Failing to Walk the Rights Talk? Post-9/11 Security Policy and the Supreme Court of Canada

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This article explores the Supreme Court of Canada's record in dealing with a range of security policies implicating the Charter of Rights *in the post-9/11 era, including deportation to torture, the use of security certificates and investigative hearings, and the Canadian government's obligations to Omar Khadr, the sole Canadian citizen held at Guantanamo Bay, Cuba. The article demonstrates that the decisions are marked by a mix of judicial deference and judicial minimalism, each of which has important policy implications. The article concludes that the Court's record in balancing* Charter *rights with security objectives is mixed. The Court has, for the most part, adopted a posture of restraint that safeguards rights in a prudent manner. In certain instances, however, the Court's reasoning fails to live up to its rhetoric in support of rights. When the justices adopt a minimalist posture, rights failures may result from making compromises that weaken the* Charter's *scope. When the justices adopt a deferential posture, rights failures may result from justifications for deference that make little institutional sense. These considerations have important implications for the protection of* Charter *rights.*

Dans cet article l'auteur examine le dossier de la Cour suprême du Canada en matière de politiques sur la sécurité et la charte des droits et libertés *dans les années suivant le 11 septembre 2001, y compris l'expulsion et la torture, l'utilisation de certificats de sécurité et les audiences d'investigation, ainsi que les obligations du gouvernement canadien envers Omar Khadr, le seul citoyen canadien détenu à Guantanamo Bay, à Cuba. L'auteur démontre que les décisions sont caractérisées par un minimalisme et une retenue judiciaires, tous deux ayant des incidences importantes sur les politiques. Il conclut que la Cour suprême a équilibré les droits garantis par la* Charte *et les objectifs de sécurité de façon inégale. En général, la cour a adopté une position de retenue qui protège prudemment les droits. Dans certains cas, cependant, le raisonnement de la cour n'est pas à la hauteur de sa rhétorique à l'appui des droits. Lorsque les juges adoptent une position minimaliste, des manquements au niveau des droits peuvent résulter de compromis qui affaiblissent la portée de la* Charte. *Lorsque les juges adoptent une position de déférence, des manquements au niveau des droits peuvent résulter des justifications de la déférence qui n'ont pas beaucoup de sens sur le plan institutionnel. Ces considérations ont des implications importantes quant à la protection des droits garantis par la* Charte.

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Introduction

One of the most fundamental challenges facing liberal democracies in the aftermath of the September 11, 2001 terror attacks in the United States has been to balance the design and implementation of effective national security policies with the protection of individual rights. In Canada, courts are central players in weighing the federal government's security policies against the perceived demands of the *Charter of Rights and Freedoms*. One of the principal concerns among rights proponents is that the 9/11 context has encouraged undue judicial deference to executive and legislative anti-terrorism or security objectives. Chief Justice Beverley McLachlin acknowledged the considerable challenge faced by the Supreme Court in this regard shortly after the attacks, but noted the necessity of remaining vigilant in protecting civil liberties.[1]

In the decade since 9/11, the Supreme Court of Canada has ruled not only on the constitutionality of provisions in the country's anti-terrorism and immigration legislation, but also on foreign affairs decisions that are considered a matter of executive prerogative. Critics contend that the Court's post-9/11 jurisprudence on these issues has been overly cautious and, even more critically, that certain cases represent an abdication of the Court's responsibility to uphold *Charter* rights. Although the Court makes strong rhetorical statements on the *Charter* rights implicated by security policies challenged in these cases, scholars have expressed concern that the decisions remain generally deferential or fail to impose meaningful remedies on government when rights are infringed.[2]

After exploring the Court's major security policy cases, this article examines two important institutional factors that help shed light on the Court's cautious approach. First, norms of consensus on the Court suggest that in highly salient cases such as these the justices will attempt to reach unanim-

1 Cristin Schmitz, "Chief Justice McLachlin Discusses Terrorism, Liberty, Live Webcasting of Appeals" (2002) 21:33 The Lawyers Weekly.

2 James Stribopoulous, "Charkaoui: Beyond Anti-Terrorism, Procedural Fairness and Section 7 of the Charter" (2007) 16 Const Forum Const 15 [Stribopoulous]; Audrey Macklin, *The Canadian Security Certificate Regime: CEPS Special Report* (Brussels: Centre for European Policy Studies, 2009) [Macklin]; Lorna McGregor, "Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of Khadr v Canada" (2010) 10:3 Human Rights Law Review 487 [McGregor]; Kent Roach, "'The Supreme Court at the Bar of Politics': The Afghan Detainee and Omar Khadr Cases" (2010) 28 NJCL 115 [Roach]; Sonja Grover, "The Supreme Court of Canada's Declining of its Jurisdiction in Not Ordering the Repatriation of a Canadian Guantanamo Detainee: Implications of the Case for Our Understanding of International Humanitarian Law" (2011) 15:3 Int'l JHR 481 [Grover]; David Rangaviz, "Dangerous Deference: The Supreme Court of Canada in Canada v. Khadr" (2011) 46 Harv CR-CLL Rev 253 [Rangaviz].

ity. Indeed, the most prominent and important cases—such as those relating to the government's security certificates regime and those involving the fate of Omar Khadr, the Canadian citizen held by the United States at the Guantanamo Bay detention facility—have resulted in unanimous decisions. Efforts by the justices to achieve consensus in highly visible or controversial cases has important implications for the scope and impact of the Court's reasons. Unanimity produces a moderating effect on any remedies imposed by the Court and a tendency to engender judicial minimalism, which is distinct from straightforward judicial deference. Judicial minimalism is marked by an effort to decide cases on narrow grounds and to avoid clear rules and final resolutions. Unlike judicial deference, however, minimalism is not premised on a belief that the Court should try to avoid intruding on or interfering with the policies of the legislative or executive branches. A minimalist decision can invalidate laws or involve the Court in policy-making. While both deference and minimalism are conceptually related, the distinction between the two is a significant one and helps to explain much of the Court's approach to security issues in the post-9/11 period.

