machines failed in Florida, legal regulation was imprecise or contradictory or unintelligible, and a presidential election seemed up for grabs. The chief election official of the state, Katherine Harris, was not only Secretary of State but also state campaign chair for George Bush. The chief legal officer of the state, Bob Butterworth, was not only Attorney General but also state campaign chair for Al Gore. The Supreme Court may have resolved the election of 2000, but it did nothing to cure the manifest problems in election administration—save to confirm the intuition that ex post judicial intervention declaring the winner does not cure the potential illegitimacy of elections, but risks compounding it.

One of the remarkable and underappreciated developments following Florida 2000 was the response of the judiciary, most notably the federal courts. Judicial efforts in this respect should be credited with the improvement of presidential elections since 2000, as each election witnessed successively fewer controversies, both in number and scope, than its predecessors. Simply put, federal courts were open for business when it came to adjudicating election administration claims, and the post-2000 era witnessed an immense growth in election-related litigation. In moves remarkably parallel to the Fifth Circuit in Judge Brown's day, courts relaxed rules concerning standing, ripeness,

32. Most of the academic writing tends both to acknowledge the improvements and still stress the vulnerabilities of the system. See Richard L. Hasen, Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown, 62 WASH. & LEE L. REV. 937, 939 (2005) (arguing that had the result been within the margin of litigation, "it would have gotten ugly very quickly"); Daniel P. Tokaji, Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act, 73 GEO. WASH. L. REV. 1206, 1206 (2005) ("Had Bush's morning-after lead been half of what it was, a replay of the legal battles that culminated in Bush v. Gore... would have been almost certain." (footnote omitted)).
33. See Hasen, supra note 32, at 957–58 (charting the number of election challenges from 1996 to 2004 by year).
and other justiciability concerns in order to guarantee that disputes going to the fairness of the election process be adjudicated before the voting began.

The clearest example is Ohio in 2004, which certainly had the potential to become another stage for electoral embarrassment. Once again the Secretary of State in Ohio, Kenneth Blackwell—the official charged with ensuring the integrity of the presidential election—was simultaneously serving as co-chair of the Bush/Cheney re-election campaign.\(^{34}\) In the weeks leading up to the election, his directives became the subject of a flood of litigation.\(^{35}\) Certainly the oddest was the sudden requirement to reject all voter registrations not on 80-pound paper stock, even though the official forms issued by the Secretary of State’s office were on 60-pound stock paper.\(^{36}\) Courts in Ohio took admirable steps during this time to temporarily relax certain procedural requirements in order to resolve as many of these disputes before the election as possible. For example, in \textit{Sandusky County Democratic Party v. Blackwell}, a case decided within days of the 2004 election, the Sixth Circuit held that political parties and labor unions had the standing to assert the rights of their members who would vote in the upcoming elections to cast provisional ballots under the Help America Vote Act (HAVA).\(^{37}\) Plaintiffs did not have to undertake the onerous and likely impossible task of identifying specific voters who would seek to vote at a polling place and who would, in turn, be deemed erroneously by election workers to be at the wrong site. Given the inability of voters to anticipate human errors of election workers and whether their names would be dropped from the rolls, the Court acknowledged the “inevitability” of such mistakes and interpreted the standing requirement accordingly.\(^{38}\) This pattern of judicial accommodation was present in later cases and in other jurisdictions.\(^{39}\)

\(^{34}\) \textit{Id.} at 939.


\(^{37}\) \textit{Sandusky County Democratic Party v. Blackwell}, 387 F.3d 565, 573-74 (6th Cir. 2004). This standard was followed in other cases addressing election disputes in the run-up to the 2004 elections. See, \textit{e.g.}, \textit{Miller v. Blackwell}, 348 F. Supp. 2d 916, 920-21 (S.D. Ohio 2004) (holding that labor unions and political parties had standing to bring suit on behalf of themselves and their members).

