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A Symposium on the Legacy of the Rehnquist Court
National Security Panel

**THE REHNQUIST COURT'S NONINTERFERENCE WITH THE
GUARDIANS OF NATIONAL SECURITY**

Gregory E. Maggs*

Introduction

The "Rehnquist Court" came into existence in September 1986 when President Ronald Reagan and the Senate elevated William H. Rehnquist from his position as an Associate Justice of the U.S. Supreme Court to Chief Justice of the United States. The era of the Rehnquist Court came to a close in September 2005 with the sad news of Chief Justice Rehnquist's death.

In this nineteen-year period, the Supreme Court decided many important national security cases. The term "national security" generally refers to the safety of the U.S. government, territory, and people from external threats.¹ When the Rehnquist Court initially began, the Cold War had not ended, and the United States was mostly concerned with risks posed by the communist Soviet Union.² But at least since 2001, the nation has given most of its

* Professor of Law, The George Washington University Law School. I presented this Essay during the National Security Panel of the Symposium on the Legacy of the Rehnquist Court that The George Washington Law Review hosted on October 28-29, 2005. I would like to thank the moderator, the Honorable Steven Colloton, and other panelists, Professors Burt Neuborne, Jonathan Turley, and John Yoo, for their comments.

¹ Federal regulations contain various similar definitions of "national security." See, e.g., 22 C.F.R. § 171.20(i) (2005) ("National Security means the national defense or foreign relations of the United States."); 39 C.F.R. § 233.3(c)(9) (2005) ("Protection of the national security means to protect the United States from any of the following actual or potential threats to its security by a foreign power or its agents: (i) An attack or other grave, hostile act; (ii) Sabotage, or international terrorism; or (iii) Clandestine intelligence activities, including commercial espionage.").

² See Amy B. Zegart, September 11 and the Adaptation Failure of U.S. Intelligence Agencies, 29 Int'l Security 78, 79 (2005) (describing how, for more than forty years, the CIA and thirteen other U.S. intelligence agencies perceived the Soviet Union as the principal threat to U.S. national security).

attention to threats from international terrorism and to the possibility that weapons of mass destruction might fall into the hands of rogue nations.³

The Supreme Court does not decide in the first instance what to do about national security. The Rehnquist Court, for example, never had to determine whether the United States was following the right strategy in the Cold War, how to respond to North Korea's nuclear program, or what measures to take against international terrorism. On the contrary, what is most commonly litigated in the Supreme Court is usually one or more steps removed*1123 from these inherently political, diplomatic, and strategic questions. As this Essay will show, the Supreme Court usually is limited to reviewing the legality of governmental actions taken either in preparation for national security threats or in response to them. For example, the Court has had to decide whether the military may detain terrorists,⁴ whether the Department of Transportation may require drug testing for customs officials,⁵ whether the decision of the Director of the Central Intelligence Agency to dismiss certain employees who might pose security risks is judicially reviewable,⁶ and whether the states (as opposed to the federal government) may enact legislation to influence foreign policy.⁷

This Essay describes numerous important national security cases that the Supreme Court decided between 1986 and 2005. Giving attention to these national security cases at this time is fitting because the United States is now engaged in armed conflicts in Afghanistan and Iraq and is fighting terrorism both at home and in other places around the world. In addition, Chief Justice Rehnquist had a special interest in the Supreme Court's role in national security matters: in 1998, he wrote a comprehensive book called *All the Laws but One: Civil Liberties in Wartime*.⁸ In this work, he discussed the tensions between national security and individual rights

³ See Bureau of Int'l Info. Programs, U.S. Dep't of State, Iran, North Korea Threaten to Develop, Spread Nuclear Weapons: Nuclear Proliferation Second Only to Terrorism as Danger to United States, Wash. File, Mar. 1, 2006, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=March&x=20060301173919idybeekcm0.1129419> [hereinafter State Department Information Release].

⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

⁵ See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 659 (1989).

⁶ See *Webster v. Doe*, 486 U.S. 592, 598-99 (1988).

⁷ See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000).

⁸ William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (1998).

during times of war.⁹ Although the book dealt almost exclusively with cases decided before 1986, as this Essay will show, Chief Justice Rehnquist's observations and analysis remain relevant today.

Based on an examination of the Rehnquist Court's national security cases, this Essay makes three claims. The first claim is that the Rehnquist Court generally did not interfere with the governmental units that serve as the guardians of national security. These guardians include the President and various federal departments and agencies such as the Department of Defense ("DOD"), the Central Intelligence Agency ("CIA"), the Federal Bureau of Investigation ("FBI"), and others. The Rehnquist Court almost always rejected challenges to governmental actions taken by these guardians of national security when the guardians justified the actions based on the need to protect the United States from external threats.

The second claim is that the Rehnquist Court's hands-off approach generally had favorable consequences. It promoted national security by leaving the subject to the governmental units most competent to address the topic. The Rehnquist Court's practice of noninterference also kept the Court out of the kinds of controversies that in other areas of the law have embroiled the Court in political disputes that have damaged its reputation.¹⁰ Although the *1124 national security policies of the United States have many critics, few of these critics fault the Supreme Court for the content of these policies; instead, they sensibly assign responsibility for the policies to the political branches that created them.¹¹ Fortunately, the institutional benefits to the Supreme Court from its practice of noninterference came at little cost. Although a deferential approach in national security cases might have led to significant governmental abuses, that potential consequence does not appear to have occurred during the past nineteen years.

The third claim is that the Rehnquist Court's principal legacy to the Roberts Court is one of experience. The Rehnquist Court did not establish a generalized and binding doctrine of noninterference that the Roberts Court must follow. Instead, in case after case, the Rehnquist Court simply found some way to defer to or otherwise uphold governmental choices. Although the Roberts Court now has considerable freedom to choose

⁹ See *id.*

¹⁰ See *infra* Part II.A.2. (discussing how noninterference in areas of national security may have kept the Court out of the kinds of controversies created by the Court's extensive involvement in public safety issues like criminal procedure, the death penalty, and prisoners' rights).

¹¹ See *infra* Part II.A.2.

another approach, it has the benefit of knowing that the Rehnquist Court's practice served both the Court and the nation very well.

I. Guardians of National Security and How They Fared

The United States has many guardians of national security--agencies and other political entities that have the responsibility of keeping the country safe. These guardians include federal law enforcement agencies, the armed forces, the intelligence services, and other governmental units. A useful way to appreciate the breadth and consistency of the Rehnquist Court's practice in national security matters is to look at how the Court treated these various guardians. The Court's cases reveal that, regardless of the governmental agency or legal issue involved, the Rehnquist Court almost always upheld actions taken in the name of national security. Or to put it another way, the Rehnquist Court generally followed a practice of noninterference in national security matters.

A. The FBI

The FBI has domestic counterterrorism and counterespionage responsibilities and has often become involved in national security programs. One significant Rehnquist Court decision concerning the actions of the FBI was *John Doe Agency v. John Doe Corp.*,¹² decided in 1989. In that case, the FBI was investigating potential fraud by a defense contractor in a secret military program.¹³ In an apparent attempt to discover what the investigators knew and did not know, the contractor requested documents from the FBI under the Freedom of Information Act ("FOIA").¹⁴ But the FBI refused to turn over the documents, citing an exception that allowed it to keep records compiled for law enforcement purposes, including those involving national security investigations.¹⁵ In an opinion by Justice Blackmun (joined by five others, *1125 including Chief Justice Rehnquist),

¹² *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989).

