"The Supreme Court at the Bar of Politics": The Afghan Detainee and Omar Khadr Cases

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1. INTRODUCTION

The Supreme Court has recently engaged with two contentious issues in Canada's foreign and security policy: the treatment of detainees captured by Canadian Forces in Afghanistan and of Omar Khadr, a Canadian citizen held by the United States at Guantanamo Bay. In May 2009, three judges of the Supreme Court refused to grant leave to consider an appeal from a unanimous decision of the Federal Court of Appeal that the Canadian *Charter* of Rights and Freedoms did not apply even if Canadian officials transferred Afghan detainees to face a substantial risk of torture.[1] After granting leave and hearing an appeal on an expedited basis, the Court held that Canada had violated Omar Khadr's rights when it interrogated him at Guantanamo, but that the Federal Court had erred by interfering with prerogative powers over foreign policy by ordering Canada to request Khadr's repatriation.[2]

The two Supreme Court cases both involve attempts to apply the *Charter* to the actions of Canadian officials outside of Canada and both have a common security and foreign policy context. Nevertheless, there are some important differences. The Afghan detainee case only involved a decision by the Supreme Court not to grant leave to hear the appeal: a decision not to decide. The Court routinely decides not to hear appeals and does not give reasons for such decisions.[3] The Khadr case in contrast resulted in the Court's second full decision on the matter in two years.[4]

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1 *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, 2008 CarswellNat 5727, 2008 CarswellNat 597 (F.C.); affirmed 2008 FCA 401, 2008 CarswellNat 5272, 2008 CarswellNat 4625 (F.C.A.); leave to appeal refused 2009 CarswellNat 1345, 2009 CarswellNat 1346 (S.C.C.). I disclose that I am a board member of the co-applicant in this case, the British Columbia Civil Liberties Association, but did not participate in the decision to litigate or the litigation.

2 *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44 (S.C.C.) (henceforth *Khadr II)*.

3 In 2008, the Court denied leave in 400 cases and granted leave in 42 cases. See SCC Special Bulletin at http://www.scc-csc.gc.ca/stat/html/cat2-eng.asp.

4 *Khadr v. Canada (Minister of Justice)*, 2008 CarswellNat 1400, 2008 CarswellNat 1401, [2008] 2 S.C.R. 125 (S.C.C.) (holding that *Charter* should be applied to Canadian participation in a breach of international law rights and ordering that material gained by Canadian officials from an interrogation at Guantanamo be disclosed to Khadr as a remedy subject to judicial determination of national security confidentiality).

The Court in *Khadr* both affirmed that Omar Khadr's rights under international law and the Canadian *Charter* were violated by his interrogations at Guantanamo by Canadian officials and its responsibility to evaluate the state's exercise of prerogative foreign policy powers against the *Charter* and Canada's international law obligations. At the same time, however, the Court concluded that "the prudent course at this point"[5] was simply to make a declaration of the past violation. It reversed the trial judge's remedy that Canada be required to request Khadr's repatriation as one that gave too little weight to the government's responsibilities and powers over foreign affairs. Canada responded to the Court's declaration of an ongoing violation by issuing a diplomatic note requesting the United States not to use information obtained by Canada,[6] but such information has been used in Khadr's military commission proceedings.[7] The Federal Court has recently held that the government breached a duty of fairness towards Khadr by not informing him about the diplomatic note and providing him with an opportunity to make written submissions about the adequacy of the proposed remedy. The Federal Court also made clear, contrary, in my view, to at least some dicta from the Supreme Court in *Khadr II*, that it could order Canada to request Khadr's repatriation if that was the only effective remedy notwithstanding that such an order does affect the government's prerogative powers.[8] The Federal government has obtained a stay of this ruling pending appeal with Chief Justice Blais of the Federal Court of Appeal expressing doubts that courts can order or supervise diplomatic representations in light of the Supreme Court's decision in *Khadr v. Canada (Prime Minister)*.[9]

The two Supreme Court cases can be linked by considering Alexander Bickel's theory of judicial review and in particular his study of the Supreme Court

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5 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44, ¶47 (S.C.C.).

6 Statement by the Justice Minister, Feb 16, 2010 at http://www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc_32482.html. The Justice Minister stressed that that "the Supreme Court recognized the constitutional responsibility of the executive to make decisions on matters of foreign affairs, given the complex and ever-changing circumstances of diplomacy, and the need to take into account Canada's broader interests. The Supreme Court did not require the Government to ask for accused terrorist Omar Khadr's return."

7 *Khadr v. Canada (Prime Minister)*, 2010 FC 715, 2010 CarswellNat 1968, 2010 CarswellNat 1969, ¶85–89 (F.C.).

8 *Khadr v. Canada (Prime Minister)*, 2010 FC 715, 2010 CarswellNat 1968, 2010 CarswellNat 1969 (F.C.). The federal government has appealed this ruling stressing those parts of the Supreme Court's decision in *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44 (S.C.C.) which suggest that it would not be appropriate for the courts to dictate what diplomatic steps should be taken to remedy the breach of Mr. Khadr's rights. See Statement of Justice Minister Nicholson 12 July 2010 available at http://www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc_32529.html.

9 *Khadr v. Canada (Prime Minister)*, 2010 CarswellNat 3554, 2010 CarswellNat 2482, Blais C.J (F.C.A.).

"at the bar of politics".[10] Bickel was the first constitutional theorist to consider how a Supreme Court should make decisions not to decide, something that he coined as "the passive virtues". He argued that the Court should exercise prudence and not decide issues that were not ripe; were likely to become moot or that were better decided by the elected branches of government. Bickel also defended the use of prudence when devising constitutional remedies most particularly the United States Supreme Court's controversial "all deliberate speed" approach to school desegregation.

In this paper, I will examine whether the Court's decision not to hear the Afghan detainee case and its decision to grant a limited declaratory remedy in the Khadr case can be defended on Bickelian grounds as an exercise of self-preserving prudence in the face of concerns about the limits of the Court's role. I will suggest that both decisions are questionable even if one accepts Bickel's theory of judicial review. Bickel justified the passive virtues of not deciding in order to allow issues of principle to ripen. In the Afghan detainee case, however, the Court was squarely confronted with an issue of principle but chose to avoid it. It is doubtful that the issues in the Afghan detainee case will be further refined and crystallized in the political process given the secrecy that surrounds the detentions and the limits of Parliamentary and other forms of review. It is also not likely that such issues will be raised in other litigation. Put simply, the issue of principle with respect to the unacceptability of possible Canadian complicity in torture in Afghanistan may never be squarely confronted in the wake of the Court's decision not to decide.

I will also argue that the Court's remedial decision in *Khadr* is even more objectionable on "Bickelian" grounds because the Court seemed to suggest that courts lack the power to formulate a remedy in the foreign policy context. Bickel defended remedial prudence and incrementalism in politically charged cases, but not remedial abdication to the political branches. The Federal Court's more robust remedial approach of retaining jurisdiction over the case and making it clear that it could, if no other effective remedy emerges, order the government to request Khadr's repatriation, however, is more consistent with Bickelian insights about the importance of remedies. It is also more consistent with the Supreme Court's rejection of a political questions doctrine in *Operation Dismantle Inc. v. R.*[11] that would make the exercise of prerogative review immune from *Charter* adjudication.

2. BICKEL'S THEORY OF JUDICIAL REVIEW, PRUDENCE, PASSIVE VIRTUES AND REMEDIAL DEFERENCE

Alexander Bickel is a particularly important constitutional theorist for understanding how courts respond to politically sensitive cases. Bickel advocated the passive virtues and various means to avoid constitutional decisions as a means to promote what he called a "colloquy"[12] and what Canadians would call a "dia-

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10 The title is taken from the title of Alexander Bickel's major work: *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2nd ed. (New Haven: Yale University Press, 1986).

11 1985 CarswellNat 151, 1985 CarswellNat 664, [1985] 1 S.C.R. 441 (S.C.C.).

12 Alexander Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2nd ed. (New Haven: Yale University Press, 1986) at 70.

logue"[13] between the courts and the elected branches of government. The *Charter* has been called "Bickellian" in its promotion of a back and forth between courts and governments under ss.1 and 33.[14] Although the Court did not cite Bickel in the Khadr case, it is difficult to believe that its reference in *Khadr* that only issuing a declaration as a remedy was "the prudent course at this point"[15] was not made without a nod to Bickel.

Bickel did not call on courts to bargain with governments and he was quite sensitive to the fact that the court as an appointed institution in a democracy did not have the power or legitimacy to engage in such bargaining. Rather in his view "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess."[16] The fact that courts act on principle and through fully reasoned decisions for Bickel meant that courts had to be particularly careful both in deciding whether to make constitutional decisions and then in crafting and justifying such decisions.

(a) Bickel and Decisions Not to Decide

Bickel defended the passive virtues as a means for the Supreme Court to avoid deciding cases through devices such as standing, ripeness, the political questions doctrine and the denial of leave to appeal.[17] He stressed that such "passive devices . . . do not produce constitutional decisions. They do not check or legitimate on principle."[18] Bickel distinguished between the obligation of courts of general jurisdiction to decide cases and the "exceptional and limited" interventions of a final Court.[19] As such, no one had a right to a Supreme Court judgment in the same way that they have a right to a day in court.

One of the benefits of using the passive virtues was that the Court effectively remanded the issue back to the legislature and executive for further refinement. As Bickel described it, the Court would engage "in a Socratic colloquy with other institutions of government and with society as a whole concerning the necessity for this or that measure, for this or that compromise. All the while, the issue of principle remains in abeyance and ripens . . . These are the techniques that allow leeway to expediency without abandoning principle."[20] Implicit in such statements, however, is the assumption that issues of principle would eventually ripen and be decided and that the courts could segregate their unprincipled decisions from their principled ones.

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13 There is a large literature on dialogue between courts and legislatures. See for example "Symposium" (2007) 45 Osgoode Hall L.J. at 1ff.

14 Guido Calabresi "Foreward: Anti-Discrimination and Constitutional Accountability" (1991) 105 Harv. L.Rev. 80.

15 *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44, ¶47 (S.C.C.).

16 Bickel, *The Least Dangerous Branch*, *supra*, note 12 at 25.

17 See also Alexander Bickel "Foreword: The Passive Virtues" (1961) 75 Harv.L.Rev. 40.

18 Bickel, *The Least Dangerous Branch*, *supra*, note 12 at 205.

19 *Ibid.* at 173.

20 *Ibid.* at 70-71.

Bickel did not believe that the court should engage in untrammeled discretion or expediency when deciding not to decide. He was not a legal positivist who believed in unfettered discretion even when courts made otherwise unreviewable decisions not to grant leave to decide a case. Bickel wrote that "the antithesis of principle" for courts was "not whim or even expediency, but prudence."[21] In this sense, Bickel was the first constitutional theorist to make prudence a central but by no means exclusive pillar of judicial review.[22]

The passive virtues for Bickel were not a matter of unfettered discretion for which there could never be a right or wrong answer. Rather, they were "relative virtues . . . It cannot always be true in practice that the effect of a passive device, though not radiating from principle, is necessarily narrower, less pervasive, than the consequences of some constitutional adjudications."[23] A refusal to hear a case could in some cases have drastic consequences and effectively amount to an abandonment of principle. This insight is important to remember with respect to the Supreme Court's decision not to hear an appeal from the Federal Court's decision that the *Charter* would not apply even if the Afghan detainees were being transferred to face a substantial risk of torture.

(b) Bickel and Remedial Discretion

Bickel's theory of judicial review featured both principle and prudence. He defended the decision in *Brown v. Topeka Board of Education*[24] (referred to hereafter as *Brown I*) to declare that racially segregated schools violated the constitution as a principled decision, but also the Court's decision a year later in *Brown v. Topeka Board of Education*[25] (referred to hereafter as *Brown II*) to delegate the task of providing remedies to the lower courts to act with "all deliberate speed." Bickel stated that the remedial traditions of equity allow some "discretionary accommodation between principle and expediency."[26] In the unique context of the *Brown* decision challenging segregation, Bickel warned about "the resistance, not of a fringe of misfits, but of a populace. In such circumstance, it may not be prudent to force immediate compliance."[27]

Bickel did not, however, believe that public or governmental hostility meant that the judiciary should abdicate its remedial role. Remedial deference as represented by *Brown* II did not mean that courts themselves should find "expedient compromises for a difficult situation. It means only that the Court, having announced its principle, and having required a measure of initial compliance, resumed its posture of passive receptiveness to the complaints of litigants". Bickel stressed that the courts maintained a duty to supervise the proposed compromises and

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21 *Ibid.* at 133.

22 Anthony Kronman "Alexander Bickel's Philosophy of Prudence" (1985) 94 Yale L.J. 1567.

23 Bickel *The Least Dangerous Branch supra* note 12 at 207.

24 (1954), 347 U.S. 483 (U.S. Kan.).

25 (1955), 349 U.S. 294 (U.S. S.C.).