\(^{38}\) \textit{Sandusky County Democratic Party}, 387 F.3d at 574.

\(^{39}\) See, \textit{e.g.}, \textit{Bay County Democratic Party v. Land}, 347 F. Supp. 2d 404, 422-23 (E.D. Mich. 2004) (holding that political party had standing to bring suit against
The new-found receptiveness was felt not just in the doctrine, but in the increased judicial activity on election day as courts worked extra hours and issued rulings up to the moment the polls closed. Even the U.S. Supreme Court showed its willingness to assist, ruling unanimously in October 2008 to uphold an administrative determination by the Ohio Secretary of State (no longer Mr. Blackwell) to process voter registrations ahead of the November election.

Fortunately, there has been no subsequent election that has tested the voting system in the way that Florida 2000 did. For our purposes here, however, the issue is the institutional role of the judiciary in protecting a critical yet vulnerable American institution: the election system.

B. Post-September 11th

Shortly after September 11th, Justice O'Connor came to New York for the groundbreaking ceremony for a new building for New York University School of Law. This was a significant moment because it was an act of confidence to begin construction after the attacks, and it occasioned thoughtful comments about the nature of the threat to our society. In the course of her remarks, Justice O'Connor prophesied the coming demands for greater security and wondered how courts would address the question: "[A]t what point does the cost to civil liberties from legislation designed to prevent terrorism outweigh the added security that that legislation provides?"

All democracies confronted with military challenge must weigh the respective costs to liberty and security. The openness of the society proves to be both a source of strength and

Michigan Secretary of State and election officials where plaintiffs were challenging a directive under a state law that allegedly abridged plaintiffs' members' right to vote under federal election law).

40. See, e.g., White v. Blackwell, No. 3:04 CV 7689, slip op. at 4 (N.D. Ohio Nov. 2, 2004), available at http://www.moritzlaw.osu.edu/electionlaw/docs/ohio/white-order.pdf ("The Court is mindful that it is late on election day but that it must take the within action to protect the rights of Ohio citizens to cast provisional ballots as provided by law."); Ohio Democratic Party v. Blackwell, No. C2 04 1055, slip op. at 1 (S.D. Ohio Nov. 2, 2004), available at http://www.moritzlaw.osu.edu/electionlaw/docs/ohio/041102LongLineOrder.pdf ("The Court directs that the defendants shall keep the polls open for voters waiting in line at 7:30 p.m."); see also Tokaji, supra note 32, at 1238–39 (discussing the Ohio Democratic Party’s election-day lawsuit prompted by long lines at the polls).


43. Id.
vulnerability in times of military exigency. Democracies, from the Roman Republic's use of the time-limited dictatorship to the formal declarations of states of emergency in European constitutions, create reservoirs of exceptional powers designed to deal with such circumstances. Our Constitution is distinct in that, with the minor exception of the process for suspension of the writ of habeas corpus, it does not address how emergency powers may be invoked, by whom, for how long, or how the exercise of the emergency powers will be conducted.

As anticipated by Justice O'Connor, this became the source of tremendous conflict when the Bush Administration not only sought to exercise the power to exercise emergency authority in the wake of September 11, but also claimed the right to do so unilaterally. As I have noted elsewhere, no democracy (with the partial exception of Weimar Germany) ever sought to concentrate in the same officer of government the power to decree when emergency authority would be necessary, what would be the scope of such emergency authority, or what would be the duration of the emergency powers. Yet our Constitution had no express provisions to address these critical issues.