¹³ See *id.* at 148-49 & 148 n.1.

¹⁴ *Id.* at 149; see also Freedom of Information Act, 5 U.S.C. § 552 (2000).

¹⁵ See *John Doe Agency*, 493 U.S. at 149-50; see also 5 U.S.C. § 552(b)(7) ("This section does not apply to matters that are--...(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings...[or] (D) could reasonably be expected to disclose...in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source....").

the Supreme Court held that the FBI could retain the requested records, even though the government had not originally compiled the records for law enforcement purposes.¹⁶

The John Doe case has significance because the holding may permit the FBI and other governmental agencies to use the “compiled for” exception in FOIA to make otherwise nonsecret information unobtainable on grounds of national security. For example, after the September 11, 2001 attacks, the United States sought to use immigration laws to thwart further terrorist actions.¹⁷ The federal government detained hundreds of aliens, mostly from the Middle East, for minor immigration violations.¹⁸ Few if any of these aliens actually had ties to terrorism.¹⁹ And in other circumstances, the government probably would not have arrested them.²⁰ A factor making the program especially controversial was that the government refused to make a list of the detainees’ names known to the public, fearing that such a list might reveal to terrorist organizations which of their members the government had arrested and which it had not.²¹

In *Center for National Security Studies v. United States Department of Justice*,²² a private organization challenged this nondisclosure policy.²³ It made a FOIA request asking for the names of the persons detained on immigration charges.²⁴ The government, invoking the “compiled for law enforcement” exception, argued that it did not have to release the names.²⁵ The D.C. Circuit upheld the government’s position, concluding that John Doe Agency and other decisions permitted the government to withhold the

¹⁶ See *John Doe Agency*, 493 U.S. at 147, 155.

¹⁷ See Gregory E. Maggs, *Terrorism and the Law: Cases and Materials* 124 (2005).

¹⁸ *Id.* at 127-28.

¹⁹ *Id.* at 125-26.

²⁰ *Id.* at 125.

²¹ Official expressions of the government’s policy and its rationale appear in declarations by James S. Reynolds, Chief of the Terrorism and Violent Crime Section of the U.S. Department of Justice, and Dale L. Watson, the FBI’s Executive Assistant Director for Counterterrorism. These declarations are quoted in Brief for the Respondent in Opposition at 6-7, *Ctr. for Nat’l Security Studies v. Dep’t of Justice*, 540 U.S. 1104 (2005) (No. 03-472), available at 2003 WL 22989100.

²² *Ctr. for Nat’l Security Studies v. Dep’t of Justice*, 331 F.3d 918 (D.C. Cir. 2003).

²³ *Id.* at 920.

²⁴ *Id.* at 920-21.

²⁵ *Id.*

names.²⁶ Even though the individual names by themselves were not secret, the collection of the names fit within the FOIA's "compiled for law enforcement" exception.²⁷

***1126 B. Drug Enforcement Administration**

For many years, the United States has waged an international campaign against illegal drugs. Another guardian of national security, and one engaged in this campaign, is the Drug Enforcement Administration ("DEA"). In 1990, the Rehnquist Court decided an important case related to the DEA and the war on drugs called *United States v. Verdugo-Urquidez*.²⁸ In that case, DEA agents assisted Mexican authorities in searching the Mexican home of Rene Martin Verdugo-Urquidez, a Mexican citizen suspected of illegal narcotics activities.²⁹ When the U.S. government later tried Verdugo-Urquidez in federal court in California, Verdugo-Urquidez objected to the introduction of evidence obtained from his home.³⁰ He asserted that the search had violated the Fourth Amendment because the DEA had not obtained a warrant.³¹

The Supreme Court, in an opinion written by Chief Justice Rehnquist, rejected Verdugo-Urquidez's argument.³² It held that the Fourth Amendment did not apply to the search of an alien's residence outside the United States.³³ The Court explained:

The available historical data show . . . that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.³⁴

²⁶ *Id.* at 925-26.

²⁷ *Id.* at 926 ("Plaintiffs are seeking a comprehensive listing of individuals detained during the post-September 11 investigation. The names have been compiled for the 'law enforcement purpose' of successfully prosecuting the terrorism investigation. As compiled, they constitute a comprehensive diagram of the law enforcement investigation after September 11. Clearly this is information compiled for law enforcement purposes." (quoting 5 U.S.C. § 552(b)(7)(A))).

²⁸ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

²⁹ *Id.* at 262.

³⁰ *Id.* at 263.

³¹ *Id.*

³² *Id.* at 261, 274-75.

³³ *Id.* at 274-75.

³⁴ *Id.* at 266.

The Court therefore concluded that the United States could introduce evidence obtained from the Mexican home in its prosecution.³⁵

The Verdugo-Urquidez decision has far-reaching national security implications. If the Rehnquist Court had reached a different conclusion, the Fourth Amendment might limit the ability of the federal government to practice espionage against our foreign enemies. But the CIA, National Security Agency (“NSA”), and military intelligence agencies presumably conduct searches and wiretaps in foreign countries without obtaining a warrant.³⁶ Although*1127 these agencies generally do not seek to use the information that they collect as evidence in court, they still could face liability or other sanctions for violating the Fourth Amendment if the Court had held that the Amendment’s prohibitions apply outside of the United States.³⁷

The Verdugo-Urquidez decision also is playing a key role in litigation arising out of the United States’ War on Terror. The federal courts, for example, have relied on the precedent in two cases stemming from al Qaeda’s 1998 bombing of the U.S. embassies in Kenya and Tanzania. One decision, styled *United States v. Bin Laden*³⁸ in reference to the mastermind of the conspiracy, concerned the indictment of some of the suspects in the bombing. Agents of the United States had questioned these suspects in Africa.³⁹ The trial court had to determine, on the basis of the Verdugo-

³⁵ See *id.* at 274-75.

³⁶ The Court explained:

The rule adopted by the Court of Appeals would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in ‘searches or seizures.’ The United States frequently employs Armed Forces outside this country...for the protection of American citizens or national security... Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters.

Id. at 273-74.

³⁷ See *id.*

³⁸ *United States v. Bin Laden*, 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

³⁹ *Id.* at 171-72.

Urquidez decision, the extent to which the suspects were entitled to the benefits of the Miranda rule regarding confessions.⁴⁰

The other decision, *El-Shifa Pharmaceutical Industries Co. v. United States*,⁴¹ concerned the consequences of a military action that the United States took following the bombings of U.S. embassies abroad. To strike back at al Qaeda, the United States fired missiles at a pharmaceutical plant in Sudan that it believed was making chemical weapons for bin Laden.⁴² The owner of the plant, who denied any link to al Qaeda, subsequently sued the U.S. government for the taking of his property.⁴³ The U.S. Court of Appeals for the Federal Circuit was asked to determine, among other issues, whether the Supreme Court's decision in *Verdugo-Urquidez* barred claims for compensation for property taken outside of the United States.⁴⁴

In addition, the *Verdugo-Urquidez* decision has come up in lower court litigation concerning detainees whom the United States captured when fighting in Afghanistan and now holds at the U.S. Naval Base in Guantánamo Bay, Cuba. The decisions in *In re Guantanamo Detainee Cases*⁴⁵ and *Khalid v. Bush*⁴⁶ disagreed about whether detainees at Guantanamo have a right to *1128 due process under the Fifth Amendment.⁴⁷ Because of this division, more litigation on this subject appears likely.