26 Bickel, *The Least Dangerous Branch*, *supra* note 12 at 253–255.

27 *Ibid.* at 251.

should reject a "suggested expedient" if it "amounted to an abandonment of principle".[28] He thus approved of the 1958 decision in *Cooper v. Aaron*[29] to order that school desegregation proceed in the face of fierce state and societal resistance in Little Rock, Arkansas. Of particular relevance with respect to *Khadr*, Bickel argued that the Court would not have been justified simply in declaring the principle in *Brown I* and not struggling with remedies in *Brown II*. In Bickel's evocative phrase, the Supreme Court "is not a synod of bishops, nor a collective poet laureate" but "a court of law, which wields the power of government in disposing of certain controversies."[30] Remedies for Bickel might have to be tempered by prudence and even expediency, but they remained a vital judicial function.

3. THE AFGHAN DETAINEE CASE

(a) Initial Challenges to the Litigation: Standing, Political Questions and Mootness

The Afghan detainee case faced some preliminary challenges associated with what Bickel identified as the passive virtues that allowed courts to avoid sensitive issues. In some respects, the case would have been an ideal case under Bickel's theory to exercise the passive virtues and decline to hear the case. The American political questions,[31] state secrets[32] and restrictive standing and case and controversy[33] doctrines all might have potentially precluded the litigation. In Canada, however, the courts have rejected the idea that certain political questions are not justiciable under the *Charter*[34] and they allow public interest standing where no directly affected person can bring the litigation.[35] Although Bickel might have supported the use of such doctrines to preclude the Afghan detainee litigation, he also would have been sensitive to the need for the courts to discharge their distinct role in a credible and legitimate manner once they had decided to engage on the merits.

The case was not brought by any particular detainee but by Amnesty International and the British Columbia Civil Liberties Association. Both groups were granted public interest standing on the basis that they raised serious constitutional issues and there was no other reasonable and practical way that these issues could be litigated. The Federal Court rejected the government's argument that the individual detainees in Afghanistan were capable of bringing actions noting "I cannot

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28 *Ibid.* at 254.

29 358 U.S. 1 (U.S. Ark. 1958).

30 Bickel, *The Least Dangerous Branch*, *supra* note 12 at 246-247.

31 See for example *Nixon v. U.S.*, 506 U.S. 224 (U.S. Dist. Col. 1993) (impeachment a political question); *Goldwater v. Carter*, 444 U.S. 996 (U.S. 1979) (Presidential authority to terminate treaties a political question).

32 See for example *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008).

33 See for example *City of Los Angeles v. Lyons*, 461 U.S. 95 (U.S. 1983).

34 *Operation Dismantle Inc. v. R.*, 1985 CarswellNat 151, 1985 CarswellNat 664, [1985] 1 S.C.R. 441 (S.C.C.).

35 *Canadian Council of Churches v. R.*, 1992 CarswellNat 650, 1992 CarswellNat 25, *(*sub nom. *Canadian Council of Churches v. Canada (Minister of Employment & Immigration))* [1992] 1 S.C.R. 236 (S.C.C.).

agree that individuals who have been handed over to the custody of the Afghan government have any meaningful or realistic ability to mount a challenge in this country with respect to the conduct of the Canadian Forces in Afghanistan."[36] Nevertheless, both groups would have likely been denied standing under more restrictive American standing and case and controversy requirements.

The government originally opposed the litigation by arguing that it "involves the exercise of prerogative powers and matters of 'high policy' that are generally not justiciable."[37] This argument is striking because the Supreme Court rejected an American style political questions doctrine in *Operation Dismantle Inc. v. R.*[38] on the basis that the *Charter* should apply to all Cabinet decisions including those that involved foreign policy prerogative powers, such as the decision to allow the United States to test cruise missiles on Canadian soil. Chief Justice Dickson explicitly declined to follow the Federal Court of Appeal's decision that the matter was not justiciable. He concluded: "I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts."[39] Justice Wilson surveyed the American political questions doctrine including Bickel's theory of the passive virtues which she stated was based on "the rather vague concept of judicial 'prudence' whereby the courts enter into a calculation concerning the political wisdom of intervention in sensitive areas."[40] She concluded that there was "no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative."[41] She stressed that the role of the Court was not to second guess government policy, but to determine whether it violated the *Charter* and to provide appropriate and just remedies for such violations. Justice Wilson distinguished between legalized decisions such as war time conscription and discriminatory or illegal decisions, such as decisions to force particular groups to test nerve gas or "press gang" tactics that forced people to serve and exposed them to danger without enabling legislation.[42] This suggests that the courts should intervene when state officials exercise prerogative powers in a manner that defies the rule of law and violates fundamental rights like the

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36 *Amnesty International Canada v. Canada (Minister of National Defence)*, 2007 FC 1147, 2007 CarswellNat 3688, ¶47 (F.C.).

37 *Ibid.* at para. 121.

38 1985 CarswellNat 151, 1985 CarswellNat 664, [1985] 1 S.C.R. 441 (S.C.C.).

39 *Ibid.* at para. 38.

40 *Ibid.* at para. 57. She concluded: "Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the Court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review. It is not, however, called into operation here since the facts alleged in the statement of claim, even if they could be shown to be true, could not in my opinion constitute a violation of s. 7." *Ibid.* at para. 104.

41 *Ibid.* at para. 50.

42 *Ibid.* at para. 66.

right not to be tortured.[43]

Although the Supreme Court rejected a political question doctrine that rendered the exercise of prerogative or foreign policy powers non-justiciable, it concluded in *Operation Dismantle* that it was inappropriate to enter a declaration or an injunction against cruise missile testing because of the impossibility of proving that the testing of cruise missiles would violate anyone's *Charter* rights. The Court did not cite the foreign policy or prerogative context of the case as a reason for holding that the remedy requested by the applicants could not be granted. As will be seen, the type of factual uncertainty encountered in *Operation Dismantle* was not a factor in the Afghan detainee case because of an agreement by the parties to put some preliminary questions before the Court. As will be seen, these questions assumed that there was a substantial risk of torture when Canadian officials transferred detainees to Afghan authorities.

In recognition of *Operation Dismantle*, the government conceded that the *Charter* applied. Mactavish J. rejected the remaining political question arguments by concluding that "whether or not this case involves a matter of high policy, I do not understand the scope of the applicants' case to extend beyond their *Charter* claims. As a consequence, the matter is not bereft of any chance of success on the basis of non-justiciability."[44] The courts have remained true to the rejection of the political questions doctrine in *Operation Dismantle*. Nevertheless, the final decision by the Supreme Court not to hear this case, as well as its decision in *Khadr* II that it should not order the Cabinet to request Khadr's repatriation, raises the question of whether a partial and defacto political question doctrine is creeping into discretionary decisions not to hear appeals and to the exercise of remedial discretion.

The government also attempted to have the case declared moot both in the wake of a new agreement it signed with the Afghans in 2007 that allowed Canada to conduct inspections of the conditions of detainees that Canada has transferred to the Afghan government and a 2008 decision temporarily to halt transfers because of concerns about mistreatment.[45] Mactavish J. rejected the former attempt to have the case declared moot concluding that the government had not satisfied the "onus of establishing that the issues raised by the applicants' application for judicial review are purely hypothetical or abstract. Nor have the respondents established that there is no longer a live controversy between the parties, such that the application

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43 See Kent Roach "National Security and the *Charter*" in James Kelly and Christopher Manfredi, eds. *Contested Constitutionalism* (Vancouver: University of British Columbia, 2009) at 147ff.

44 *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 162, 2008 CarswellNat 217, 2008 CarswellNat 1922, ¶125 (F.C.).

45 Transfers were, however, resumed by the end of February, 2008. *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, 2008 CarswellNat 5727, 2008 CarswellNat 597 (F.C.); affirmed 2008 CarswellNat 5272, 2008 CarswellNat 4625 (F.C.A.); leave to appeal refused 2009 CarswellNat 1345, 2009 CarswellNat 1346, ¶81 (S.C.C.) and all parties agreed that the issue was not moot *Ibid.* para. 95.

for judicial review is therefore bereft of any chance of success."[46] This decision appropriately recognized the recurring nature of the controversy over the treatment of the Afghan detainees. It also expressed a concern about their treatment even if the particular individual detainees could not be identified. As will be seen, the Federal Court of Appeal's decision on the merits displayed much less concern about the detainees and essentially dismissed them as foreigners with no connection to Canada.

The government's temporary suspension of transfers was decisive when Mactavish J. rejected a request for an interlocutory injunction prohibiting all further transfers on the basis that the applicants could no longer establish a risk of irreparable harm. She concluded that "Given the uncertainty as to whether transfers will resume during this period, as well as the lack of information with respect to the terms and conditions that may surround future detainee transfers, the applicants have not met this burden."[47] The judge also refused the applicants' request that the government give them 7 day notice of the resumption of detainee transfers, citing concerns about the disclosure of operations and the government's indication that they might claim national security confidentiality under s. 38 of the *Canada Evidence Act*.[48] This latter decision indicates how claims of secrecy may frustrate the review of governmental action, both in and outside of courts.

(b) The Questions to be Decided in the Afghan Detainee Case

After considerable case management, the parties agreed to put two questions to the Court for preliminary resolution. The first question was whether the *Charter* applied to the detention and transfer of non-Canadians by Canadian Forces in Afghanistan and the second was whether the *Charter* would nevertheless apply if the transfer would expose the detainees to a substantial risk of torture. These questions favoured the applicants because they avoided the need to prove that there was a substantial risk of torture as a matter of fact. The question posed also engaged the standard already established in *Suresh v. Canada (Minister of Citizenship & Immigration)*[49] that Canadian participation in foreign activities that presented a substantial risk of torture would trigger Canada's *Charter* and international obligations not to be complicit with torture. The questions posed thus raised important issues of principle.

(c) The Changing Legal Environment: Hape and Khadr I

In order to understand the Afghan detainee case and to evaluate the Supreme Court's decision not to grant leave and hear the appeal in the case, it is important to appreciate the changing, contested and uncertain legal environment surrounding the extra-territorial application of the *Charter*.

Before the Court's 2007 decision in *R. v. Hape*, the leading case on the extra-

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46 *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 162, 2008 CarswellNat 217, 2008 CarswellNat 1922, ¶136 (F.C.).

47 *Ibid.* at para. 124.

48 *Ibid.* at paras. 126-127

49 2002 CarswellNat 7, 2002 CarswellNat 8, [2002] 1 S.C.R. 3 (S.C.C.).

territorial application of the *Charter* was *R. v. Cook*.[50] In that case, the Court held that the *Charter* applied to the conduct of two Canadian police officers who interviewed a murder suspect in the United States without complying with the right to counsel in s. 10(b) of the *Charter*. The Court stressed that the police officers were subject to s. 32(1) of the *Charter* as part of the Canadian government. Moreover, the Court stressed that the application of the *Charter* in the circumstances would not interfere with the sovereignty of the foreign state. On such reasoning, it is arguable that the *Charter* applied to Canada's initial hand-off of Afghan detainees to the United States.[51] The military was subject to s. 32(1) and the application of the *Charter* especially in the immediate aftermath of the invasion of Afghanistan would not interfere with Afghan sovereignty.

In *R. v. Hape*,[52] a divided Supreme Court appeared to overrule *Cook* and considerably narrowed the extra-territorial application of the *Charter*. Justice LeBel wrote the majority judgment for four other justices. He seemed to articulate a general rule that the *Charter* would not apply beyond Canada's shores without the consent of the foreign country. The rationale for this rule was international law concerns about the equal sovereignty of all nations. The Court did, however, appear to recognize some exceptions to this general rule, though the scope of such exceptions were not clear. The clearest exception was that Canadian courts could exclude evidence obtained abroad if it was obtained in violation of "certain basic standards . . . adhered to in all free and democratic societies."[53] This exception was not in play in the Afghan detainee case because there was no question of a subsequent trial of detainees in Canada.

Any remaining exception to the rule in *Hape* against extra-territorial application of the *Charter* was particularly unclear. In a critical but very ambiguous passage, LeBel J. seemed to contemplate an exception for conduct in breach of international obligations and human rights when he stated that:

> there is an argument that comity cannot be invoked to allow Canadian authorities to participate in activities that violate Canada's international obligations. As a general rule, Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state. The permissive rule that allows Canadian officers to participate even when there is no obligation to do so derives from the principle of comity; the rule that foreign law governs derives from the principles of sovereign equality and non-intervention. But the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights.[54]

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50 1998 CarswellBC 2001, 1998 CarswellBC 2002, [1998] 2 S.C.R. 597 (S.C.C.).

51 Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill Queens, 2003) at 159–161.

52 2007 CarswellOnt 3563, 2007 CarswellOnt 3564, [2007] 2 S.C.R. 292 (S.C.C.).

53 *Ibid.* at para. 111.