Once again, the judiciary rose to the task. Although judges are poorly positioned to judge military needs or the scope of a national security threat, they are well positioned to insist that the coordinate branches of government address these issues jointly, and not merely through an assertion of executive branch unilateral power. Here it was the Supreme Court that directed judicial review based on the distinctions drawn by Justice Jackson in the Steel Seizure Cases, that presidential authority rises when action is taken in conjunction with congressional approval, and falls to the extent that Congress is either silent or in opposition. The pivotal decisions from Hamdi v. Rumsfeld to Rasul v. Bush buttressed the critical institutional divisions of authority that have come to define emergency power in the

44. Samuel Issacharoff, Political Safeguards in Democracies at War, 29 OXFORD J. LEGAL STUD. 189, 200–02 (2009).
45. U.S. CONST. art. I, § 9, cl. 2.
46. See Issacharoff, supra note 44, at 202 ("No country permits executive unilateralism across all the key emergency functions: declaration of the emergency, definition of emergency powers, review of the exercise of emergency powers and determination as to when the emergency is concluded.").
47. This is the argument set out in Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 THEORETICAL INQUIRIES L. 1, 5 (2004).
absence of greater constitutional precision.°9 Taken as a whole, the post-2001 decisions addressing the scope of detention powers of the government allowed for a calibrated response to the new-found threats, not because the Court could properly gauge the level of the security threat, but because it could force the institutions of government collectively to respond according to core constitutional principles. Perhaps most notably, the Court in the last of these decisions, Boumediene v. Bush, asserted the role of the judiciary as an institutional linchpin in the constitutional separation of powers.°0 In sum, the Court emerged as a guarantor of proper institutional functioning in a time of grave danger and uncertainty, certainly an admirable response to crisis.

IV. GOING TO THE WELL

Let me turn to one last topic, one not addressing the role of courts rising to the task of rectifying institutional failure. This final topic, in contrast, concerns the risk that courts forced to assume unfamiliar, extraordinary roles may ultimately compromise the societal and international confidence that they have achieved. In case I have stayed too long in the uncontroversial areas of Bush v. Gore and the legal framework of the War on Terror, let me stray a bit into another perhaps contestable topic: the decision to try Khalid Sheikh Mohammed (KSM) in the ordinary civilian courts, rather than before a military tribunal.

Unfortunately, here it is necessary to confront the tragic legacy of what our country resorted to during the period of Mohammed’s capture. In 2007 the Red Cross published a report detailing its findings on the treatment of several “high value” detainees in government custody, KSM among them.°1 According to the report, following his arrest in Pakistan in March 2003, KSM was held incommunicado in a series of secret CIA detention centers for over three years.°2 During the entire period of his detention in the various CIA holding facilities, KSM was kept in solitary confinement with no indication of where he was, no information from or communication with the outside world, and no access to counsel.°3


52. Id. at 5, 7.

53. Id. at 7–8.
We may debate the legal status of prisoners from non-state groups, we may debate the demands of national security, but let us also confront what was done in the name of this country. We begin with long periods of treatment that we would unqualifiedly denounce as torture if done to our soldiers by enemy captors. The report alleges that at one particular detention site, KSM was shackled in a "stress standing position" continuously for approximately one month, during which time he was able to sleep only occasionally due to the severe pain.54 Later, at the same site, KSM was fitted with a plastic collar around his neck, attached to a rope; guards were able to yank the rope and slam KSM's head into the wall at any time, which they did "repeatedly" and without warning.55 Further, the report alleges that KSM was subjected to regular beatings, was kept nude for long periods of time (including an uninterrupted month of nudity while detained in Afghanistan), and was shackled continuously, even when inside his cell, for nineteen months.56 Nor is this something that we seriously dispute. Apart from news corroborations, a 2005 Justice Department memorandum described 183 separate instances of waterboarding use against KSM,57 and according to news reports, KSM was noteworthy for his exceptional resilience in the face of the torture, winning "the admiration of interrogators when he was able to last between two and two-and-a-half minutes" before breaking down, far longer than his fellow detainees.58

From the vantage point of the courts, two things stand out. The first is that KSM is presumptively an ongoing danger to our society. The second is that his treatment is something that no court could tolerate in the ordinary workings of our criminal justice system. I would expect that any judge in the Fifth Circuit, if faced with comparable treatment of an individual in the back of a Houston police station, would barely indulge a prosecution argument that a criminal conviction could be obtained independent of the apparent taint. And could you imagine the hearing at which the prosecution would both have to justify the quality of the evidence obtained independent of this conduct and explain that the source of some of the evidence may not be revealed because of security concerns?