C. CIA, NSA, and Other Intelligence Agencies

The CIA and the NSA also have responsibility for protecting the nation from external threats. These agencies collectively had several cases before the Supreme Court. Much like the situation for other government entities,

⁴⁰ See *id.* at 181-82 (comparing the extraterritorial application of the Fifth Amendment and Fourth Amendment based on the reasoning in *Verdugo-Urquidez*); see also *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴¹ *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004).

⁴² See *id.* at 1349.

⁴³ *Id.* at 1348-49.

⁴⁴ *Id.* at 1352 (concluding that the “takings claim at bottom presents a nonjusticiable political question,” rendering it unnecessary to determine whether the *Verdugo-Urquidez* decision also blocked the claim).

⁴⁵ *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

⁴⁶ *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

⁴⁷ Compare *Guantanamo*, 355 F. Supp. 2d at 463-64 (distinguishing *Verdugo-Urquidez* and holding that the detainees have a right to due process under the Fifth Amendment), with *Khalid*, 355 F. Supp. 2d at 322-23 (relying on *Verdugo-Urquidez*, among other decisions, in holding that nonresident aliens captured and detained outside the United States do not have constitutional rights).

when these agencies defended their actions based on national security, the Rehnquist Court generally did not interfere.

In *Webster v. Doe*,⁴⁸ the CIA discharged an employee because it determined that his homosexuality posed a security risk.⁴⁹ The Supreme Court, in an opinion by Chief Justice Rehnquist,⁵⁰ concluded that the employee had no administrative remedies under any statute.⁵¹ The Court remanded the case for consideration of the employee's constitutional claim.⁵² Following remand, the U.S. Court of Appeals for the D.C. Circuit considered the constitutional question.⁵³ The court concluded that the CIA's action did not violate the guarantee of equal protection because terminating the employee was "rationally related to the legitimate government security interest in collecting foreign intelligence and protecting the nation's secrets."⁵⁴ The Supreme Court denied the employee's petition for review.⁵⁵ In the same year, the Rehnquist Court similarly rejected administrative challenges to adverse personnel actions taken by NSA and the Department of the Navy against employees whom these agencies deemed to present security risks.⁵⁶

⁴⁸ *Webster v. Doe*, 486 U.S. 592 (1988).

⁴⁹ *Id.* at 595.

⁵⁰ This Essay is about the legacy of the Rehnquist Court in national security cases generally, not just about the legacy of Chief Justice Rehnquist himself. The broader focus is appropriate because the Chief Justice has only one vote, the same as each of the Associate Justices, and thus cannot by himself or herself set the Court's jurisprudential path. Yet, the Chief Justice does have a special power worth noting. When in the majority, the Chief Justice can decide to write the majority opinion himself or herself or instead decide to assign the opinion to someone else in the majority who may have very closely aligned views. What the majority opinion says (or does not say) may influence subsequent decisions. See Barry Friedman, *The Politics of Judicial Review*, 84 *Tex. L. Rev.* 257, 291-92 (2005) ("[T]he Chief Justice assigns the opinion if he is in the majority; otherwise the senior associate Justice assigns. Empirical work suggests that the initial opinion assignee often ends up writing the opinion for the Court and that most members of the majority coalition join without requesting any changes, making the initial assignment incredibly important as to the direction the law will take.").

⁵¹ *Webster*, 486 U.S. at 594, 601.

⁵² *Id.* at 604-05.

⁵³ *Doe v. Gates*, 981 F.2d 1316, 1324 (D.C. Cir. 1993).

⁵⁴ *Id.* (quotation omitted).

⁵⁵ *Doe v. Woolsey*, 510 U.S. 928 (1993).

⁵⁶ See *Carlucci v. Doe*, 488 U.S. 93, 95 (1988) (considering a challenge to the discharge of an NSA employee who admitted having homosexual relationships with foreign nationals); *Dep't of the Navy v. Egan*, 484 U.S. 518, 526-27 (1988)

*1129 A more recent case, *Christopher v. Harbury*,⁵⁷ was about denying a concerned citizen access to classified information. That case involved Jennifer Harbury, the American widow of a Guatemalan dissident who died in custody of the Guatemalan Army.⁵⁸ She sued the CIA, State Department, and National Security Council, and officials of each agency, alleging that they had withheld information about her husband and thus prevented her from bringing a lawsuit to save him.⁵⁹

The Supreme Court denied relief.⁶⁰ It held that Harbury failed to state a claim of denial of access to the courts because she had not identified what cause of action she might have brought.⁶¹ The Court also emphasized that further judicial inquiry would raise concerns for the separation of powers because it would encroach on diplomatic matters committed to other branches.⁶² The Court thus did not interfere with the intelligence agencies' withholding of the information.

Another recent decision, *Tenet v. Doe*,⁶³ concerned the rights of informants for the CIA. Two foreign nationals sued the Director of the CIA, claiming that he had broken a promise to provide them with financial support in exchange for their espionage work.⁶⁴ The Supreme Court, in an opinion written by Chief Justice Rehnquist, held that public policy barred the courts from hearing suits against the government based on covert espionage agreements.⁶⁵ The CIA thus was free to not keep any promises of support that it might have made.

In each of these cases, the Court declined to interfere with actions taken by federal intelligence agencies in the name of national security. How important are these cases? An observer might be tempted to dismiss them as not very significant from a national security law perspective. If the government had lost each of these cases, the nation probably would not have faced much increased peril. The apparent dangers simply were not that great.

(holding that the Merit Systems Protection Board could not review the revocation of a civilian employee's security clearance).

⁵⁷ *Christopher v. Harbury*, 536 U.S. 403 (2002).

⁵⁸ See *id.* at 406.

⁵⁹ See *id.* at 408.

⁶⁰ *Id.* at 415.

⁶¹ *Id.*

⁶² *Id.* at 417.

⁶³ *Tenet v. Doe*, 544 U.S. 1 (2005).

⁶⁴ See *id.* at 4.

⁶⁵ *Id.* at 8.

But that is not the correct conclusion to draw. These cases clearly were important to the parties and to all persons similarly situated. The loss of a job to a typical government employee, information about a missing spouse, or payment for potentially dangerous spying are no small matters to the individuals concerned. Yet the Rehnquist Court still chose not to interfere, even when contrary decisions would have posed little danger to the country. These cases thus strongly illustrate the Court's preference for not interfering with the guardians of national security.

***1130 D. Customs Service**

The Customs Service also plays a role in protecting the United States from external threats to its security. A large part of its mission is to prevent illegal items from coming across the borders.⁶⁶ In the course of its work, the Customs Service prevents or fails to prevent weapons or other dangerous materials from reaching the hands of terrorists or other enemies who might harm America.