54 *Ibid.* at para. 101. The idea that the *Charter* might apply to prevent certain activities is also found in the statement that "The only reasonable approach is to apply the law of the state in which the activities occur, subject to the *Charter*'s fair trial safeguards and to the limits on comity that may prevent Canadian officers from

This passage taken on its own supports the applicants in the Afghan detainee case because involvement in a transfer decision that produced a substantial risk of torture would clearly violate international human rights obligations. That said, Justice LeBel concluded the paragraph cited above with the statement that "in such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating. I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada."[55] This statement may have limited any international human rights exception to cases where a remedy was sought to prevent an unfair trial in Canada.[56] There was, of course, no prospect of a Canadian trial in the Afghan detainee cases. At the same time, Justice LeBel might have referred to cases such as those in which an injunction was obtained in Canada to prohibit Canadian officials from participating in an international human rights violation abroad.[57]

The judges in *Hape* were aware that the new restrictions articulated in *Hape* could affect the ongoing Afghan detainee case. Justice Binnie dissented from the majority's implicit overruling of *Cook* and its creation of a sweeping new rule against the extra-territorial application of the *Charter*. He stated:

> Recently, claims have been launched in Canadian courts by human rights activists (including Amnesty International Canada and British Columbia Civil Liberties Association) against the federal government asking the courts to extend *Charter* protections (as well as international human rights and humanitarian law) to individuals detained by the Canadian Forces operating in Afghanistan. It is not known to what extent Canadian citizens were among the detainees in question, although there is some evidence that there are Canadians among the Taliban. The allegation against the Minister of National Defence and the Attorney General of Canada (both civilian authorities) is that detainees were given into the custody of the security personnel of the government of Afghanistan without adequate safeguards (see Federal Court File Number T-324-07). We have no idea if there is any merit in any of these claims, but at some point we are likely to be called upon to address them. . . . Traditionally, common law courts have declined to make far-reaching pronouncements before being required by the facts before them to do so, heeding the cautionary words of the poet:
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> > There are more things in heaven and earth, Horatio, Than are dreamt of in your philosophy.
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> > (*Hamlet*, Act I, Scene v, 11. 166-67)

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participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights." *Ibid.* at para. 90.

55 *Ibid.* at para. 101.

56 Lebel J. recognized that evidence abroad obtained by torture would be excluded in a Canadian trial. *Ibid.* at para. 109.

57 See for example *Khadr (Next Friend of) v. Canada*, 2005 CarswellNat 2188, 2005 CarswellNat 3203, 2005 FC 1076 (F.C.) (interlocutory injunction prohibiting Canadian officials from questioning Omar Khadr at Guantanamo).

Justice Binnie went on to suggest that the majority was putting too much emphasis on the possibility that courts could order remedies for extra-territorial violations of the *Charter* in Canadian trials. In recognition of the increase in extra-legal or "press gang" tactics after 9/11, Justice Binnie warned that in cases such as those involving Afghan detainees, there might not be any trial at all, let alone a Canadian trial. In his view, "such serious *Charter* issues should be resolved only after full argument and debate in this Court, which we did not receive (and had no reason to expect) in this case."[58]

Justice LeBel responded to this pointed critique of the broad and abstract nature of the new rule against extra-territorial application of the *Charter* by stating that matters such as the "war on terror" were not before the Court and that "until those new issues are presented in live cases we ought not to abdicate our duty to rethink and refine today the law when confronted by jurisprudence that has demonstrated practical and theoretical weaknesses."[59] It will be suggested below that this preliminary skirmish should have been relevant to the decision made by the Court whether to hear an appeal in the Afghan detainee case.

The Afghan detainee case was decided at the first instance on the basis of *Hape*. As will be seen, Mactavish J. concluded that there was no applicable exception to the rule against extra-territorial application of the *Charter*. By the time the Federal Court of Appeal considered the appeal in this case, the Supreme Court had decided *Khadr v. Canada (Minister of Justice)*.[60] In that case, the Court held that the *Charter* should be applied to interviews of Omar Khadr by Canadian officials at Guantanamo Bay in 2003 and 2004 on the basis that they involved Canadian participation in violation of Canada's international human rights obligations. A unanimous Court in *Khadr I* held that:

> While not unanimous on all the principles governing extraterritorial application of the *Charter*, the Court was united on the principle that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. It was held that the deference required by the principle of comity "ends where clear violations of international law and fundamental human rights begin" (*Hape*, at para. 52, *per* LeBel J.; see also paras. 51 and 101). The Court further held that in interpreting the scope and application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law (para. 56, *per* LeBel J.).[61]

The Court in *Khadr I* ordered that Omar Khadr receive disclosure of information from the interviews and shared with the Americans, subject to national security confidentiality proceedings in the Federal Court. *Khadr I* affirmed an exception to *Hape* for Canadian participation in foreign activities that violated Canada's international obligations. Taken by itself, this exception would seem to apply in the Afghan detainee case, especially because the question set by the Court assumed that the detainees would be transferred to face a substantial risk of torture. As will be

58 *Ibid.* at paras. 184-185.

59 *Ibid.* at para. 95.

60 2008 CarswellNat 1400, 2008 CarswellNat 1401, [2008] 2 S.C.R. 125 (S.C.C.).

61 *Ibid.* at para. 18.

seen, however, *Khadr I* ultimately did not benefit the applicants in the Afghan detainee case.

(d) The Judgment of Mactavish J.

Mactavish J. decided the Afghan detainee case after the Supreme Court's decision in *R v. Hape* which limited the extra-territorial application of the *Charter*, but before the Court's decision in *Khadr I* which applied a human rights exception to the general rule against extra-territorial application of the *Charter*. Even given that *Khadr I* had not yet been decided, Mactavish J. interpreted *Hape* in a restrictive manner that centred on the question of whether the government of Afghanistan had consented to the application of the *Charter*. Moreover, she explicitly rejected an international human rights exception to the general rule in *Hape* that the *Charter* would not apply beyond Canada's borders.

Mactavish J. concluded that Afghanistan had only consented to the application of Canadian law with respect to disciplinary and criminal offences of Canadian Forces personnel and "there has been no consent by the Government of Afghanistan to having Canadian *Charter* rights conferred on its citizens, within its territory."[62] She recognized that this raised a "troubling"[63] scenario where Canada could prosecute those in the military for alleged mistreatment, but the *Charter* would not apply "to limit the exercise of the authority of state actors so that breaches of the *Charter* are prevented."[64] Nevertheless, she held that such a result was dictated by the emphasis that the Supreme Court had given in *Hape* to whether foreign countries had consented to allow the *Charter* to apply and the terms of the various agreements that Canada had entered into with Afghanistan.

In a relatively short portion of an otherwise lengthy and comprehensive judgment, Mactavish J. rejected the idea of an international human rights exception to the rule against extra-territorial application of the *Charter*. Her conclusion that the *Charter* would not apply even if the applicants could establish that Canada's transfer of the detainees would expose them to a substantial risk of torture was made largely on the assumption that either all parts of the *Charter* would apply or none of the *Charter* should apply. To this end, Mactavish J. asserted that "it cannot be that the *Charter* will not apply where the breach of a detainee's purported *Charter* rights is of a minor or technical nature, but will apply where the breach puts the detainee's fundamental human rights at risk"[65] on the basis that such an approach "would be a completely unprincipled approach to the exercise of extraterritorial jurisdiction."[66]

Justice Mactavish's judgment is based on an assumption that the *Charter* and international law are mutually exclusive and do not overlap. Such an approach was

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62 *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, 2008 CarswellNat 5727, 2008 CarswellNat 597 (F.C.); affirmed 2008 CarswellNat 5272, 2008 CarswellNat 4625 (F.C.A.); leave to appeal refused 2009 CarswellNat 1345, 2009 CarswellNat 1346, ¶172 (S.C.C.).

63 *Ibid.* at para. 340.

64 *Ibid.* at para. 340.

65 *Ibid.* at para. 310.

66 *Ibid.* at para. 311.

fundamental to her rejection of the idea that there was an international human rights exception to the rule in *Hape*. This approach lead to some inconsistencies in her reasoning, particularly the more overtly policy based parts of the judgment. One of the reasons that she gave for the rejection of the control over the person test for establishing the applicability of the *Charter* was the difficulties of applying "a patchwork of different legal norms"[67] to the multinational military effort in Afghanistan. She suggested that the more appropriate legal framework for a United Nations-sanctioned international military effort was international humanitarian law.[68] Consistent with her dichotomous approach to international and national law, international humanitarian law could in her view only be enforced through the available mechanisms of international law including the rather drastic option of prosecutions in the International Criminal Court (ICC). One of the reasons for rejecting the idea that a subset of *Charter* violations would trigger an international human rights exception to *Hape* was the danger that such a qualitative approach "would surely lead to tremendous uncertainty on the part of Canadian state actors 'on the ground' in foreign countries."[69] Her judgment ignored the possibility that the *Charter* could be enforced abroad to the extent that it overlapped with international law.

Despite the above weaknesses, there is a sense that Mactavish J. was genuinely troubled by her conclusion that the *Charter* would not apply to detainee transfers even if the transfers resulted in a substantial risk of torture. She noted that concerns about the weakness of the enforcement of international law and of the efficacy of safeguards that had been devised to safeguard the detainees. She hinted that the concerns about Afghan sovereignty were somewhat artificial because the applicants were not attempting to apply the standards of the *Charter* to Afghan officials but rather to "the conduct of Canada's own military forces, in relation to decisions and individuals entirely within their own control."[70] She recognized that it was "troubling"[71] that Canadian Forces personnel could be prosecuted or disciplined "after the fact" for their treatment of detainees but that the *Charter* could not applied "to prevent their mistreatment in the first place."[72] In the end, the tone of the judgment was one of a trial judge somewhat reluctantly following the law as she believed it had been articulated by the Supreme Court in *Hape* and who did not believe that it was "for this Court to second-guess the choices made by the Supreme Court of Canada."[73]

(e) The Judgment of the Federal Court of Appeal

The Federal Court of Appeal upheld the decision of Mactavish J. in a relatively brief judgment. The Court of Appeal held that the Supreme Court's decision

67 *Ibid.* at para. 274.
68 *Ibid.* at para. 276.
69 *Ibid.* at para. 314.
70 *Ibid.* at para. 341.
71 *Ibid.* at para. 340.
72 *Ibid.* at para. 340.
73 *Ibid.* at para. 330.

in *Khadr I* had not changed the restrictions on the extra-territorial application of the *Charter* in *Hape* because the Supreme Court in *Khadr I* had relied on U.S. Supreme Court authority to conclude that detention at Guantanamo Bay in 2003 and 2004 violated international human rights obligations including those under Common Article 3 of the Geneva Conventions. The Federal Court of Appeal was correct that the Supreme Court had relied on these American cases, but its approach had the effect of diminishing the international human rights exception. The exception will not be terribly meaningful if it has to be recognized by domestic courts in the country where applicants seeks the extra-territorial application of the *Charter*.

The Court of Appeal also read *Khadr I* narrowly and distinguished it on another factual basis, namely that Omar Khadr is a Canadian citizen and the Afghan detainee case involved non- citizens. The essence of the Federal Court of Appeal's reasoning can be found in the following two paragraphs:

> The factual underpinning of this decision [Khadr] is miles apart from the situation where foreigners with no attachment to Canada or its laws, are held in CF detention facilities in Afghanistan . . .
>
> I understand the Supreme Court of Canada to say that deference and comity end where clear violations of international law and fundamental human rights begin. This does not mean that the *Charter* then applies as a consequence of these violations. Even though section 7 of the *Charter* applies to "Everyone . . ." (compare with the words "Every citizen . . ." in section 6 of the *Charter*) all the circumstances in a given situation must be examined before it can be said that the *Charter* applies.[74]

The Federal Court of Appeal restricted the doctrinal holding in *Khadr I* about international human rights exceptions as limited to its factual application to a Canadian citizen even while recognizing that such an approach had no textual support whatsoever in s. 7 of the *Charter* which applies to "everyone" and not just Canadian citizens. Moreover, the Court of Appeal did not advert to abundant authority both in international law and in *Suresh* that Canada's obligations not to expose individuals to a substantial risk of torture were categorical and admitted of no exception, including on the basis of citizenship.

The Federal Court of Appeal's decision had a very different tone than the trial judgment. Whereas Mactavish J. had candidly revealed that she was troubled by several aspects of her decision that the *Charter* did not apply even if Canadian officials transferred the detainees to a substantial risk of torture, Desjardins J.A. appeared not to be troubled at all by such a conclusion. For her, the detainees were not individuals who should receive the benefit of the *Charter*, but "foreigners with no attachment whatsoever to Canada or its laws".[75] The Court of Appeal was also much more confident than Mactavish J. that "no legal vacuum" would occur because of the applicability of "international humanitarian law."[76]

Although there are important differences in the tone and reasoning of the two judgments, they both conceive of the *Charter* and international law as mutually exclusive forms of law. Mactavish J. rejected the idea that those parts of the *Char-*

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74 *Ibid.* at paras. 14, 20.

75 *Ibid.* at para. 14

76 *Ibid.* at para. 36

ter which overlap with Canada's international obligations could be applied extra-territorially whereas the Court of Appeal rejected the idea that *Charter* obligations that were supported by Canada's international law obligations could be enforced for the benefit of non-Canadian citizens. The Court of Appeal's approach is arguably inconsistent with both the scope of Canada's international obligations and s. 7 of the *Charter*. The Court of Appeal limited *Khadr I* to its particular facts even though Khadr's Canadian citizenship and the Court's reliance on the American decisions finding that there was a violation of international law did not appear critical to the international human rights exception identified in *Hape* and *Khadr I*.

In any event, the Federal Court's decisions suggest that the scope of exceptions to the rule against extra-territorial application of the *Charter* remained unclear both before and after *Khadr I*. In some ways, these uncertainties are to be expected given the dramatic change articulated in *Hape* to the extra-territorial application of the *Charter* and the fact that Canada is a dualist system that, until *Hape*, had little experience with applying the *Charter* only to the extent required by Canada's international obligations. These jurisprudential uncertainties, coupled with the issue of principle about complicity in torture and the preliminary skirmish within the Court in *Hape* over the Afghan detainee case, all suggested that the Supreme Court might agree to hear the case when the applicants sought leave to appeal.