54. Id. at 11-12.
55. Id. at 12.
56. Id. at 13-14, 16.
Taken together, there is nothing obvious about the use of the ordinary criminal courts for an affair of national security involving foreign nationals, captured abroad, directing military campaigns against the U.S. More significantly, there is much to fear. This is the risk that Justice Jackson identified in his dissenting opinion in Korematsu v. United States, in which he wrote of the dangers lurking in the “normalization” of the legal constructs governing the Japanese internment during World War II:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.” A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. 59

Inescapably, the criminal prosecution of KSM forces an immediate confrontation with important constitutional guarantees. Beginning with what is first raised at these proceedings, what of the Sixth Amendment’s guarantee of a speedy trial? Granted, the right has long been held to be “necessarily relative”60 and subject to a balance of factors concerning the “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”61 Even if far from absolute, does the

Sixth Amendment not have bite in an ordinary criminal prosecution? The doctrinal answer is no, and this is sustainable precisely because this is not an ordinary criminal prosecution. According to the government in the case of another military detainee, Jose Padilla, who spent more than three years in isolation in a military brig, the speedy trial requirement attaches only when there is actually a criminal prosecution and, "[t]hese provisions would seem to afford no protection to those not yet accused." This is consistent with the criminal procedure doctrines that view the role of criminal prosecution as distinct from other governmental conduct, such as immigration detentions or battlefield capture. As might be thought a bit facile, this was the argument accepted by Judge Marcia Cooke as recounted in the press in the Padilla matter: "I agree that the law in this case is that a criminal trial proceeding begins with the filing of the criminal process .... Mr. Padilla has been promptly brought to court in that matter."

Nonetheless, concerns over the speedy trial issues are small beer, matters of court administration rather than the underlying conduct of the government. What of the real issue? How is an ordinary criminal prosecution supposed to handle the facts of KSM's treatment while under our custody? For these purposes, I do not ask about the underlying conduct itself, or the codes of war, or even our signature of international conventions that, hopefully, would spare our troops such treatment. I want to direct myself to a simpler question of how the judiciary is supposed to respond to the courtroom appearance of a criminal defendant treated in a manner so at odds with our customs of tolerable forms of interrogation. As it happens, there is law on this issue, and it takes the form of a cautionary warning.

The controlling authority comes from a 1973 Supreme Court opinion in United States v. Russell, an entrapment case that

62. Government's Opposition to Defendant Padilla's Motions to Dismiss for Lack of Speedy Trial and for Pre-Indictment Delay at 6, United States v. Padilla, No. 0:04 CR 60001 (S.D. Fla. Apr. 9, 2007), 2007 WL 1079090 (quoting United States v. Marion, 404 U.S. 307, 313 (1971)). The brief lists additional cases for authority to establish this reading of the rule. See id. at 7 (listing five cases that held an indictment is a prerequisite for a speedy trial).

63. See, e.g., United States v. Guevera-Umana, 538 F.3d 139, 141–42 (2d Cir. 2008) (finding detention by immigration officials does not trigger speedy trial obligations for subsequent criminal prosecution); United States v. Jones, 129 F.3d 718, 720, 722 (2d Cir. 1997) (holding that even DOJ custody does not trigger speedy trial requirements if custody not in anticipation of criminal charges against defendant).