The Rehnquist Court did not interfere with the Customs Service's actions in a major case in which the Customs Service justified the actions on the grounds of national security. In *National Treasury Employees Union v. Von Raab*,⁶⁷ the Court allowed the Customs Service to perform suspicionless drug tests on employees applying for promotion to positions involving interdiction of illegal drugs or requiring the carrying of firearms. The Court recognized that the Fourth Amendment ordinarily prohibits the government from making searches (including searches for drugs through drug testing) unless the government has some reason to believe that the search will yield evidence of wrongdoing.⁶⁸ But the Court concluded that the drug testing by the Customs Service did not violate the Fourth Amendment due to "the extraordinary safety and national security hazards that would attend the promotion of drug users."⁶⁹

The *Von Raab* decision is now playing an important role in litigation regarding counterterrorism measures. For example, following the bombing attacks on London subways in 2005, New York City instituted a practice

⁶⁶ See U.S. Customs and Border Prot., U.S. Customs Service--Over 200 Years of History, <http://www.cbp.gov/xp/cgov/toolbox/about/history/history.xml> (last visited June 11, 2006) (describing the mission of the Customs Service, which prominently includes "[i]nterdicting and seizing contraband").

⁶⁷ *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

⁶⁸ See *id.* at 665.

⁶⁹ *Id.* at 674.

of searching containers brought into its subway system.⁷⁰ In an opinion citing *Von Raab* eight times, the U.S. District Court for the Southern District of New York rejected a Fourth Amendment challenge to this program.⁷¹ The court found the practice to be “a reasonable method of deterring (and detecting) a terrorist bombing of the New York City subway system,” and compared it favorably to the Customs Service’s drug testing program upheld by the Rehnquist Court.⁷²

E. State Department

The State Department is another guardian of national security, managing international relations as a method of protecting the United States. As with other departments and agencies in the federal government, the Rehnquist Court did not interfere with the State Department when it justified its actions on grounds of national security. In *American Foreign Service Ass’n v. *1131 Garfinkel*,⁷³ for example, foreign service officers sued to enjoin the State Department from requiring them to sign nondisclosure agreements.⁷⁴ While the litigation was pending in the lower courts, Congress passed a law supporting the foreign service officers.⁷⁵ The United States argued to the Supreme Court that the statute unconstitutionally intruded upon executive power “to regulate the disclosure of national security information.”⁷⁶ Because of the importance of the constitutional question posed by the new act, the Supreme Court vacated the judgment against the State Department and remanded the case.⁷⁷ On remand, the district court interpreted the statute in a way that favored the State Department and avoided any constitutional issue.⁷⁸ The federal courts thus did not interfere with the State Department’s use of the form.

The *Garfinkel* decision has affected national security in other areas. For example, in *Encuentro Del Canto Popular v. Christopher*,⁷⁹ a group of

⁷⁰ See *MacWade v. Kelly*, No. 05CIV6921RMBFM, 2005 WL 3338573 (S.D.N.Y. Dec. 7, 2005).

⁷¹ *Id.* at *1.

⁷² *Id.* at *18.

⁷³ *Am. Foreign Serv. Ass’n v. Garfinkel*, 490 U.S. 153 (1989).

⁷⁴ *Id.* at 155.

⁷⁵ Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202, § 630, 101 Stat. 1329, 1432 (1987).

⁷⁶ *Garfinkel*, 490 U.S. at 158.

⁷⁷ *Id.* at 161.

⁷⁸ *Am. Foreign Serv. Ass’n v. Garfinkel*, 732 F. Supp. 13, 16 (D.D.C. 1990).

⁷⁹ *Encuentro Del Canto Popular v. Christopher*, 930 F. Supp. 1360 (N.D. Cal. 1996).

Cuban musicians sought entry into the United States. The State Department denied them visas.⁸⁰ It based its decision on a presidential proclamation requiring exclusion of “individuals who, notwithstanding the type of passport that they hold, are considered by the Secretary of State or his designee to be officers or employees of the Government of Cuba or the Communist Party of Cuba.”⁸¹ The sponsors of the musicians argued that a federal statute had overturned the proclamation.⁸² Following Garfinkel, however, the district court rejected this argument, interpreting the federal statute in favor of the State Department’s position so as to avoid the “thorny constitutional question whether or to what extent the President’s power over foreign affairs must yield to Congress’ power over immigration in cases in which both areas are implicated.”⁸³ The State Department thus again prevailed.

F. Federal Government vs. the States

The Rehnquist Court’s national security cases did not all involve disputes between the executive branch and private parties. In *Crosby v. National Foreign Trade Council*,⁸⁴ the Court considered the respective roles of the federal government and the states. The case arose after Massachusetts enacted a law designed to put pressure on the repressive government of Burma.⁸⁵ The law restricted the ability of state agencies to purchase goods or ***1132** services from companies that did business with Burma.⁸⁶ But the Rehnquist Court found the state law preempted by a federal statute, which among other things had sought to give the President “effective discretion . . . to control economic sanctions against Burma.”⁸⁷ The Court thus made clear that the federal government, rather than the states, is the keeper of national security.

The Rehnquist Court also adhered to this approach in a case concerning the National Guard. In *Perpich v. Department of Defense*,⁸⁸ the Minnesota governor opposed the federal government’s decision to send the Minnesota

⁸⁰ *Id.* at 1362.

⁸¹ *Id.* (quoting Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985)).

⁸² *See id.* at 1365 (citing 22 U.S.C. § 901, repealed by Pub. L. No. 96-465, § 2205(1), 94 Stat. 2071, 2159-60 (1980)).

⁸³ *Id.*

⁸⁴ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

⁸⁵ *See id.* at 366-67.

⁸⁶ *See id.* at 367.

⁸⁷ *Id.* at 373-74.

⁸⁸ *Perpich v. Dep’t of Def.*, 496 U.S. 334 (1990).

National Guard to Central America for training.⁸⁹ He argued that the Militia Clause of the U.S. Constitution authorized the calling of any kind of state troops to active service only “for three limited purposes that do not encompass either foreign service or nonemergency conditions.”⁹⁰ But the Court upheld the federal action; pursuant to a federal statute, all National Guardsmen are members not only of their state forces but also of a reserve component of the U.S. Army.⁹¹ Consequently, the Court concluded, the federal government has authority to deploy Minnesota National Guardsmen for training abroad.⁹²

G. The Armed Forces

The Rehnquist Court also decided a number of important cases challenging actions taken by the military. In these cases, the Court generally did not interfere. Even in the few cases when the Rehnquist Court did not completely agree with the military’s positions, however, it kept its intrusion into military activity to a minimum.

1. Courts-Martial

Several of the Rehnquist Court’s decisions involved courts-martial. Court-martial cases in lower tribunals often involve criminal prosecutions concerning offenses that have little to do with national security. But the cases that came to the Rehnquist Court involved important questions of executive and congressional authority over military matters. In these cases, the Rehnquist Court did not disturb the judgments of other branches of the government.⁹³

⁸⁹ Id. at 336-38.

⁹⁰ Id. at 347 (citing U.S. Const. art. I, § 8, cl. 15, which states that Congress may “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” and id. cl. 16, which states that Congress may provide for the “organizing, arming, and disciplining” of the Militia).