(f) The Leave to Appeal Process

The criteria for granting leave to appeal under s. 40.1 of the *Supreme Court Act*[77] is whether a matter is of sufficient "public importance" to merit a decision by the Supreme Court. The Supreme Court of Canada did not gain discretionary control over its non-criminal law docket until 1975. Such control is an important but often understudied component of the Court's lawmaking functions.

A recent book that has examined the leave process has used the metaphor of "a tournament of appeals" to describe how the Court grants only about 1 in 5 applications for leave to appeal.[78] Lorne Sossin has suggested that the discretionary granting of leave to appeals by three judges of the Court can better be described as a puzzle. Dean Sossin suggests that the judges may be motivated by strategic reasons while at the same time noting that the American practice of defensive and offensive agenda setting sounds "oddly foreign" in the Canadian context.[79] The possibility of strategic considerations governing the leave process is also underlined by reports that leave decisions made by three judge panels are subsequently reviewed in conference by the entire Court.[80]

In many ways the leave process is a judicial anomaly because no reasons are

77 R.S.C. 1985 c. S-26.

78 Roy B. Flemming, *Tournment of Appeals: Granting Judicial Review in Canada* (Vancouver: University of British Columbia Press, 2004).

79 Lorne Sossin "Review" (2005) 30 Queens L.J. 900.

80 Flemming, *Tournment of Appeals*, *supra* note 78 at 16 noting that "no case-level data are available that show in a systematic fashion whether votes in conference alter or reverse panel recommendations."

given for the Court's decisions, dissents are very rarely recorded[81] and even then no reasons are given. Although the decision is made by three judges of the Court, the entire Court may have some unknown degree of involvement something that seems to offend basic rules of procedural justice which require the applicants to know the decision-maker. The system is less transparent than in the United States Supreme Court where justices do on occasion write dissents from denial of leave to appeal and where four judges out of nine can require the Court to hear a case.[82]

What criteria, if any, should be used to evaluate the Supreme Court's decisions on leaves to appeals? Although some may be tempted to conclude that such decisions are simply a matter of the Court's unreviewable discretion, it is significant that a legal standard in the *Supreme Court Act* does govern such decisions. Nevertheless, the Canadian standard of public importance is more general and vague than a similar American rule which articulates some examples of the factors that the Court considers.[83]

Lorne Sossin, like Bickel, accepts that strategic considerations associated with the political questions doctrine and the passive virtues can play a role in the leave granting process. Nevertheless, he suggests that leave decisions should be exposed to the discipline of reasons or at least some jurisprudence fleshing out the parameters of public importance.[84] In what follows, I will consider the written arguments that the parties to the Afghan detainee case advanced to the Court and speculate about some of the reasons that may have motivated the Court in its decision not to grant to leave. I will also attempt to evaluate these reasons in an attempt to better understand the leave process. This examination will also discuss some of the jurisprudential gaps and uncertainty about the extra-territorial application of the *Charter*.

(g) The Supreme Court's Refusal To Grant Leave

On May 21, 2009, a three judge panel of the Supreme Court composed of Chief Justice McLachlin and Justices Abella and Rothstein denied leave in the Afghan detainee case. Following the Court's invariable practice, no reasons were given. The denial of leave to appeal is the prototypical exercise of the passive virtues. The decision to deny leave meant that the Federal Court of Appeal's decision that the *Charter* did not apply even if officials transferred detainees to a substantial risk of torture remained a binding precedent, but not one with the legal authority of the Supreme Court behind it. In other words, the Court's decision not to grant leave does not lend the Supreme Court's authority to the Federal Court of Appeal's decision. In Bickel's terms, the decision not to grant leave is simply a decision not to decide.

Professor Flemming has outlined three different approaches to understanding

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81 Flemming reports that 30 dissents were recorded in 1,200 applications for leave to appeal that were heard in 1993 to 1995. *Ibid.* at 83.

82 For an explanation of the American certiorari granting process see http://epstein.law.northwestern.edu/blackmun.php?p=1.

83 Rule 10 United States Supreme Court available at http://www.supreme court.gov/ctrules/2010RulesoftheCourt.pdf.

84 Sossin "Review" (2005) 30 Queens L.J. 900.

the leave process. The first is litigant centred and follows from the American practice where amicus, or what Canadians would call interveners, often intervene in leave applications. This practice is rare in Canada and Flemming finds this account of the leave process not to be particularly compelling. The Afghan detainee case is an interesting exception because two public interest groups with established track records as interveners were granted public interest standing. These groups were thus the parties that made submissions to the Court about why the Supreme Court should hear the case. As will be seen, however, they were unsuccessful and this suggests that the identity and credibility of the litigants as repeat players before the courts was not determinative in this case.

The second basis that Flemming identifies for studying the leave process is jurisprudential. The late Justice Sopinka in an extra-judicial speech about the leave process stressed that the Court is "not a court of error and the fact that a Court of Appeal reached the wrong result is not in itself sufficient . . . On the other hand, if a misinterpretation of one of our judgments becomes an epidemic below, we may want to set the record straight."[85] One widely accepted indicia of the possible jurisprudential importance of granting leave to appeal is the need for the Court to resolve disputes between Courts of Appeals on important matters of law. The Afghan detainee case, however, did not involve such a dispute because the matter was within the exclusive jurisdiction of the Federal Court, as indeed were the issues of the extra-territorial application of the *Charter* in the Khadr case. Nevertheless, it will be suggested below that the case raised important jurisprudential questions about the existence and application of an international human rights exception to the rule against the extra-territorial application of the *Charter* and about the relevance of Canadian citizenship in cases under s. 7 that involve the extra-territorial application of the *Charter*.

The third basis for assessing the leave to appeal process that Flemming identifies is consistent with a Bickelian approach because it involves questions of strategic choice on behalf of individual Justices or the Court as an institution. The existence or non-existence of such prudential reasons are even more speculative than considerations of litigant status or the state of the jurisprudence. As will be seen, there are a variety of strategic considerations that might have motivated the Court's decision not to hear the case. They include concerns about the Court's relation with the elected government and its own reputation on issues relating to torture.

(h) Possible Reasons for the Refusal to Grant Leave

In what follows, I will attempt to provide the best reasons that could have motivated either the decision to grant or deny leave in the Afghan detainee cases. As suggested above, such reasons are speculative. It could be argued that it is unedifying to speculate when the Court has chosen not to decide, but the importance of the issues as well as the nature of the leave process suggests that the discipline of reasons could improve the transparency and quality of leave decisions. The Court has in other contexts stressed the importance of reasoned decisions as a guide

85 As quoted in Roy Flemming and Glen Krutz "Selecting Appeals for Judicial Review in Canada" (2002) 64 Journal of Politics 232 at 242-243.

to a better understanding of issues and fairness to all affected parties.[86]

(i) The Status and Citizenship of the Litigants

Although political scientists often examine the status of the litigants as a means to explain judicial decision-making, judicial attitudes towards a litigant should not influence their decisions, even decisions such as leave to appeal. In other words, the Court's perceptions of the litigants in this case should not have influenced its decision either way. The same is true with respect to the Court's perceptions of those whose rights were actually at stake in this case, the Afghan detainees. The Court may have assumed that many of these detainees were associated with al Qaeda and/or the Taliban, but that does not mean that they had no rights. A judge does not have the option of finding that an enemy has no rights.

Nevertheless, the status of the litigant may be relevant to the question of whether the law applies to them or whether they have certain rights. The Court might have refused to hear the case because it was satisfied with the Federal Court of Appeal decision was correct when it distinguished *Khadr I* on the basis that the Afghan detainees were not Canadian citizens with a connection to Canada. It is undeniable that the Supreme Court in *Khadr I* made reference to Khadr's Canadian citizenship. For example, it stated that "s.7 imposes a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process that is contrary to international law and jeopardizes the liberty of a Canadian citizen."[87] Nevertheless, in most instances the Court in *Khadr I* defined Canada's obligation in terms of conduct by Canadian officials that violated Canada's international law obligations and without reference to Omar Khadr's Canadian citizenship.[88] If the Court had meant to restrict the international human rights exception to activities involving Canadian citizens, it should have provided some justification for such a use of citizenship. There is, however, no such justification in *Khadr I*.

Even if the Court accepted that the Federal Court of Appeal was correct in its approach, the Afghan detainee case would have provided an opportunity for the Court to explain and justify the use of citizenship as a means of restricting the extra-territorial application of the *Charter*. The need for such an explanation is considerable because both the text of s. 7 and the Court's many immigration law decisions[89] applying s. 7 have not limited the provision to citizens. In addition, most of Canada's international law obligations and specifically its obligations not to participate in torture apply to all persons and not just Canadian citizens. In such jurispru-

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86 *R. v. Sheppard*, 2002 CarswellNfld 74, 2002 CarswellNfld 75, [2002] 1 S.C.R. 869, ¶28 (S.C.C.) (though the right to reasons in the trial context is related to the ability to appeal which is not a factor in the denial of leave context).

87 *Khadr v. Canada (Minister of Justice)*, 2008 CarswellNat 1400, 2008 CarswellNat 1401, [2008] 2 S.C.R. 125, ¶31 (S.C.C.).

88 *Ibid.* at para. 27.

89 See for example *Singh v. Canada (Minister of Employment & Immigration)*, 1985 CarswellNat 663, 1985 CarswellNat 152, [1985] 1 S.C.R. 177 (S.C.C.); *Charkaoui, Re*, 2007 CarswellNat 325, 2007 CarswellNat 326, *(*sub nom. *Charkaoui v. Canada)* [2007] 1 S.C.R. 350 (S.C.C.).

dential circumstances, the Court should have felt some responsibility to either reject or justify the Federal Court of Appeal's reading in of a citizenship restriction to the international human rights exception to *Hape*.

The Court's subsequent denial of leave in *Slahi v. Canada* where the Federal Court of Appeal again distinguished *Khadr* in a case involving non-Canadian citizens interviewed by Canadian officials in Guantanamo is consistent with the idea that the Court may be comfortable with requiring the affected rights holder to be a Canadian citizen before the *Charter* is applied in an extra-territorial manner.[90] Again, however, the Court has still not explained or justified a Canadian citizenship requirement. Such a requirement would be in tension with the language of s. 7 of the *Charter* which applies to everyone as well as Canada's international law obligations which are generally not limited to Canadian citizens. Even in a policy sense, Canadian citizenship is a blunt proxy for functional concerns about judicial resources or connection to Canada that might underlie any requirement that the *Charter* only be enforced extra-territorially to benefit Canadian citizens.

(ii) Concerns about the Ripeness of the Torture Issue

A classic justification for denying leave defended by Bickel and others is a sense that a judicial decision is not necessary because the issue is either not ripe for review or has become moot. Although the Court has developed legal tests to govern decisions on timing in cases that it hears,[91] it is also possible that the Court applies these or other similar tests when deciding whether to hear a case.

It can be argued that the issues in the Afghan detainee case were not ripe. The questions raised in the litigation were in some respects abstract and hypothetical because they assumed that the applicants would ultimately be able to establish that the transfer of the detainees would expose them to a substantial risk of torture. The establishment of that actual risk would require fact specific litigation. The Court might have decided that it should not devote scarce resources to deciding such abstract questions and that it should not be bound by the parties' decision to agree to litigate these preliminary issues.[92]

Such an approach would not be sensitive to the reality that the applicants as public interest groups had an obvious interest in establishing these points of laws without engaging in time consuming and expensive litigation of the facts on the ground. Moreover establishing that specific detainees were transferred to a substantial risk of torture would likely have required the applicants to defend national security confidentiality applications by the Attorney General of Canada under s. 38 of

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90 *Slahi v. Canada (Minister of Justice)*, 2009 FC 160, 2009 CarswellNat 1112, 2009 CarswellNat 264 (F.C.); affirmed 2009 FCA 259, 2009 CarswellNat 2748, 2009 CarswellNat 5845 (F.C.A.); leave to appeal refused 2010 CarswellNat 297, 2010 CarswellNat 298, Binnie, Fish and Charron JJ. (S.C.C.)

91 *Borowski v. Canada (Attorney General)*, 1989 CarswellSask 241, 1989 CarswellSask 465, [1989] 1 S.C.R. 342 (S.C.C.).

92 *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, 2008 CarswellNat 5727, 2008 CarswellNat 597 (F.C.); affirmed 2008 CarswellNat 5272, 2008 CarswellNat 4625 (F.C.A.); leave to appeal refused 2009 CarswellNat 1345, 2009 CarswellNat 1346, ¶15 (S.C.C.).

the *Canada Evidence Act*. As matters stand, it is doubtful whether the fact specific issue of transfers and torture will ever be litigated.