64. Peter Whoriskey, Judge Refuses to Dismiss Padilla's Charges, WASH. POST, Mar. 24, 2007, at A9 (internal quotation marks omitted). Only the press account of this order appears to have been reported.
tested the bounds of what the Court termed "‘fundamental
fairness, shocking to the universal sense of justice,’ mandated by
the Due Process Clause of the Fifth Amendment." While it
rejected the argument there, the Court announced that there
must be limits: "[W]e may some day be presented with a
situation in which the conduct of law enforcement agents is so
outrageous that due process principles would absolutely bar the
government from invoking judicial processes to obtain a
conviction." The potential to bar prosecution for outrageous
government conduct in turn drew from an earlier case, Rochin v.
California, in which a criminal suspect was forced to ingest an
emetic solution in order to induce him to vomit up narcotics
evidence which he had swallowed immediately prior to arrest.
Justice Frankfurter, writing for the majority, opined that:

Regard for the requirements of the Due Process Clause
"inescapably imposes upon this Court an exercise of
judgment upon the whole course of the proceedings
[resulting in a conviction] in order to ascertain whether
they offend those canons of decency and fairness which
express the notions of justice of English-speaking peoples
even toward those charged with the most heinous offenses."

Applying these general considerations to the
circumstances of the present case, we are compelled to
conclude that the proceedings by which this conviction was
obtained do more than offend some fastidious
squeamishness or private sentimentalism about combatting
crime too energetically. This is conduct that shocks the
conscience. Illegally breaking into the privacy of the
petitioner, the struggle to open his mouth and remove what
was there, the forcible extraction of his stomach’s
contents—this course of proceeding by agents of
government to obtain evidence is bound to offend even
hardened sensibilities. They are methods too close to the
rack and the screw to permit of constitutional
differentiation."

States ex rel. Singleton, 361 U.S. 234, 246 (1960)).
66. Id. at 431–32.
68. Id. at 169, 172 (alteration in original) (emphasis added) (quoting Malinski v.
New York, 324 U.S. 401, 416–17 (1945)). This opinion, in turn, hearkens back to Justice
Brandeis who cautioned:

Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt
for law; it invites every man to become a law unto himself; it invites anarchy. To
declare that in the administration of the criminal law the end justifies the
It hardly need be stated that we are dealing with methods of interrogation that are not just close to the rack and screw—they are pretty much it. For Justice Frankfurter, the judiciary was charged with ensuring that “States in their prosecutions respect certain decencies of civilized conduct.”

Unfortunately, Russell and Rochin are the judicial equivalent of the nuclear option: they do not admit of partial use. These cases and the extreme sanction of forbidding the prosecution of a mistreated prisoner serve as warnings that the integrity of the judiciary may be called into question if used to validate post hoc governmental conduct that shocks the conscience. As in the manner of mutually assured destruction, the incendiary doctrines of Russell and Rochin should serve as a warning to governmental officials not to engage in outrageous conduct in the first place, and should they believe that it needs be done anyway, not to believe that the courts are there to tolerate and integrate such conduct into the normal operations of the criminal justice system. As with all deterrence systems, the hope is that they are never invoked and never tested.

Not surprisingly, the examples of the deterrence strategy being deployed are few and far between. Perhaps the leading example comes with United States v. Toscanino, a Second Circuit decision from 1974. There the court held that a defendant’s kidnapping and torture at the hands of federal agents prior to trial required the court to “divest itself of jurisdiction” over the defendant due to its having been “acquired as the result of the government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights.” Although the court ruled that due process “could not tolerate [the abuses committed by the government] without debasing ‘the processes of justice,’” it did so narrowly as a matter of how it acquired jurisdiction, and the opinion has been distinguished accordingly.

---

69. Rochin, 342 U.S. at 173.
71. Id. at 275.
72. Id. at 276.
Quite simply, the dicta in *Russell* has never been invoked to free a defendant by holding that any putatively “clean” admission or evidence notwithstanding, the original interrogation corrupts the entire prosecution. 74 Frankly, it is inconceivable that such a reading of the Fifth Amendment doctrine governing coerced statements will ultimately be used to free KSM, again notwithstanding its inevitable invocation by defense counsel. 75 In the manner of deterrence, one hopes the reason for the paucity of case law on the boundaries of coerced interrogations is that courts have not had to confront cases of truly outrageous police misbehavior serving as the backdrop to a prosecution.