⁹¹ Id. at 346 (explaining that “under the dual enlistment provisions of the statute that have been in effect since 1933, a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service” (quotation omitted)).

⁹² Id. at 354-55.

⁹³ The Rehnquist Court decided several cases involving courts-martial in addition to the ones described above. See, e.g., *Clinton v. Goldsmith*, 526 U.S. 529, 531 (2004) (considering whether the Court of Appeals for the Armed Forces lacked jurisdiction to enjoin the removal of an airman from the service); *Ryder v. United States*, 515 U.S. 177, 179 (1995) (deciding a procedural issue concerning Appointments Clause challenges to military judges); *Davis v. United States*, 512 U.S. 452, 461 (1994) (deciding a right-to-counsel issue).

*1133 In *Solorio v. United States*,⁹⁴ for example, a member of the Coast Guard made a constitutional challenge to the jurisdiction of a court-martial that tried him for sex offenses allegedly committed against the children of another Coast Guardsman. He argued that the court-martial lacked jurisdiction because the charged offenses lacked any “service connection.”⁹⁵ The Supreme Court disagreed.⁹⁶ In an opinion written by Chief Justice Rehnquist, the Court held that a court-martial’s jurisdiction depends solely on the accused’s status as a member of the armed forces, and not on the character of the offense.⁹⁷ The Court reasoned that a requirement that the offense have a service connection did not exist in Article I, Section 8, Clause 14.⁹⁸ The decision overruled another case, *O’Callahan v. Parker*,⁹⁹ decided by the Warren Court seventeen years earlier.¹⁰⁰

In *Weiss v. United States*¹⁰¹ and *Edmond v. United States*,¹⁰² the Rehnquist Court considered challenges to the appointment process for the trial and appellate judges involved in courts-martial.¹⁰³ The appointment process in these cases did not involve the President; instead, the senior legal officers in the Army, Navy, and Air Force assigned personnel to serve as military judges in their respective services,¹⁰⁴ and the Secretary of Transportation assigned military judges in the Coast Guard.¹⁰⁵ The accused in these cases contended that vesting the task of appointing military judges in these officials violated the Appointments Clause.¹⁰⁶ The defendants

⁹⁴ *Solorio v. United States*, 483 U.S. 435 (1987).

⁹⁵ *Id.* at 436.

⁹⁶ *Id.*

⁹⁷ *Id.* at 450-51.

⁹⁸ *Id.* at 441-45 (citing U.S. Const. art. I, § 8, cl. 14, which provides Congress with the power to “make Rules for the Government and Regulation of the land and naval Forces”).

⁹⁹ *O’Callahan v. Parker*, 395 U.S. 258, 274 (1969) (holding that because the offenses committed by a U.S. Army sergeant were not service connected, he could not be charged by a court-martial), overruled by *Solorio v. United States*, 483 U.S. 435 (1987).

¹⁰⁰ *Solorio*, 483 U.S. at 436 (overruling *O’Callahan*).

¹⁰¹ *Weiss v. United States*, 510 U.S. 163 (1994).

¹⁰² *Edmond v. United States*, 520 U.S. 651 (1997).

¹⁰³ See *Weiss*, 510 U.S. at 181; *Edmond*, 520 U.S. at 666.

¹⁰⁴ See *Weiss*, 510 U.S. at 168.

¹⁰⁵ See *Edmond*, 520 U.S. at 653-54.

¹⁰⁶ See *Weiss*, 510 U.S. at 171; *Edmond*, 520 U.S. at 655-56 (citing U.S. Const. art. II, § 2, cl. 2, which states that the President “shall appoint...all other Officers of the United States, whose Appointments are not herein otherwise provided for, and

argued that only the President could appoint military judges, and that the Senate had to confirm them.¹⁰⁷ In *Weiss*, the Court held that military officers detailed to serve as military judges did not pose a constitutional problem; because they had already received commissions as military officers, they did not need an additional appointment to serve as military judges.¹⁰⁸ In *Edmond*, the Court held *1134 that the Secretary of Transportation could appoint civilians to serve as appellate judges on the Coast Guard Court of Criminal Appeals because these appellate judges are “inferior officers” not covered by the Appointments Clause.¹⁰⁹

Courts-martial conduct trials according to the Rules for Courts-Martial and the Military Rules of Evidence in the Manual for Courts-Martial, which the President promulgates by executive order.¹¹⁰ In two important cases, the Rehnquist Court considered challenges to these rules. In *United States v. Scheffer*,¹¹¹ the accused challenged a provision in the Military Rules of Evidence that prohibited the introduction of polygraph evidence.¹¹² He argued that the prohibition violated the Fifth Amendment requirement of due process and the Sixth Amendment right to present a defense by preventing him from introducing exculpatory evidence.¹¹³ But the Court rejected this argument.¹¹⁴ It held that the President’s rule was “a rational and proportional means of advancing the legitimate interest in barring unreliable evidence.”¹¹⁵ The Court thus did not interfere with the President’s decision to promulgate the Military Rules of Evidence.

which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments”).

¹⁰⁷ See *Weiss*, 510 U.S. at 170; *Edmond*, 520 U.S. at 655-56.

¹⁰⁸ *Weiss*, 510 U.S. at 176.

¹⁰⁹ *Edmond*, 520 U.S. at 666.

¹¹⁰ See, e.g., Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (Oct. 18, 2005).

¹¹¹ *United States v. Scheffer*, 523 U.S. 303 (1998).

¹¹² *Id.* at 306-07 (quoting Mil. R. Evid. 707(a), which states: “Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence”).

¹¹³ See *id.* at 307-08 & 307 n.3.

¹¹⁴ See *id.* at 309, 317.

¹¹⁵ *Id.* at 312.

In *Loving v. United States*,¹¹⁶ a court-martial sentenced a soldier to death in connection with murders committed in the course of robberies.¹¹⁷ The soldier challenged the death sentence as unconstitutional under the Eighth Amendment.¹¹⁸ The Supreme Court had previously ruled that the Eighth Amendment permits the imposition of the death penalty for murder only if the presence of predefined aggravating factors shows a greater level of culpability.¹¹⁹ In *Loving*, a court-martial found the presence of three aggravating factors listed in the Rules for Courts-Martial promulgated by the President.¹²⁰ The accused argued that the President lacked the authority to promulgate*1135 the applicable rules by executive order.¹²¹ But the Court rejected this contention, relying on statutes giving the President authority to establish procedural rules for courts-martial and to limit the punishments that courts-martial may impose.¹²²

The *Loving* case stressed two points. One is that national security requires military discipline, which is accomplished through courts-martial.¹²³ The other is that the Court must defer to the President as Commander in Chief in his control of military forces and military policy.¹²⁴

¹¹⁶ *Loving v. United States*, 517 U.S. 748 (1996).

¹¹⁷ *Id.* at 751.

¹¹⁸ *Id.* at 754-55.

¹¹⁹ In *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), the Supreme Court held that death penalty sentencing schemes were unconstitutional in a situation where they did not limit discretion sufficiently to prevent the arbitrary or capricious imposition of capital punishment. In subsequent cases, the Court ruled that death penalty schemes may be constitutional if they require proof of “aggravating factors” that justify imposing the capital punishment instead of a lesser penalty. See, e.g., *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988).