The Court might also have concluded that the transfer to torture issue would be furthered refined by ongoing Parliamentary and other investigations. This impression may have been inadvertently promoted by the applicants' own memorandum of argument on the leave application. It stressed the number of days (75) devoted to the issue in Parliament, as well as ongoing investigations by Parliamentary committees and by the Military Police Complaints Commission, as indicia of the public importance of the case. The applicants' leave argument also made reference to the extensive media coverage of the issue.[93]

If the Court concluded that the issue was not ripe, there is a danger that it overestimated the ability of Parliament, media and other bodies to investigate the issue. The work of Parliamentary committees has been set back by disputes over access to documents, the prorogation of Parliament in December 2009 and the referral of the national security confidentiality issues first to former Supreme Court Justice Iacobucci for advice and to a panel including Justice Iacobucci and two other retired judges. In addition, a few months after the Supreme Court denied leave in the Afghan detainee case, the Federal Court decided that the Military Police Complaints Commission (MPCC) did not have jurisdiction to inquire into the Afghan detainee policy.[94] The Commission had initiated a public interest hearing into the matter but encountered difficulties receiving all the relevant documents from the government. The Court held that it was "unreasonable for the Commission to use its jurisdiction to investigate complaints against Military Police as a springboard to investigate government policy at large."[95] The Court issued a declaration that precluded any further investigation by the MPCC from going beyond the question of what the Military Police, as opposed to others in government, knew or had means of knowing about the possible torture of detainees. Although both Parliamentary committee hearings and a hearing before the MPCC continue, it remains unclear whether they will be able to discover the facts. The danger is that the torture issue will not ripen or crystallize and the public will eventually lose interest in it.

The Afghan detainee issue raises a larger problem of the lack of adequate review of the government's national security, national defence and foreign policy activities. The Arar Commission had commented on the inadequacy of existing review mechanisms and recommended that the jurisdiction of the Security Intelligence Review Committee be extended to among others the national security activities of the Department of Foreign Affairs.[96] The Security Intelligence Review

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93 Applicants Memorandum of Argument at paras. 6, 26, 27 and 34. The applicants argued "This level of public engagement demonstrates the national importance of the appeal."

94 *Canada (Attorney General) v. Amnesty International Canada*, 2009 FC 918, 2009 CarswellNat 2806, 2009 CarswellNat 4819 (F.C.).

95 *Ibid.* at para. 54.

96 Commission of Inquiry Concerning the Activities of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (2006) at 568-569.

Committee unlike Parliamentary committees has access to secret information. The courts have made clear that the MPCC has a limited jurisdiction over the military police. Public inquiries have, to some extent, filled the accountability gap in national security matters especially in relation to activities that involve different ministries and secret information, but their appointment remains at the discretion of the Cabinet. Although courts may be tempted to defer hearing national security matters for strategic reasons relating to their relationship with governments and concerns about their own expertise, they should also recognize that judicial review may be the only effective means of review in some contexts.

The Court might also have justified the refusal to grant leave on the basis that various international law bodies could respond to the Afghan detainee issue. Both Mactavish J. and the Federal Court of Appeal stated that there was not a legal vacuum even if the *Charter* did not apply. International humanitarian law could be enforced through various mechanisms such as committees under the Convention Against Torture. Justice Mactavish, however, noted some concerns about the efficacy of this process. A stronger approach could perhaps be taken by the International Criminal Court, and in 2007 two prominent Canadian international law professors wrote to the prosecutor of the ICC to call his attention to possible Canadian involvement in war crimes involving torture. No action, however, has yet been taken. Even if the ICC were to become involved, it would focus on questions of individual wrongdoing and knowledge and it would not directly evaluate the government's policy with respect to the detainees. In addition, it would focus on alleged mistreatment after the fact whereas full litigation of the *Charter* issue had a potential to help prevent such mistreatment.

It is possible that the Court might have thought the issue of transfer to a substantial risk of torture was moot because it would not occur again. The Court would likely have known that in 2007 Canada had formulated a new transfer agreement with Afghan authorities that allowed Canadian visits to Afghan detention centres. Even subsequent to this agreement, however, the Canadian government was forced to stop transfers because of concerns about the treatment of the detainees. Recent reports by the U.S. Department of State continue to raise concerns about torture and mistreatment in Afghan detainee issues.[97] If the Court thought the torture issue was moot, it erred.

Bickel's implicit assumption that the exercise of passive virtues allows issues of principle either to ripen or to become moot needs to be revised in contexts where government secrecy and inadequate review may inhibit the discovery of the truth. Because of secrecy, courts and litigants may not know the precise actions taken by Canadian officials and foreign officials unless litigation is allowed to proceed. In short, there may not be enough transparency or review to reveal rights violations. In the Afghan detainee context, this means that the Court's refusal to hear the appeal may have contributed to a process where the truth about the treatment of the Afghan detainees may never come out. Such a result will, of course, mean that the underlying issues of principles and rights with regards to torture may never be applied.

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97 US Department of State 2009 Human Rights Report Afghanistan March 11, 2010 at http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136084.htm.

(iii) Possible Reluctance by the Court to Engage on the Torture Issue

The applicants' memorandum of argument to the Supreme Court on the leave to appeal cited Justice O'Connor's conclusion in the Arar Commission report that Canada never should be complicit in torture.[98] Justice O'Connor's absolutist position on this issue follows international law, but does not follow the Supreme Court's willingness in *Suresh v. Canada (Minister of Citizenship & Immigration)*[99] to contemplate exceptions to that rule under the *Charter*. The government's memorandum of argument on the leave issue did not mention the torture issue. In the absence of reasons for the decision to refuse leave, one is left to speculate about the Court's motivation for not confronting the torture issue.

It is possible that the Court might have been uneasy taking an absolutist position against torture and effectively imposing it on the Canadian military when the Court had in *Suresh* been reluctant to impose a similar absolutist restraint on the Canadian government with respect to the deportation of non-citizens found to be a threat to national security. On the other hand, if the judges believed that the Federal Court of Appeal's decision was sustainable because of the limits in applying the *Charter* in an extra-territorial manner, the Court may have been reluctant to decide the case in a manner that could be criticized as insensitive to Canada's international obligations against torture and would have attracted similar criticisms as the possible exception to the rule against torture in *Suresh*. It will be suggested below, however, that making the law clear on the torture issue was the most important reason for granting leave in this case. Nevertheless, the possibility that the Court may have been reluctant to elaborate on its stance on torture in light of *Suresh* and the Federal Court of Appeal's decision in the Afghan detainee case cannot be discounted.

(iv) Concerns about the Governmental Reaction to the Case

A final justification that Bickel's theory of the passive virtues might provide for the denial of leave to appeal is that an affirmative decision might have provoked controversy and even resistance from the government who argued that the *Charter* should not apply to the difficult decisions that the military had to make in Afghanistan. The problem with this argument is that it both overstates the impact of a Court decision that would have reversed the Federal Court of Appeal and understates the importance of the torture issue.

A reversal of the Federal Court's decision would not have resulted in judicial micro-management of the detainee issue. Rather it would have kept the litigation going to determine the many factual issues surrounding the detainees. This process would have given the government an opportunity to demonstrate that it was taking reasonable steps to ensure that detainees were not tortured. The *Suresh* decision suggests that the Court would likely have deferred to reasonable determinations that the risk of torture was not substantial. In addition, the government could have, as it did in the security certificate cases, also have invoked the *Suresh* exception to torture as an alternative argument. Legal debate about the issue would have continued and the factual record would likely have continued to evolve before the courts

98 Applicants Memorandum of Argument at para. 53.

99 2002 CarswellNat 7, 2002 CarswellNat 8, [2002] 1 S.C.R. 3, ¶78 (S.C.C.).

made final decisions.

(i) Possible Reasons for Granting Leave

Many of the strongest reasons that could have justified a granting of leave in the Afghan detainee case relate to the uncertain nature of the extraterritorial application of the *Charter* in the wake of *Hape* and *Khadr I*. Other reasons relate to the importance of the torture issue and the dispute in the Court in *Hape* over the possible application of that decision to the Afghan detainee case.

(i) Need to Clarify the Exception to the Rule in Hape Against Extra-territorial application of the Charter

Even after the Court's decisions in *Hape* and *Khadr I*, the nature of the international human rights exception to the new rule against extra-territorial application of the *Charter* remains unclear and could have been clarified by a Supreme Court decision in the Afghan detainee case.

The Federal Court of Appeal appeared to draw a distinction between the references in both *Hape* and *Khadr I* to judicial deference and comity ending when violations of international human rights start and the issue of whether the *Charter* should be applied. Justice Desjardins stated that the Court's reference to deference and comity ending "does not mean that the *Charter* then applies as a consequence of these violations."[100] The government in its memorandum of argument relied on this statement. The government also argued that the Federal Court of Appeal had correctly interpreted *Khadr I* as limiting the international human rights exception to the issue of comity and not to the application of the *Charter*.[101] Such arguments are, however, difficult to reconcile with the decision in *Khadr I* that the *Charter* did apply. Moreover, a bare judicial declaration that the need for comity and deference has ended that was not tied to a finding of jurisdiction to apply the *Charter* would seem to be a gratuitous and pointless judicial intervention that simply opined on the conduct of foreign countries without actually making a judicial decision. In any event, this dispute about the scope of the international human rights exceptions articulated in *Hape* and *Khadr I* supports the applicants' argument that the scope of the exception "requires further clarification before it will be meaningful applied by the courts below."[102]

It is possible that the Federal Court of Appeal was correct and the only exception to the rule against extra-territorial application of the *Charter* is cases where Canadian courts can decide whether to admit evidence in Canadian trials. This restrictive reading of international human rights exception, however, discounts refer-

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100 *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FCA 401, 2008 CarswellNat 5272, 2008 CarswellNat 4625 (F.C.A.); leave to appeal refused 2009 CarswellNat 1345, 2009 CarswellNat 1346, ¶20 (S.C.C.).

101 The Respondents argued: "the applicants conflate the principles of jurisdiction and comity to arrive at the extraordinary proposition that wherever there may be a violation of international human rights standards, Canada may apply its laws in foreign sovereign territory." Respondents Memorandum of Argument at para. 49.

102 Applicants Memorandum of Argument at para. 58.

ences in *Hape*[103] to the possible ability of Canadian courts to restrain Canadian participation in international rights violations before the fact. It would also mean that cases such as the Federal Court's injunction that restrained Canadian officials from continuing to go to Guantanamo to question Omar Khadr were wrongly decided.[104] The disagreement between the parties about the precise scope of the international human rights exception to the rule against extra-territorial application of the *Charter* should have signaled to the Court that further clarification of *Hape* was required. These concerns about clarifying the jurisprudence supported a grant of leave in this case.

(ii) Need to Clarify Khadr I and the Relevance of Canadian Citizenship

The Federal Court of Appeal also distinguished *Khadr I* on the basis that Omar Khadr is a Canadian citizen and the Afghan detainees are not. As discussed above, it is possible that the Court might want to limit extra-territorial application of the *Charter* to only those cases that would benefit Canadian citizens. Nevertheless, such an approach would be in tension to the text of s. 7 of the *Charter* which is not restricted to citizens and the Court's prior decisions on s. 7 which have benefited non-citizens. In addition, Canadian citizenship would be only a rough guide to an applicant's connection to Canada. Finally, a Canadian citizenship requirement would also result in the anomaly that only Canadian citizens would benefit from the extra-territorial application of the *Charter* even though the underlying rationale for the application — the enforcement of Canada's international human rights obligations- generally apply without regard to Canadian citizenship.

Although the Court in *Khadr I* made reference to Canadian citizenship, it did not explicitly base its holding that the *Charter* should apply to Omar Khadr's Canadian citizenship and it provided no rationale for such a limitation. Given the Federal Court of Appeal's reliance on citizenship, the Supreme Court should have taken the opportunity to clarify the relevance of citizenship. If citizenship is not decisive, the Court should have intervened to reverse a decision that denied individuals most basic rights not to be exposed to a substantial risk of torture. If citizenship is decisive, the Court should have attempted to justify this state of affairs especially given its failure clearly to apply and defend a Canadian citizenship requirement in *Khadr I.*

(iii) The Dispute over the Afghan Detainee Issue in Hape

Another reason why the Court should have granted leave is the dispute that arose within the Court in *Hape* about the possible application of the new restrictions on the extra-territorial application of the *Charter* to this very case. As discussed above, Justice Binnie criticized the majority judgment for articulating a sweeping new rule at a time when there was increased awareness and sensitivity about the international activity of Canadian police and military officials. Justice

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103 *R. v. Hape*, 2007 CarswellOnt 3563, 2007 CarswellOnt 3564, [2007] 2 S.C.R. 292, ¶90, 101 (S.C.C.).

104 *Khadr (Next Friend of) v. Canada*, 2005 FC 1076, 2005 CarswellNat 2188, 2005 CarswellNat 3203 (F.C.) (interlocutory injunction prohibiting Canadian officials from questioning Omar Khadr at Guantanamo).

LeBel replied that matters such as the Afghan detainees were not before the Court and "that the law will grow and evolve as necessary and when necessary in response."[105] Although this does not amount to a promise that the Court will consider such issues when they arise, it does acknowledge that they may require further jurisprudential consideration.

(iv) Concerns about Torture

The final and in my view most compelling reason for why the Court should have granted leave and heard the Afghan detainee case revolves around the importance of the torture issue. The Federal Court's conclusion that the *Charter* would not apply even if there was a substantial risk of torture makes clear that the *Charter* would not apply in a situation that was clearly in breach of Canada's international human rights obligations. Indeed, the Supreme Court in *Suresh* had closely examined Canada's various international law obligations against torture and found that they admitted of no exception. In addition, the Court in *Hape* had indicated that Canada's international human rights obligations would be relevant in deciding when the *Charter* could be applied in an extra-territorial manner. These two findings make the Federal Court's conclusion that the *Charter* would not apply even if there was a substantial risk of torture questionable. Although the Supreme Court does not exist as a court of error, errors on issues such as torture are particularly important to correct.