But a warning exists from the recent habeas proceeding for Farhi Saeed Bin Mohammed, a Guantanamo detainee. 76 The only evidence against Farhi Saeed Bin Mohammed came from the statements at Guantanamo of another detainee, Binyam Mohamed, who had been tortured and sliced repeatedly with a scalpel by FBI agents during his initial detention and interrogation in Pakistan, including scalpel cuts on his penis. 77 Confronted with this story of abuse, Judge Gladys Kessler ruled that no evidence obtained from Binyam Mohamed could be admitted, even that obtained after the torture had ended. 78 Because the Government’s defense to habeas relied almost exclusively on the inadmissible statements of Binyam Mohamed, Farhi Saeed Bin Mohammed was released. 79 Again, this was an evidentiary ruling and not a merits determination under *Russell*, but it well anticipates the risks of confounding national security operations with the normal course of criminal prosecutions.

There are certainly difficult lines to be drawn. Citizens versus noncitizens, persons captured in the United States versus those captured abroad, those taken in a combat zone versus those obtained through extradition or police operations, and no doubt many more. But one cannot evade the difficult lines by simply

78. Mohammed, 689 F. Supp. 2d at 66.
79. Id. at 66, 69.
ignoring the ordinary workings of the criminal justice system. Nor can seemingly arbitrary decisions be made about who is to be tried in ordinary criminal courts and who is to be tried before special tribunals, such as military commissions. And what of those who are not brought into the civilian courts? Is that an admission of such egregious conduct as to condemn military commissions to a presumption of illegitimacy?

To return to the work of the Supreme Court in the post-September 11 cases, our efforts may be more usefully directed to the proper operation of tribunals designed to address the tension between proper judicial practices and the demands of the battlefield. On this score, I am struck by the efforts made to improve the legal protections offered through military tribunals, such as the 2009 reforms to the Military Commissions Act. Section 1802 address the sorts of issues posed by a determination of the status of nonstate combatants, providing for: (1) inadmissibility of statements obtained by the use of torture, whether or not under color of law; (2) application of procedures and rules of evidence applicable to trials by general courts-martial, except when necessitated by "the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need"; (3) the accused's right to the suppression of evidence that is not reliable or probative; (4) further restrictions on the use of hearsay evidence not otherwise admissible under rules of evidence applicable in trials by general courts-martial; and (5) specific procedures for the treatment and protection of classified information.

More is to be gained through fair procedures in an appropriate forum than by compromising the practices of our court system, both in terms of fairness to all parties and in terms of international acceptance. All such modern prosecutions for crimes of war draw their ultimate inspiration from Nuremberg. The legitimacy of the post-World War II trials drew not from their being held in the ordinary courts of law of any of the victorious Allies, but from the fairness and decency of the

tribunals established for that purpose, and for the transparency of the provisions under which they would operate. 83

V. CONCLUSION

We have come a long way since Montesquieu first posited the separation of powers among our branches of government. 84 The United States pioneered, perhaps not by design, the role of the courts as a reservoir of exceptional power in times of national distress. By trial and error, by hope and by need, we have developed a judiciary capable of rescuing our national ambitions and our national institutions in times of stress. At those moments, we call upon our judges, men and women drawn from the main walks of American life, to rise above their station and to address the demands of extraordinary times. That Judge Brown did so admirably is the best tribute I can offer on the centenary of his birth.

83. See Arthur L. Berney, Revisiting a Conference Commemorating the Nuremberg Trials: A Commentary from a Nuremberg Prosecutor, 17 B.C. THIRD WORLD L.J. 275, 276–77 (1997) (“[R]esponsibility and punishment were meted out in accordance with law and fair trials . . . . That was the impetus, the meaning and the most enduring legacy of the Nuremberg trials.”).