¹²⁰ See *Loving*, 517 U.S. at 751 (describing how the court-martial found, with respect to the murders of two taxi drivers, “(1) that the premeditated murder of the second driver was committed during the course of a robbery, Rule for Courts-Martial (RCM) 1004(c)(7)(B); (2) that *Loving* acted as the triggerman in the felony murder of the first driver, RCM 1004(c)(8); and (3) that *Loving*, having been found guilty of the premeditated murder, had committed a second murder...RCM 1004(c)(7)(J)”).

¹²¹ See *id.* at 751-52.

¹²² *Id.* at 769-70 (citing 10 U.S.C. §§ 818, 836, 856).

¹²³ See *id.* at 763-67 (describing the lessons the Framers learned from the English Parliament’s experience in using courts-martial and the subsequent decision to vest Congress with the power to regulate the Armed Forces).

¹²⁴ See *id.* at 768 (reasoning that “it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority”).

Because of these points, the Loving case has had and will continue to have a lasting effect on national security matters.

Federal courts have relied on Loving in several important national security cases. One court, for example, cited the decision in litigation regarding the conviction of Jonathan Pollard for being a spy for Israel.¹²⁵ Loving's principles also have come up in litigation concerning Zacharias Moussaoui, who now has confessed to conspiring with the September 11th hijackers.¹²⁶ Further, Loving has played a role in the litigation concerning Jose Padilla, an American citizen whom the President ordered the military to hold as an enemy combatant.¹²⁷

Shortly after the September 11, 2001 attacks, the President ordered the establishment of "military commissions"--a form of military tribunal--to try enemy detainees suspected of war crimes.¹²⁸ The actual trials have not yet occurred, but cases may arise that challenge the subject matter jurisdiction of the military commissions, their judicial composition, and the procedures that they use. If courts reach the merits of these cases, they are likely to look at the broad language in Solorio, Edmond, and Scheffer for guidance on these issues, even though these precedents concern courts-martial and not military commissions.

2. Military Counterterrorism Cases

In addition to these cases concerning courts-martial, the Rehnquist Court decided two very significant counterterrorism cases following the attacks*1136 of September 11, 2001. In *Hamdi v. Rumsfeld*,¹²⁹ an American citizen named Yaser Esam Hamdi, who was taken into military custody in Afghanistan and subsequently transferred to a navy brig in South Carolina, challenged the lawfulness of his detention by the U.S. military.¹³⁰ Five Justices, in two separate opinions, concluded that a congressional authorization to use force against the persons responsible for the September

¹²⁵ See *United States v. Pollard*, 416 F.3d 48, 57 (D.C. Cir. 2005) (citing separation of powers principles set forth in *Loving*), cert. denied, 126 S. Ct. 1590 (2006).

¹²⁶ See *United States v. Moussaoui*, 382 F.3d 453, 469 (4th Cir. 2004) (same), cert. denied, 544 U.S. 931 (2005).

¹²⁷ See *Padilla v. Rumsfeld*, 352 F.3d 695, 714 (2d Cir. 2003) (same), rev'd on other grounds, 542 U.S. 426 (2004).

¹²⁸ See *Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 C.F.R. 918 (2002).

¹²⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹³⁰ *Id.* at 510-11.

11, 2001 attacks empowered the President to capture and detain enemy combatants, even if they are American citizens.¹³¹ But a majority, composed of a different set of Justices, concluded that the Fifth Amendment's Due Process Clause required the military to give Hamdi a hearing at which he could contest whether he was in fact an enemy combatant (as opposed to a noncombatant, such as a traveler, tourist, or student whom the military had mistakenly captured).¹³²

In this instance, by requiring the military to give Hamdi a hearing, the Court departed from its usual practice of noninterference with the guardians of national security. Yet, the interference was minor for three reasons. First, a joint service regulation already required the armed forces to afford a hearing to detainees who challenged their status.¹³³ The decision thus did not require the military to take any action that it had not already committed itself to take.

Second, the hearing requirement did not pose a large burden on the military. The plurality said that Hamdi would bear the burden of proof at the hearing and that the government could present hearsay evidence to

¹³¹ See *id.* at 517 (opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy & Breyer, JJ.) (“[W]e conclude that the [Authorization for Use of Military Force] is explicit congressional authorization for the detention of individuals....”); see also *id.* at 589 (Thomas, J., dissenting) (“I agree with the plurality that the Federal Government has power to detain those that the Executive Branch determines to be enemy combatants.”).

¹³² See *id.* at 533 (opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy & Breyer, JJ.) (“We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.”); see also *id.* at 553 (Souter, J., concurring in part and dissenting in part) (“Although I think litigation of Hamdi's status as an enemy combatant is unnecessary, the terms of the plurality's remand will allow Hamdi to offer evidence that he is not an enemy combatant, and he should at the least have the benefit of that opportunity.”).

¹³³ See *id.* at 550 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.) (explaining that the government's position that it did not have to provide detainees with a hearing was “apparently at odds with the military regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Reg. 190-8, ch. 1, §§ 1-5, 1-6 (1997)”). The military inexplicably had not followed this regulation when taking prisoners in Afghanistan. See *id.* at 550-51.

justify his detention.¹³⁴ Following these principles, the United States subsequently held “Combatant Status Review” hearings for several hundred prisoners captured in Afghanistan, releasing only a handful of these prisoners.¹³⁵

*1137 Third, although the Court required the military to afford detainees a hearing, the plurality opinion in dicta expressed agreement with the military on two important procedural principles. First, even though the question was not before the Court, the opinion said that detention of an enemy combatant can last for the duration of the relevant hostilities.¹³⁶ Second, the Court asserted that the President can try enemy combatants by military commissions.¹³⁷ These pronouncements likely will lead to noninterference with the government in future cases.

The Hamdi case was important in lower court litigation prior to Chief Justice Rehnquist’s death. In *Hamdan v. Rumsfeld*,¹³⁸ the D.C. Circuit relied in part on Hamdi in rejecting a detainee’s challenge to trial by military commission.¹³⁹ Similarly, in *Padilla v. Hanft*,¹⁴⁰ the Fourth Circuit concluded that the United States could detain an American citizen, captured at O’Hare International Airport, as an enemy combatant.¹⁴¹ The govern-

¹³⁴ See *id.* at 533-34 (plurality opinion) (“Hearsay...may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.”).

¹³⁵ See Dep’t of Def., *Combatant Status Review Tribunal Summary 1*, <http://www.defenselink.mil/news/Mar2005/d20050301csrt.pdf> (last visited June 11, 2006) (reporting that only twenty-two nonenemy combatants were found in 558 reviews held from August 13, 2004 until March 1, 2005).

¹³⁶ See *Hamdi*, 542 U.S. at 521 (plurality opinion) (“[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict...” (quoting *Authorization for Use of Military Force*, Pub. L. No. 107-40, § 2(a), 115 Stat 224, 224 (2001))).

¹³⁷ See *id.* at 518 (“[T]he capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’” (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942))).

¹³⁸ *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev’d*, 126 S. Ct. 2749 (2006).