(j) Summary

The best Bickelian reason for not deciding the case were concerns that the issue of torture had either become moot or was not ripe enough to decide and that other institutions were dealing with it. Such prematurity arguments assume that the facts on the ground can evolve and be discovered in a transparent manner. As suggested above, there is a danger that secrecy claims in this and other military/foreign policy/national security contexts may make it impossible for us ever to have accurate and transparent determinations of the facts on the ground. Bickel's assumptions that issues of principle will eventually crystallize or that they will become genuinely moot though concrete and verifiable factual developments do not hold true in contexts where secrecy may prevail and where the actions reviewed are transnational.

The Court was aware that other institutions were examining the detainee issue, but real limits have emerged in the ability of Parliament and the Military Police Complaints Tribunal to examine the issue. It is also possible that various international institutions might examine the issue, but the remedies that they can provide are limited and in the case of the ICC tied to proof of individual fault after mistreatment has occurred. The Bickelian idea that issues of principles can be refined and ripen over time needs to be rethought in the national security context to take into account the dangers that secrecy may result in the facts never being known in the absence of litigation. It also needs to be rethought in a transnational context where various domestic and international institutions may not squarely confront issues of

105 *Hape*, *supra* note 103 at para. 95.

principle, such as the issue of transfer to torture that was raised in the Afghan detainee case.

The applicability of the *Charter* to cases where detainees faced a substantial risk of torture raised issues of public importance. The use of torture has emerged as one of the most pressing issues of our times. The use of torture degrades and corrupts battles against terrorism that are fought in Afghanistan and other venues. Despite clear and absolute international law prohibitions against torture and complicity in torture, the commitment of many governments not to participate in torture has become less clear in the wake of the 9/11 attacks. The Supreme Court itself bears some responsibility to be clear about the torture issue given its much criticized refusal in *Suresh* to declare an absolute rule that deportation to face a substantial risk of torture would always violate the *Charter*. The *Suresh* decision, at least, made clear that the Court had equivocal views about torture, whereas the decision not to decide the Afghan detainee case leaves one to speculate about the Court's views about torture.

Leaving aside the importance of the torture issue, there are several compelling jurisprudential considerations that supported a grant of leave to appeal. The Federal Court of Appeal distinguished *Khadr I* on the factual basis that Omar Khadr is a Canadian citizen but the Afghan detainees were not. It is unclear what, if anything, the Supreme Court intended by its reference to Khadr's citizenship. Moreover, any decision to limit extra-territorial application of the *Charter* to Canadian citizens required justification, and none was provided in *Khadr I*. Finally, many ambiguities in the scope of exceptions to the rule in *Hape* against extra-territorial application of the *Charter* remain and many of them could have been clarified had the Court granted leave in the Afghan detainee case.

It is impossible to know how Bickel would have viewed the Supreme Court's decision not to hear the Afghan detainee case. He might have concluded that the Court was prudent to avoid the issue given the dynamic military and foreign affairs context. As an American who accepted both the political questions doctrine and narrow standing and case and controversy rules, he might even have been shocked that the case got as far as it did. Nevertheless, it is also possible that Bickel might have viewed the denial of leave as one of those few cases were the Court's decision not to decide a case that raised a compelling issue of principle would have a harmful effect on the principle and the Court's role. Although the concept of the passive virtues is based on the idea that the Court's decision not to decide does not bestow legitimacy, it is difficult to escape the conclusion that the Court's decision not to hear the case suggests that it did not see the Federal Court's decision that the *Charter* did not apply even if the detainees were transferred to a substantial risk of torture as an egregious injustice.

Bickel's defence of the passive virtues was based on the premise that considerations of strategy and expediency that might motivate decisions not to decide would not invade the Court's decisions on the merits or undermine its adjudicative functions of applying long-standing principles. As will be discussed in the next part of this essay, the Court's decision in the second Khadr case raises the issue of whether such a separation can be sustained and whether the Court's decision on remedy compromised its adjudicative function.

4. THE COURT'S DECISION IN KHADR II

In *Khadr II*,[106] the Supreme Court decided that the lower courts were correct to hold that Canada had violated Omar Khadr's rights when they interviewed him at Guantanamo Bay, but that they had erred in ordering that the government request his repatriation from the United States. This decision raises concerns about the existence of rights without meaningful remedies and the effect that such a conclusion would have on evaluation of the court's distinct role in a democracy. It also raises questions about whether a common sense of leaving issues of foreign and security policy-making to the government might have motivated both the decision to deny leave in the Afghan detainee case and the approach to remedy in the second *Khadr* case.

The essence of the Court's unanimous decision is caught by its conclusion that "the prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it, which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*."[107] The Court's invocation of the concept of prudence is evocative of Bickel and raises the question of whether the Court's approach to remedies in this case is consistent with Bickel's recognition of the role that prudence played in the formation of remedies in the wake of *Brown I*.[108] It also raises the question of whether the distinctions that Bickel sought to draw between the role of prudence with respect to both the passive virtues and the crafting of remedies and the role of principle in articulating rights is sustainable.

(a) The Court's Approach to the Rights Violation

The Court's approach to the violation of s. 7 of the *Charter* in *Khadr II* was relatively broad and generous. Although the violation stemmed from the 2003 and 2004 interviews and the Court had already provided Khadr with a disclosure remedy for those violations in *Khadr I*, the Court held that statements taken during those interviews "are contributing to the continued detention of Mr. Khadr, thereby impacting his liberty and security interests".[109] The Court reached this conclusion despite the fact that Omar Khadr was not co-operative in the 2004 interview and the 2003 interview was conducted by CSIS for intelligence gathering purposes and had already been the subject of a disclosure remedy in *Khadr I*.

The Court dealt with the inherent uncertainty of the record and, in particular, uncertainty about what evidence the Americans possess in the case by indicating that it would presume that there was a connection between Canadian conduct and Khadr's deprivation of liberty "in the absence of any evidence to the contrary (or

106 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44 (S.C.C.).

107 *Ibid.* at para. 47.

108 *Brown v. Topeka Board of Education*, *supra* note 25.

109 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44, ¶21 (S.C.C.).

disclaimer rebutting this inference)".[110] This approach was generous to Khadr and can be contrasted with the Court's approach on remedies where uncertainties about the record were used as a reason to overturn the trial judge's remedy that Canada be required to request Khadr's repatriation. It is an interesting question to ask how the Court would have reacted had the United States indicated that it did not intend to rely on any information that it had obtained from Canada in Khadr's prosecution in the military commission. Such a statement might have broken the causal link between the 2003 and 2004 interviews and Khadr's detention and the ongoing effects of Canada's violations of Khadr's rights. Given that Omar Khadr has been detained at Guantanamo since October 2002 and before that was interrogated as a severely wounded 15 year old in Afghanistan, it is doubtful that the Canadian material would really be critical in the case against him.[111]

The Court was also relatively generous in its approach to the review of the executive's exercise of its prerogative powers over foreign relations. Following the rejection of a political questions doctrine in *Operation Dismantle*, the Court stressed that "the executive is not exempt from constitutional scrutiny".[112] In this respect, the Court followed *Operation Dismantle* and affirmed that the courts "are charged with adjudicating the claims of individuals who claim that their *Charter* rights have been or will be violated by the exercise of the government's discretionary powers."[113]

On the merits, the Court in *Khadr II* held that the statements were obtained in violation of the principles of fundamental justice because interrogations of a youth without access to counsel or habeas corpus and subject to indeterminate detention "offends the most basic Canadian standards about the treatment of detained youth suspects."[114] This approach went beyond that taken in *Khadr I* by placing less reliance on findings by American courts that indeterminate detention at Guanantamo without access to habeas corpus violated Common Article III of the Geneva Conventions.

(b) The Court's Approach to the Remedy

The Court overturned the remedy ordered by the trial judge that Canada request the United States to repatriate Omar Khadr to Canada on the basis that such a remedy "gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national inter-

110 *Ibid.* at para. 21.

111 The Court specifically noted that there had been no suggestion that the material gathered by Canadian officials and shared with the U.S. military "does not form part of the case against Mr. Khadr or that it will not be put forward at his ultimate trial." *Ibid.* at para. 30. As discussed above, the government's response to the case was to ask the Americans not to use any of the material that Canadian officials had obtained from Khadr and shared with them.

112 *Ibid.* at para. 36.

113 *Ibid.* at para. 40.

114 *Ibid.* at para. 25.

ests."[115] The Court defended leaving the government "a measure of discretion in deciding how best to respond"[116] to its declaration about the violation of Khadr's rights on the basis of "the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive."[117] As will be seen, the strongest of these reasons relate to concerns about the court's institutional role in matters relating to prerogative and foreign relations powers.

(c) The Reliance on a Declaration

The Court's remedy was a declaration that Omar Khadr's *Charter* rights had been violated in 2003-04 and that the effects of the violation were continuing. There was some precedent for the Court relying on a declaration of a past violation as a remedy. In *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*,[118] the majority of the Court relied on a declaration that ss. 2 and 15 of the *Charter* had been violated by the targeting of imports destined for a gay and lesbian bookstore by custom officials. As in *Khadr II*, the Court in *Little Sisters* expressed concerns about evidential uncertainties in the record given that the violation had occurred six years ago.

On balance, however, *Little Sisters* is distinguishable from *Khadr II*. Unlike in *Khadr II*, the government in *Little Sisters* had told the Court that it had "addressed the institutional and administrative problems encountered by the appellants."[119] In addition, the Court found that Little Sisters had not proposed a viable remedy that was an alternative to the declaration of a past violation. In contrast, the applicants in *Khadr II* had proposed an alternative remedy to the simple declaration of a past violation, namely the repatriation request. This remedy had been ordered by the trial judge and even the Supreme Court acknowledged that it was responsive to the *Charter* violation that it affirmed.

Little Sisters is not cited in *Khadr II*. As with the decision not to hear the Afghan detainee case, one can only speculate on the reasons. One reason might relate to the distinctions between the government's approach in the two cases and the viability of the alternative remedy of a repatriation request in *Khadr II* as discussed above. Another factor might have been Justice Iacobucci's strong and prophetic dissent in *Little Sisters* which stressed the insufficiency of declaratory relief because it was not specific about what was required from the government and it would require the *Charter* applicants to bear the "heavy" and "indeed unfair"[120] burden of starting new litigation should the government not respond appropriately to remedy the past violation. *Little Sisters bookstore* did indeed conclude that new litigation was needed, but this litigation was ended when the Supreme Court subse-

115 *Ibid.* at para. 39.

116 *Ibid.* at para. 3.

117 *Ibid.* at para. 46.

118 2000 CarswellBC 2442, 2000 CarswellBC 2452, [2000] 2 S.C.R. 1120 (S.C.C.).

119 *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44, ¶157 (S.C.C.).

120 *Ibid.* at para. 261.

quently reversed an order granting the small bookstore advance costs to litigate.[121] In many ways, *Little Sisters* is not a good example of an effective or meaningful remedy. Nevertheless, *Little Sisters* remains the most relevant precedent in support of the concept that a declaration of a past violation is an appropriate and just remedy despite findings that the past violation has current effects. In addition, *Little Sisters* is relevant to the extent that the Court may have invited follow-up litigation by indicating that the trial judge's remedy was not appropriate "at this point".[122] As in *Little Sisters*, a requirement of fresh follow-up litigation places a considerable burden on a person who has already established that their *Charter* rights had been violated.

There are other precedents that support the use of declarations as a remedy, but they too are distinguishable. In minority language and other cases, the Court has stressed that declarations give the government flexibility in selecting among "myriad options . . . that may rectify the unconstitutionality of the current system."[123] In such cases, the Court articulated clear goals about what was required to comply with the *Charter*. In contrast, the Court in *Khadr I* did not articulate a clear goal for *Charter* compliance beyond noting that the trial judge's remedy of a repatriation request was sufficiently connected with the breach that it could vindicate the rights violation and hinting that the violation had ongoing effects because information obtained by Canada could be used in Khadr's American prosecution.[124] Moreover, rather than "myriad options" for possible remedies, the Court noted that the government had proposed no alternative remedies to the trial judge.[125] In the end, however, the government did implement an alternative remedy that was less drastic than repatriation. The alternative remedy took the form of a diplomatic note requesting that the United States not use the information obtained by Canada in Khadr's military commission proceedings.[126] This was the minimum possible remedy that responded to the violation as conceived by the Court.

(d) Evidential Uncertainties

The Court in *Khadr II* also sought to justify its reversal of the trial judge's remedy that Canada be required to request Khadr's repatriation by stressing the evidential uncertainty of the record. It stressed that the government conducted foreign affairs "in the context of complex and ever-changing circumstances"[127] and

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121 *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 CarswellBC 78, 2007 CarswellBC 79, [2007] 1 S.C.R. 38 (S.C.C.).

122 *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44, ¶47 (S.C.C.).

123 *Eldridge v. British Columbia (Attorney General)*, 1997 CarswellBC 1939, 1997 CarswellBC 1940, [1997] 3 S.C.R. 624, ¶96 (S.C.C.).

124 *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44, ¶30-31 (S.C.C.).

125 *Ibid.* at para. 38.

126 Minister of Justice Statement Feb 16, 2010 at http://www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc_32482.html.

127 *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44, ¶39 (S.C.C.).

that "[w]e do not know what negotiations may have taken place, or will take place, between the U.S, and Canadian governments over the fate of Mr. Khadr".[128] It also noted that the United States's decision to prosecute Khadr in a military commission "signals caution in the exercise of the Court's remedial jurisdiction."[129]

In *Khadr I*, the Court also noted that "we are acutely aware that the record before us is incomplete."[130] The record in this case will always be incomplete because of the secrecy surrounding American actions at Guantanamo and the military proceedings against Khadr. In *Khadr I* the Court, however, dealt with these uncertainties by remanding the case back to a designated judge of the Federal Court who could hear information including information that the government claims if disclosed would harm national security, national defence and international relations. The Court might have used a similar procedure in *Khadr II* either by retaining jurisdiction itself or remanding the case back to the Federal Court. This might have provided the government with an opportunity to present the Court with any new evidence in the case that was relevant to the repatriation remedy. In the follow on litigation, Zinn J. demonstrated the viability of retaining jurisdiction in order to provide judgments if necessary about the adequacy of remedial actions proposed by the government and if necessary to order an effective remedy.[131] The Supreme Court's refusal to retain jurisdiction seems to be related less to tangible concerns about new evidence or the consequences of a repatriation request, and more to concerns about the limits of the court's role over foreign relations. In this respect, strategic and institutional concerns about interfering with the government's conduct of foreign affairs may have been a common concern in both the remedial decision in *Khadr II* and the decision not to hear the Afghan detainee case.

(e) Concerns about the Efficacy of a Repatriation Request as opposed to Extradition Conditions

Another justification provided by the Court for reversing the trial judge's remedy was a concern about the efficacy of a repatriation request. The Court indicated that unlike in the extradition context where the court does require Canada to request assurances from foreign countries, "Mr. Khadr is not under the control of the Canadian government, the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court."[132] Much of the uncertainty in this case stemmed from not knowing how the United States government would react to a repatriation request. At the same time, however, there is also a possibility that foreign countries will refuse to comply with Canadian requests for assurances that the death penalty will not be applied and in such circumstances, Canada could be left

128 *Ibid.* at para. 44.

129 *Ibid.* at para. 45.

130 *Charkaoui, Re*, 2008 SCC 38, 2008 CarswellNat 1898, 2008 CarswellNat 1899, *(*sub nom. *Charkaoui v. Canada (Minister of Citizenship and Immigration))* [2008] 2 S.C.R. 326, ¶35 (S.C.C.).

131 *Khadr v. Canada (Prime Minister)*, 2010 FC 715, 2010 CarswellNat 1968, 2010 CarswellNat 1969 (F.C.).

132 *Ibid.* at para. 43.

with potentially dangerous fugitives. As suggested by Justice Zinn's subsequent approach, a logical response to concerns about the effectiveness of the repatriation request would have been for the Court to retain jurisdiction to judge the effectiveness of the remedy in light of the American response to any requests by Canada.[133] One is again brought to a conclusion that concerns about the Court's role rather than concerns about the record or remedial effectiveness were the real reason why the Supreme Court overturned the remedy of a repatriation request.

(f) Concerns about the Court's Institutional Role

The Court found that the trial judge had erred by giving too little weight to the executive's responsibility over foreign affairs when ordering the repatriation remedy. Although courts have the power to decide whether the *Charter* has been violated by the exercise of foreign affairs or other prerogative powers and even to make orders that require the government to exercise some prerogative powers in accordance with the *Charter*, such a remedy was not appropriate in the context of this case. The Court stressed that courts should remain sensitive to the fact "that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged."[134] At one level, this statement could be read as consistent with the declaratory jurisprudence cited above because it suggests that the Court was simply giving the government flexibility to select the precise means to comply with the *Charter*. As suggested above, one problem with such an interpretation is that the Court did not clearly articulate what compliance with the *Charter* would require. Indeed, the government initially appeared to have considered doing nothing as a legitimate response to the Court's ruling.[135]

The Court appeared to have fundamental concerns about its remedial compe-

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133 Under the more robust remedial response pursued by Zinn J, in the follow-on litigation in *Khadr v. Canada (Prime Minister)*, 2010 FC 715, 2010 CarswellNat 1968, 2010 CarswellNat 1969 (F.C.), the adverse American response to a Canadian response not to use the Canadian evidence (or by hypothesis a repatriation request) justifies continued judicial involvement until some effective result that ameliorates the *Charter* breach is secured.

134 *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44, ¶37 (S.C.C.).

135 Immediately after the judgment, a spokesperson for the Prime Minister seemed to indicate that the government would not respond to the decision when he stated that: "There's no shift in Canadian policy on this . . . Their ruling said we get to decide and we're saying that Mr. Khadr faces serious charges on a wide range of things." "It's under the American administration's purview right now to pursue with the court case." "Tories Not interested in Khadr's repatriation" Calgary Herald Feb 4, 2010 at http://www.calgaryherald.com/news/Tories+interested+Khadr+repatriation/2521076/story.html. In *Khadr v. Canada*, 2010 F.C. 715 at paras. 36–39, Justice Zinn characterized this original statement, as well as a similar statement made by the Minister of Foreign Affairs, as governmental decisions, and held that Mr. Khadr was entitled to procedural fairness before the decisions were made. Justice Zinn concluded that "the option of doing nothing was not an option that was legally available to Canada, given the declaration of the Supreme Court . . ." *Ibid.* at para. 70. This may be so, but

tence in the foreign affairs context. To this end, the Court cited the *Reference re Secession of Quebec*[136] which established the proposition that the political actors rather than the courts would determine what compliance with the constitution would require. In both cases, the Court seemed content to provide "the legal framework" for negotiations, while allowing the political actors to determine what was necessary to ensure compliance with the legal principles. In my view, it is problematic to rely on the *Secession Reference* case in *Khadr II* because while the political actors can be relied upon to determine the appropriate enforcement of constitutional principles and conventions in a mega political context, political actors cannot be relied upon in a case involving violations of the *Charter* rights of a very unpopular person such as Omar Khadr. In addition, the Court's rejection of a political question in *Operation Dismantle Inc. v. R.*[137] was tied not only to the importance of adjudicating rights, but also devising effective remedies. That said, it must be recognized the government's diplomatic note asking that the United States not use the information did provide a minimal remedy that was responsive to the violation found by the Court in the case. This remedy responded to the Court's conclusion that the violation was ongoing in part because the United States had not indicated that it would not use the Canadian material as evidence.[138] In this sense, the Court's expectation that the government would implement some remedy worked in this case. Nevertheless, it is unclear what would have happened had the government maintained its initial stance that the Court's decision did not require the government to take any action.

The idea that the Court was declaring fundamental limits on its remedial powers is also supported by its conclusion that given the nature of foreign affairs "it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights."[139] These statements raise the disturbing possibility that the Court has concluded that some judicial remedies that dictate the exercise of foreign affairs prerogative powers are permanently out of bounds. Such a conclusion would mean that follow-up litigation would likely not be effective because the Court would again face limits on its remedial powers and could only again make declarations about the violation. It would also result in a mini political questions doctrine precluding remedies that directly interfere with the government's diplomatic representations. A political question exists when "a question that arises in litigation and which by express or implied constitutional principle is excluded from judicial determination and is left for resolu-

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the Supreme Court itself would not have been able to require the government to provide some remedy because it did not retain jurisdiction over the case.

136 1998 CarswellNat 1300, 1998 CarswellNat 1299, [1998] 2 S.C.R. 217 (S.C.C.).

137 1985 CarswellNat 151, 1985 CarswellNat 664, [1985] 1 S.C.R. 441 (S.C.C.) at para. 63 per Wilson J. See Errol Mendes "Dismantling the Clash Between the Prerogative Power and the *Charter* on *Prime Minister of Canada et al. v. Omar Khadr*" (2010) 26 N.J.C.L. 67 at 76.

138 *Khadr v. Canada (Prime Minister)*, *supra* note 134 at para. 30.

139 *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44, ¶44 (S.C.C.).

tion to other organs of government."[140] The Court in *Khadr II* seems to be articulating a principle that leaves the determination of remedies that require diplomatic representations to be made by the government to the government. Such a principle could affect other cases and limit the court's remedial options in cases involving *Charter* violations by the government in providing consular and other services that require government-to-government diplomacy. Having rejected the political questions doctrine as a means to preclude the litigation of *Charter* rights, the Court may be using something quite close to that doctrine to preclude certain remedies.

The dissenting judge in the Federal Court of Appeal, Nadon J.A., was more blunt than the Supreme Court when he concluded that the trial judge had exceeded his remedial powers:

> Ordering Canada to request the repatriation of Mr. Khadr constitutes, in my view, a direct interference into Canada's conduct of its foreign affairs. It is clear that Canada has decided not to seek Mr. Khadr's repatriation at the present time. Why Canada has taken that position is, in my respectful view, not for us to criticize or inquire into. Whether Canada should seek Mr. Khadr's repatriation at the present is a matter best left to the Executive. In other words, how Canada should conduct its foreign affairs, including the management of its relationship with the US and the determination of the means by which it should advance its position in regard to the protection of Canada's national interest and its fight against terrorism, should be left to the judgment of those who have been entrusted by the democratic process to manage these matters on behalf of the Canadian people.[141]

Although the Supreme Court was careful not to couch its conclusions in such categorical terms and concluded that the trial judge's remedy was not appropriate "at this point,"[142] the logic of its conclusions about the court's limited competence in the foreign affairs context and in particular its reliance on the *Quebec Secession* reference suggests that courts should not interfere with the government's diplomatic representations on behalf of Khadr and probably all other Canadian citizens.

(g) The Follow-On Litigation and the Fate of a Partial Remedial Political Questions Doctrine

In follow-on litigation, Zinn J. has asserted that judges, as opposed to the political actors, will determine the adequacy of the remedy provided by Canada and that courts can order Canada to make a repatriation request if that is the only effec-

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140 Geoff Cowper Q.C. and Lorne Sossin "Does Canada Need a Political Questions Doctrine?" (2002), 16 S.C.L.R. (2d) 343 at 344.

141 *Khadr v. Canada (Prime Minister)*, 2009 FCA 246, 2009 CarswellNat 2364, 2009 CarswellNat 2699, ¶106 (F.C.A.); leave to appeal allowed 2009 CarswellNat 2602, 2009 CarswellNat 2603 (S.C.C.); reversed in part 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44 (S.C.C.). See also the judgment of Blais C.J. in granting a stay pending appeal in *Khadr v. Canada (Prime Minister)*, 2010 CarswellNat 3554, 2010 CarswellNat 2482 (F.C.A.) for a similar approach that stresses that courts should not have the power to supervise or dictate diplomatic representations made by the government.

142 *Khadr v. Canada (Prime Minister)*, *supra* note 134 at para. 47.

tive remedy available. Justice Zinn held that the government's response to the Supreme Court's ruling was subject to judicial review and that the government had treated Omar Khadr unfairly by not providing him with notice of what remedy short of a repatriation request it proposed and an opportunity to make written submissions about the adequacy of the remedy. Justice Zinn rejected the government's arguments "that Canada's Response is not justiciable because it was a decision of the executive, on broad grounds of public and foreign policy, taken in the exercise of the royal prerogative in that it affected foreign relations."[143] He stressed that the government's decision to issue a diplomatic note requesting the United States not to use the Canadian evidence was justiciable because Omar Khadr's s. 7 rights were affected, and he distinguished cases which refused to review legislative decisions affecting many people from the government's decision in this case that "impacted only one citizen, Omar Khadr."[144]

Although he devised a process that opened up the possibility of other effective remedies being devised, Justice Zinn indicated that the remedy of requiring the government to make a repatriation request could still be ordered if it was the only effective remedy.

> The fact that the one remedy available falls within the scope of the government's prerogative power does not prevent the court from fashioning a remedy. As the Supreme Court stated in *Khadr II* at para. 37: "courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution." If the *Charter*, as a part of Canada's constitution, requires an action to be taken, and it does in the present circumstances, and if that action requires the exercise of the royal prerogative, then this Court is not only empowered to order it, this Court is required to order that it be done.[145]

Justice Zinn then provided the government a limited time to propose some alternative remedy while also retaining jurisdiction and reserving the right to determine the adequacy of any remedy and to impose an effective remedy.[146] This is a commendable approach that relies on the rejection of a political questions doctrine in *Operation Dismantle* and the mandate given to superior courts under s. 24(1) to ensure appropriate and effective remedies.

The government has appealed Justice Zinn's ruling and secured a stay of the decision pending appeal. On the stay decision, Blais C.J. expressed deep scepticism that judge had the power to supervise the government's diplomatic responses or order a repatriation remedy in light of the Supreme Court's decision in *Khadr II*. Chief Justice Blais concluded that "for a member of the judiciary to give himself the power to 'supervise' the exercise of the Crown's prerogative in a context where the Supreme Court [in *Khadr II*] has recognized its limited role could be seen, in itself, as an affront to the division of powers that would cause irreparable harm. This is especially so when we consider that any action that could possibly cure the

143 *Khadr v. Canada (Prime Minister)*, 2010 FC 715, 2010 CarswellNat 1968, 2010 CarswellNat 1969, ¶57 (F.C.).