¹³⁹ *Id.* at 43.

¹⁴⁰ *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006).

¹⁴¹ *Id.* at 388, 397.

ment's initial victories in these cases showed that the lower courts interpreted Hamdi not to represent a major disruption of the government's handling of the national security issues raised by terrorism.

The other significant terrorism case, *Rasul v. Bush*,¹⁴² held that the federal courts had jurisdiction to entertain habeas corpus petitions filed by or on behalf of the detainees held by the military at the U.S. Naval Base in Guantánamo Bay, Cuba.¹⁴³ This decision was contrary to the government's position, and thus represents another rare example of the Rehnquist Court's interference with a guardian of national security. But the interference was minor in two respects. First, the Court rested its decision solely on statutory, not constitutional, grounds.¹⁴⁴ Congress, as a result, could and subsequently did pass legislation to remove federal habeas corpus jurisdiction over detainees at Guantanamo Bay.¹⁴⁵ Second, the Court limited its conclusion to the question *1138 of jurisdiction; it did not indicate whether the detainees had federal rights that the federal courts could vindicate.¹⁴⁶ At least one lower court subsequently held that detainees do not have these federal rights.¹⁴⁷ So as with the intelligence agencies, the FBI, and the Customs Service, the Rehnquist Court largely kept its hands off of the military in national security cases.

¹⁴² *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁴³ *Id.* at 484.

¹⁴⁴ See *id.* ("We therefore hold that [28 U.S.C.] § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.").

¹⁴⁵ See Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742 (2005) (codified at 28 U.S.C. § 2241(e)) (providing, subject to certain exceptions, that "no court, justice, or judge shall have jurisdiction to hear or consider--(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba"). This legislation is commonly called the "Graham-Levin Amendment" after its Senate sponsors. See, e.g., Editorial, *The President and the Courts*, N.Y. Times, Mar. 20, 2006, at A22 (referring to the "Graham-Levin Amendment").

¹⁴⁶ *Rasul*, 542 U.S. at 485.

¹⁴⁷ See *Khalid v. Bush*, 355 F. Supp. 2d 311, 321 (D.D.C. 2005) (holding that "non-resident aliens captured and detained pursuant to the [Authorization for Use of Military Force] and the President's Detention Order have no viable constitutional basis to seek a writ of habeas corpus"). But see *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 463 (D.D.C. 2005) (reaching the contrary conclusion that "detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment").

II. Assessment

Perhaps the simplest way to assess the Rehnquist Court's practice of not interfering with the guardians of national security is to consider separately its apparent benefits and its apparent costs. As the following discussion will show, on balance, the positive consequences appear to have outweighed the negative.

A. Benefits of the Practice of Noninterference

The Rehnquist Court's noninterference with the government in national security cases appears to have had two general benefits. First, it probably enhanced national security by allowing the government officials and institutions most competent in the subject of national security to decide how to make the nation safer from external threats. Second, it insulated the Supreme Court from the kinds of criticism and controversy that the Court has experienced in comparable areas--such as public safety--where the Court has exercised greater supervision of government actions.

1. Enhancing National Security

The United States faces many threats to its national security. It has poor relations with nations, like Iran and North Korea, that have or may soon have nuclear weapons.¹⁴⁸ It has large numbers of armed forces in dangerous locations around the world, such as Afghanistan and Iraq.¹⁴⁹ And as recent experience has shown, it faces the possibility of horrific terrorist attacks on its own soil.

Governmental decisions can improve or worsen national security. Put simply, some courses of action might make the country and its citizens safer, while others might make them less safe. Consider, for example, the United States' relations with North Korea. Should the United States provide conditional aid to the North Korean government to entice it to pursue less bellicose policies? Or should the United States withhold aid and threaten sanctions or military action unless North Korea gives up weapons development? The choice is not obvious (at least to a nonexpert), but it is clearly important. A bad decision may lead to a nuclear war that a good decision might avoid.

¹⁴⁸ See State Department Information Release, *supra* note 3.

¹⁴⁹ See Afghan Bomb Wounds 5 G.I.'s, *N.Y. Times*, Apr. 2, 2006, § 1, at 8 (reporting that the United States has 18,000 troops in Afghanistan); Edward Wong, U.S. Forces in Big Assault Near Samarra, *N.Y. Times*, Mar. 17, 2006, at A12 (reporting that the United States has 133,000 troops in Iraq).

The Constitution and legislation divide responsibility for making decisions about national security among different governmental units, including Congress, the President, and various federal agencies. These governmental units adopt and implement numerous policies designed to make the country safer. They decide what foreign policies to pursue, how best to protect classified information, what intelligence gathering efforts to use, and so forth.

A basic question then arises about whether judicial oversight of these guardians of national security would improve or impair national security--that is, whether the substantive involvement of judges would make the country more or less safe from external threats. In most cases, it stands to reason,¹⁵⁰ the governmental units responsible for making national security decisions will do a better job than the courts could expect to do. In general, agencies that specialize in protecting national security, such as the CIA and DOD, will have greater expertise in the area than the Supreme Court. These agencies also will have more information. And they will have a greater incentive not to make mistakes because, lacking life tenure, the leaders of these agencies can be held accountable for their decisions.

In this way, by generally not interfering with the guardians of national security, the Rehnquist Court probably contributed to the safety of the nation. The extent of the benefit is undoubtedly impossible to measure. But it is difficult to think of a possible reason that the nation might be less secure because of the Court's practice of noninterference. Whether improving national security has come with other costs--such as enabling governmental abuses of individual rights--is a separate question considered below.

2. Preserving the Reputation of the Supreme Court

National security policy is a very controversial subject. Many people agree with decisions that the United States has made in the area, while others believe that the government has made serious wrong turns. But one thing remarkably absent from public debate is placement of significant blame on the Rehnquist Court for perceived shortcomings in national security policy.

The reason that the Rehnquist Court avoided criticism of this kind should be no mystery: as Part I of this Essay showed, the Rehnquist Court almost always deferred to the political branches on matters of national

¹⁵⁰ No known empirical evidence answers this question. And the stakes are surely too high to conduct an experiment.

security. As a result, the political branches have received all of the credit for the successes of their programs and policies, and all of the blame for their shortcomings. The Rehnquist Court did not have any substantive national security policies of its own, and therefore it attracted no substantive criticism.

***1140** By way of comparison, consider public safety issues such as police investigative practices, criminal procedures, prisoners' rights, death penalty restrictions, and so forth. Just as with national security, many disagreements have arisen about the wisdom of the current substantive approaches to these subjects. But the criticism does not fall exclusively on the political branches. On the contrary, in the area of public safety, a great deal of criticism falls on the Supreme Court.¹⁵¹

Again, the reason is evident: the Supreme Court has faced more criticism with respect to public safety issues because of its extensive substantive participation in the area. The Warren Court famously began reworking criminal laws and procedures from start to finish. Although the Burger and Rehnquist Courts differed considerably from the Warren Court, they continued to interfere with governmental law enforcement policies. As a result, the Supreme Court could never avoid controversy and blame.

The Rehnquist Court, in all likelihood, would have found itself embroiled in similar controversy if it had not taken its hands-off approach to national security. By deferring to the guardians of national security, the Court avoided this potential storm. Thus, the Court's practice of non-interference in matters of national security both improved the safety of the nation and benefited the Court as an institution.