144 *Ibid.* at para. 56.

145 *Ibid.* at para. 91.

146 *Ibid.* at para. 36.

Charter breach would require the Appellants to take some kind of diplomatic action."[147] Although not a full ruling on the merits of the appeal, Chief Justice Blais' approach is consistent with the idea that there is a partial political question doctrine that precludes courts from ordering any remedy that requires the government to make diplomatic representations. There is a stark contrast between Justice Zinn's conclusion that a court could, if necessary, order Canada to make diplomatic representations as a *Charter* remedy and Chief Justice Blais's decision that such orders are beyond judicial powers.

(h) Can the Remedy in Khadr II be Justified in Bickelian Terms?

Can the remedial approach taken by the Supreme Court in *Khadr II* be seen as following the cautious remedial approach taken in *Brown II*[148] and praised by Bickel? The Court's decision in the second *Khadr* case is Bickelian in the sense that it is build on the premise that the determination of rights violations and remedies for those violations are two very distinct parts of the judicial process and are governed by different intellectual considerations. The separation of rights and remedies, however, illuminates a tension appreciated by Bickel. The tension is that courts can only hope to justify their participation in a democracy by relying on the distinct attributes that are not found in the elected branches of government. One of the long recognized and distinct attributes of courts is their ability to see through rights violations by providing aggrieved and perhaps unpopular individuals with meaningful remedies.

At a rhetorical level, *Khadr II* and *Brown II* share a common ambiguity. As Bickel noted, the United States Supreme Court used a "most elusive phrase"[149] when it remanded *Brown* back to the lower courts to desegregate schools "with all deliberate speed." A similar ambiguity is found in statements about "leaving the government a measure of discretion in deciding how best to respond"[150] and that "the prudent course at this point respectful of the responsibilities of the executive and the courts" was simply to issue a declaration about the past violation.[151] Both remedial approaches are fundamentally and it would seem, deliberately, ambiguous.

Nevertheless, the analogy between the remedial approach taken in *Brown II* and *Khadr II* breaks down. One important distinction is that the American Court in *Brown II*, much like the Canadian Court in *Khadr I*, remanded the case back to the lower courts as a means of dealing with evidentiary uncertainties, a dynamic record, and as a means to allow the government to consider its options. In contrast, the Court's declaration in *Khadr II* ended the case. Another difference is that the court in *Brown II* did not base its remedial posture on concerns about the limits of the competence or role of the judiciary whereas the Court's remedy in *Khadr II* was

147 *Khadr v. Canada (Prime Minister)*, 2010 CarswellNat 3554, 2010 CarswellNat 2482, ¶19, Blais C.J. (F.C.A.); see also paras. 14 and 32.

148 (1955), 349 U.S. 294 (U.S. S.C.).

149 Bickel, *The Least Dangerous Branch*, *supra* note 12 at 253.

150 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, [2010] 1 S.C.R. 44, ¶3 (S.C.C.).

151 *Ibid.* at para. 47.

ultimately tied to concerns about its limited institutional role in foreign affairs. Indeed, *Brown II* started a process that saw courts push the limits of their institutional competence by ordering complex school desegregation remedies. In contrast, the Supreme Court in *Khadr II* seemed to express more or less permanent reservations about judicial interference in diplomacy. In follow-on litigation, however, Justice Zinn has interpreted the Supreme Court's decision as something akin to *Brown II*. Consistent with that case, as well as *Doucet-Boudreau v. Nova Scotia (Department of Education)*,[152] he required the government to propose an alternative remedy and then allowed Khadr to comment on the adequacy of the remedy while retaining jurisdiction to decide on the adequacy of any proposed remedy and, if necessary, to issue an effective remedy. Unlike the Supreme Court in *Khadr II*, Justice Zinn emphasized that courts could and should order Canada to make a repatriation request if that was the only effective remedy.

Although Justice Zinn's robust remedial approach can be defended as one justified by the need for an effective remedy, it is in tension with some dicta issued by the Supreme Court in *Khadr II*, a tension revealed by Chief Justice Blais' decision to stay Justice Zinn's judgment pending its appeal by the Federal Court.[153] It will be recalled that the Supreme Court was concerned that the trial judge's repatriation remedy might interfere with Canada's conduct of foreign affairs including a balance between seeking justice for aggrieved individuals and "Canada's broader national interests".[154] This statement suggests that the Supreme Court may have recognized a restraint on remedial powers that would not have been foreign to Bickel's understanding of political questions as opposed to remedies. In other words, Bickel might have approved of a decision to reverse the repatriation remedy on the basis that the timing and content of diplomatic representations was a non-justiciable political question that should be left to the elected branches to decide, free from judicial interference. Such a justification for the Court's approach to remedy, however, sits very uneasily with the Court's decision on the merits in *Khadr II* to follow *Operation Dismantle* and find that the government had violated Khadr's rights by interviewing him at Guantanamo.

A partial political questions doctrine that does not preclude the courts from deciding rights violations but precludes them from issuing remedies is difficult to defend. The whole point of a political question doctrine as a passive virtue is that the courts make no decision. Although Bickel accepted that remedies would not always follow automatically or quickly from rights violations, he believed that remedies were an essential part of the distinct judicial function. The court did not have the option of being a "collective poet laurate"[155] that simply declared rights and did

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152 2003 CarswellNS 375, 2003 CarswellNS 376, [2003] 3 S.C.R. 3 (S.C.C.).

153 In deciding that the judgment would cause irreparable harm to the government's interest in its prerogative over diplomatic representations and a stay should issue, Chief Justice Blais stated "I am not at all convinced that Justice Zinn does effectively have the power 'to impose a remedy'" *Khadr v. Canada (Prime Minister)*, 2010 CarswellNat 3554, 2010 CarswellNat 2482, ¶14, Blais C.J. (F.C.A.).

154 *Ibid.* at para. 39.

155 Bickel *The Least Dangerous Branch*, *supra* note 12 at 246.

not devise remedies.[156] A court that acted in such a fashion would risk its legitimacy by not acting as a court. In the end, Bickel believed that courts could only justify their role in a democracy by capitalizing on their distinct attributes as courts, including the court's commitment to justify its decisions on the basis of principle and to ensure effective remedies for rights violation. The more robust remedial response of Justice Zinn is more consistent with Bickel and *Brown II* than the Supreme Court's more deferential approach in allowing the government to decide how to respond to the declaration without retaining jurisdiction over the case.

5. CONCLUSION

The increased role of the Supreme Court in Canadian society and the challenges of discharging that role are well demonstrated by the Court's recent decisions not to decide the Afghan detainee cases and its decision in the Omar Khadr cases. These two cases suggest that *Charter* litigation has permeated deep into the way that Canada conducts its foreign, military and security affairs.

As Bickel counselled, it is important to study both what the Court decides and what it does not decide. Moreover, decisions not to decide may be governed by less transparent and less principled reasons than are found in the Court's actual judgments. In the Afghan detainee case, the Supreme Court declined to decide whether the Federal Court was correct in holding that the *Charter* would not apply even if Canadian officials transferred detainees to face a substantial risk of torture. In the *Khadr II* case, the Court decided that while Khadr's rights were violated and the effects of those violations were continuing, the trial judge had erred in ordering Canada to request his repatriation. The Court suggested that the content and adequacy of the remedy should be left to the government to decide in the exercise of its prerogative powers over foreign relations.

The Court's decisions in both matters may have been influenced by concerns about the need for caution and prudence in the exercise of judicial powers that were articulated by Bickel in his important work on judicial review. The Court, of course, gave no reasons for not hearing the Afghan detainee case. In *Khadr II*, however, it concluded in a likely nod to Bickel that "the prudent course at this point" was only to issue a declaration. It is possible that Bickel might have concluded that both of the Court's decisions were appropriate largely on the basis that courts should avoid deciding political questions associated with foreign and military affairs. Nevertheless, given that the Court has rejected and continues to reject an American-style political questions doctrine, there are reasons to be uneasy about both the Afghan detainee and *Khadr II* cases.

Bickel defended the passive virtues of not deciding a case on the basis that issues of principle would ripen or sometimes become moot in the political process.

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156 Blackstone recognized that "it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress." Blackstone *Commentaries* 14th ed (London: A. Strachan, 1803) Book 3 Ch. 7. The Court in other remedial contexts has, however, recognized some departures from the Blackstonian ideal of fully retroactive remedies. *Hislop v. Canada (Attorney General)*, 2007 CarswellOnt 1049, 2007 CarswellOnt 1050, [2007] 1 S.C.R. 429, ¶85ff (S.C.C.).

In the Afghan detainee case, however, there are reasons to be concerned about whether possible Canadian complicity in torture will be further refined in a political process given governmental claims of secrecy about the Afghan detentions and the limits of Parliamentary and other forms of review. At the same time, Bickel might have been uneasy about the Court ducking the stark issue of principle concerning torture and leaving undisturbed a Federal Court decision that declared that the *Charter* would not apply even if Canadian officials transferred the Afghan detainees to face a substantial risk of torture.

Although Bickel accepted that some constitutional remedies such as those sanctioned under *Brown II* could be tempered by strategic and prudential considerations, he would also have been uneasy about those parts of *Khadr II* which suggest that courts lack power to order remedies that affect Canada's exercise of foreign relations. The idea that the political question doctrine should be rejected when deciding whether rights have been violated, but that it can re-emerge at the remedial stage is incoherent and unstable. Justice Zinn's more robust remedial approach in the follow-on litigation recognizes that while courts can allow some degree of delay and expediency to affect remedies, they must ensure effective remedies if they are to maintain the distinct and legitimate role of the judiciary in a democracy.

Regardless of what Bickel might have thought about the Court's handling of the Afghan detainee and Khadr cases, the Supreme Court's decisions in them illustrate some shortcomings in his theory. Bickel advocated the use of the passive virtues in large part because of his explicit faith that the Court's refusal to make a decision on the merits would not legitimize the status quo and his implicit faith that issues of principle would eventually become ripe enough to be litigated. Both of these assumptions can be questioned in the context of the Afghan detainee case. The Supreme Court left in place a restrictive precedent that held that the *Charter* would not apply even if Canadian transfers of detainees resulted in a substantial risk of torture. As such, there is a real risk that possible Canadian complicity in torture will never be determined in court even though it raises what Bickel and others would surely recognize as a matter of principle.

It is doubtful that the issue of possible Canadian complicity in torture will be determined outside of court given the difficulties that Parliament and the Military Police Complaints Commission continue to encounter in investigating the matter and the government's refusal to appoint a public inquiry. The Afghan detainee case suggests that Bickel's theory of the passive virtues may have presumed the existence of a healthy and open domestic political system that would eventually ensure that issues of principles rise to the fore. Such presumptions, however, are dubious in transnational national security and foreign policy contexts where government secrecy and the absence of effective review may mean that issues of principle never crystallize in a manner that facilitates judicial review.

Bickel's theory is also based on the questionable premise that courts can confine strategic and expedient decision-making only to its decisions not to decide. Once strategic considerations are accepted in one part of the judicial process, they may migrate into other parts of judicial work. Bickel himself accepted that strategic considerations could influence remedies as well as decisions not to decide. He limited the role of strategy in remedial decision-making, however, and stressed that courts should not accept remedial compromises that would abandon principle. The Court's reliance on a declaration of a past violation in *Khadr II* may have been

motivated by Bickelian prudence, but is not clear what the Supreme Court would have done had the government ignored or flouted its decision. There is a danger that the Court's use of prudence when it is confronted with politically sensitive questions will diminish what Bickel and others see as the distinct role of independent courts in protecting principles, rights and the rule of law in our democratic system of governance. Courts that do not follow through on remedies for aggrieved individuals risk undermining their distinct role in our system of constitutional democracy. Courts will lose their credibility if they are seen as just another advisory body.

Fortunately, Omar Khadr's lawyers demonstrated remarkable persistence and started fresh follow-on litigation. Justice Zinn found that the government treated Khadr unfairly by not allowing him to make written submissions before they requested that the Americans not use the Canadian evidence, and that this remedy was ineffective. He stressed the need for effective and expeditious remedies and the need to respect the *Charter* even with respect to prerogative matters of diplomatic representations. He indicated that he would restore the trial judge's remedy of ordering Canada to request Khadr's repatriation, if that was the only effective remedy. The government has, however, obtained a stay of this judgment pending appeal on the basis of dicta in the Supreme Court's decision that seem to suggest that courts should not dictate Canada's diplomatic requests. In his stay judgment, Chief Justice Blais suggested that courts lack the power to order remedies that require the government to make diplomatic representations. This appeal is likely moot given Omar Khadr's decision to plead guilty in his American military commission proceedings. The important dispute over whether courts can require the government to make diplomatic representations as a *Charter* remedy, like the issue of principle about the constitutionality of transferring the Afghan detainees to torture, may now not be resolved in the foreseeable future. The ambiguities about torture and the extent of remedial powers created by the Court's decision not to hear the Afghan detainee case and its overturning of the remedy that Canada request Omar Khadr's repatriation is unfortunate in a world where Canada has been complicit in torture and may need to be required by courts to make diplomatic representations in order to prevent torture and other violations of the *Charter*.