B. Costs of the Practice of Noninterference

A question separate from the benefits of the Rehnquist Court's noninterference with the guardians of national security is whether the Court's approach came at a price. As a theoretical matter, the executive and legislative branches, if unchecked by the judicial branch, could abuse individual rights or commit other misdeeds in the name of national security. But this possible negative consequence does not appear to have occurred to any significant extent during the nineteen-year period of the Rehnquist Court.

¹⁵¹ See, e.g., Harold J. Rothwax, *Guilty: The Collapse of Criminal Justice* (1996) (setting forth a now classic condemnation of judicially led developments in the criminal justice system).

1. Abdication of the Court's Duty to Protect Individual Rights

We know from history that promoting national security may come at the expense of individual rights. In his book, *All the Laws but One*, Chief Justice Rehnquist describes government excesses during the Civil War, World War I, and World War II.¹⁵² During these prior conflicts, the federal government locked up thousands of citizens, sometimes without criminal charges, a trial, or even a characterization as the enemy.¹⁵³

This unfortunate history, however, cannot justify condemnation of the Rehnquist Court's practice of noninterference in national security cases for two reasons. First, an era of the Supreme Court should be judged by the decisions that the Court actually made during the era, not by decisions that it might have made. In this regard, the Rehnquist Court existed at a fortunate *1141 time in our history. From 1986 to 2005, the Supreme Court's docket did not include cases involving extreme national security policies of the kind Chief Justice Rehnquist described in his book. Because the Rehnquist Court was not asked to review governmental policies of this kind, its practice of noninterference did not have major negative impacts on individual rights. In other words, even if a possible consequence of a policy of noninterference might be an abdication of the Court's duty to protect individual rights, this possible consequence did not occur.¹⁵⁴

Second, predictions about what the Rehnquist Court might have done if extreme cases had come before it cannot rest solely on what the Court did in the more moderate cases that it actually considered. Even if the Rehnquist Court had taken a more active role in supervising the government in the national security cases described above, we cannot know for certain what the Rehnquist Court would have done if a national crisis had prompted the government to act as it did during past wars. Indeed, in his book, Chief Justice Rehnquist hypothesized that political leaders and courts

¹⁵² See Rehnquist, *supra* note 8, at 40-58, 170-83, 184-202.

¹⁵³ See *id.*

¹⁵⁴ Looking just at the Supreme Court's docket does not provide a complete picture of what is happening in the country. A policy of noninterference by the Supreme Court theoretically might encourage misbehavior that does not reach the courts. For example, once the CIA knows that the courts will not overturn its personnel actions, it may treat its officials and employees less fairly. But evidence is lacking for the proposition that more misbehavior actually occurred during the Rehnquist Court era or that the Court's policy of noninterference created any of these negative repercussions.

realistically cannot be expected to stand in the way of actions legitimately taken to protect national security in times of emergency.¹⁵⁵

2. Enabling Post Hoc Rationalizations

Another potential problem with deferring in all cases involving national security is that it creates a great temptation for the government to use national security as a justification for all of its actions. If the government knows that the Court defers when it cites national security, the government may be tempted to cite national security in cases that do not actually concern it. Just as patriotism is the last refuge of every scoundrel, national security is an argument that the government will pull out in litigation when all else has failed.

In his book, Chief Justice Rehnquist expressed hope that courts can at least distinguish actual cases of national security from others.¹⁵⁶ Fortunately, the Rehnquist Court was usually able to distinguish real national security matters from those somewhat further afield. Two cases illustrate this point. In *Clinton v. Jones*,¹⁵⁷ the President argued that the federal courts should not hear a sexual harassment claim against him based in part on national security *1142 concerns.¹⁵⁸ In *Boos v. Barry*,¹⁵⁹ the mayor of Washington, D.C., sought to justify a ban on protests in front of foreign embassies in Washington on grounds of national security.¹⁶⁰ In both cases, the Rehnquist Court saw through the government's national security arguments, perceiving possible inconvenience to the country but no actual danger.

But at least one questionable national security argument may have slipped through. In upholding race-based affirmative action in admissions at the University of Michigan Law School, the Court in *Grutter v. Bollinger*

¹⁵⁵ See Rehnquist, *supra* note 8, at 224 (“There is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt, or that future Justices of the Supreme Court will decide questions differently from their predecessors.”).

¹⁵⁶ See *id.* at 225 (“[I]t is both desirable and likely that more careful attention will be paid by the courts to the basis for the government’s claims of necessity as a basis for curtailing civil liberty.”).

¹⁵⁷ *Clinton v. Jones*, 520 U.S. 681 (1997).

¹⁵⁸ *Id.* at 708.

¹⁵⁹ *Boos v. Barry*, 485 U.S. 312 (1988).

¹⁶⁰ *Id.* at 323-24.

¹⁶¹ cited national security as one ground for its decision.¹⁶² Reliance on national security to justify preferences at an elite law school seems a little far-fetched. But probably the Court would have reached the same conclusion even if it had omitted all assertions about national security; the Court cited national security as merely one of a number of other reasons for believing that the government could have an interest in promoting racial diversity in university admissions.¹⁶³ Therefore, even if the Court erred in this respect, the error had no consequences.

III. Concluding Thoughts on the Legacy of the Rehnquist Court

The Symposium in which this Essay appears concerns the legacy of the Rehnquist Court. A legacy is something transmitted by a predecessor.¹⁶⁴ So what did the Rehnquist Court bequeath to the Roberts Court? The Rehnquist Court did not create general doctrines of deference that the Roberts Court must follow. On the contrary, as the description of the cases above shows, the Rehnquist Court simply found one way or another to avoid interfering with the guardians of national security in the various cases it faced.

But this Essay suggests that the Rehnquist Court did give the Roberts Court something important. It passed on evidence, in the form of experience, that noninterference in national security matters can serve the Court well as an institutional matter. So long as the government does not act abusively, allowing the political branches to decide how to respond to national security threats provides better protection for the nation and avoids embroiling the Court in controversy.

What the Rehnquist Court could not ensure is that the Roberts Court will share its good fortune of not facing extreme excesses by the government. The Roberts Court may or may not be so lucky. Perhaps greater emergencies will face the United States and the government will take far more controversial measures in response. Just as we do not know what the

¹⁶¹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁶² See *id.* at 331 (“[H]igh-ranking retired officers and civilian leaders of the United States military assert that...a highly qualified, racially diverse officer corps...is essential to...national security.” (quotation omitted)).

¹⁶³ See *id.* at 330-33.

¹⁶⁴ See Webster’s Third New International Dictionary 1290 (4th ed. 1976) (defining a “legacy” as “something received (as from an ancestor or predecessor) resembling or suggestive of a gift by will”).

Rehnquist *1143 Court might have done in such circumstances, only time will tell with the Roberts Court.¹⁶⁵

¹⁶⁵ In the first significant national security case to come before it, the Roberts Court did not follow the Rehnquist Court's general practice of noninterference. It enjoined the military's use of certain tribunals (called "military commissions") to try suspected terrorists as unauthorized by statute or the laws of war. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).