Second, the national security context encourages the justices to pay explicit attention to their role, the role of the Court, and the Court's relationship with the executive and legislative branches of government. In the context of the Khadr cases, this attention to the limits of the judicial role promotes marked deference to government decision-making, particularly the executive's prerogative over foreign affairs. While the explicit attention paid by the justices to their institutional role responsibilities is a welcome development, I argue the Court's approach—particularly in the 2010 Khadr case—is representative of a wider misreading by the Court of its appropriate limits under the *Charter*. This misreading results in a justification for deference premised on questionable logic.

The final section of the article examines the Court's record in balancing *Charter* rights with security policy and concludes that it is mixed. The minimalism and deference the justices have advanced in assessing government policy objectives only ensure that *Charter* rights are sufficiently protected when they are premised on fundamentally sound institutional logic. Thus for the most part the Court has adopted a posture of restraint that safeguards rights in a prudent manner. In certain instances, however, the Court's reasoning fails to live up to its rhetoric in support of rights. If the justices adopt a minimalist posture, rights failures may result from making compromises that weaken the *Charter*'s scope. If the justices adopt a deferential posture, rights failures may result from justifications for deference that make little institu-

tional sense. These considerations have important implications for the protection the *Charter* ultimately affords rights and for the Court's understanding of its own role.

Post-9/11 Security Cases: A Tale of Deference?

The Supreme Court's post-9/11 track record on *Charter* cases implicating security issues is widely regarded as a tale of judicial deference to the policy objectives of Parliament and the executive. While deference is indeed a major factor in many of the cases, the decisions are also marked by judicial minimalism. It is important to distinguish between deference and minimalism. When the Court is deferential, it leaves certain issues or types of decisions in the hands of the executive or legislative branches, usually on the basis of their differing institutional capacities or on the idea that there are legitimate competing values or complex policy choices at stake whose resolution are best left to the realm of democratic politics. By contrast, judicial minimalism, as elaborated by Cass Sunstein, is marked by rulings that focus only on those issues necessary to resolve the particular case at hand, avoiding clear rules and final resolutions where possible.[3]

These concepts are by no means mutually exclusive. In fact, both deference and minimalism often stem from judicial recognition of the institutional limitations of court policy-making. Nevertheless, the distinction has important practical implications. A deferential court makes a determination that the executive or legislature is due a certain discretion or flexibility to make policy decisions. In the *Charter* context, this may mean a more flexible approach to determining the reasonableness of policies that infringe rights or less restrictive (weaker) judicial remedies in response to those infringements. By contrast, a court practicing judicial minimalism limits or restrains the breadth and depth of its own decision (avoiding rulings that apply to a wide set of circumstances and favouring vague, rather than specific, statements on issues of basic principle) but will still not shy away from invalidating legislation or rul-

3 Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999) at ix. Sunstein's ideas about minimalism are widely persuasive, although there is much debate about the empirical basis for minimalism (whether it can be regarded as a full-fledged theory of judicial decision-making) and its normative desirability (whether judges should be minimalist). See also Cass R Sunstein, "Beyond Judicial Minimalism" (2007) 43 Tulsa Law Review 825; Neil S Siegel, "A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar" (2005) 105 Mich L Rev 1951; Robert Anderson IV, "Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court" (2009) 32 Harv JL & Pub Pol'y 1045; Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011) for a comparative look at post-9/11 security initiatives.

ing against government policy choices when it sees fit. This section provides an overview of the major security cases and demonstrates that the Court's record is characterized by a mix of deference and minimalism. The remainder of the article will focus on explaining this record and its implications.

Four months after 9/11 the Supreme Court released its unanimous decision in *Suresh v Canada*, ruling that deporting suspected terrorists to countries where they face torture would, in most instances, violate the right to life, liberty and security of the person under section 7 of the *Charter*.[4] Despite this central finding, *Suresh* is widely criticized as an example of judicial timidity in the immediate aftermath of the 9/11 attacks.[5] Two facets of the Court's decision stand out. First, the Court articulated a broadly deferential approach to ministerial determinations of whether a deportee faced a substantial risk of torture. The decision outlines several factors to justify this deference. It notes that Parliament intended a limited right of appeal of a ministerial decision that a refugee constitutes a danger to Canada. The justices also note the "relative expertise" of the minister in making such determinations and in balancing national security against the principle of non-refoulement. The decision points to the "highly fact-based and contextual" nature of the case and the absence of clearly defined legal rules as a reason to support a deferential approach.[6] Finally, in defending this deferential standard of ministerial review, the judgment quotes approvingly from Lord Hoffman of the UK House of Lords:

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. *This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security.*[7]

This is a rather striking indication that the post-9/11 context weighed heavily on both the justices' reasoning and their contemplation of respective institutional roles.

4 *Suresh v Canada*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*].

5 Stribopoulous, *supra* note 2 at 15; Macklin, *supra* note 2 at 4; Kent Roach, "The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law" (2008) 24 Windsor Rev Legal Soc Issues 5 at 43–4.

6 *Suresh*, *supra* note 4 at paras 29–31.

7 *Ibid* at para 33, citing *Secretary of State for the Home Department v Rehman*, [2001] 3 WLR 877 (HL) at para 62 (postscript) [emphasis added by the Court].

Second, the justices took the controversial stand that there may be "exceptional circumstances" where deportation to face torture may be justified as a result of either the balancing process under section 7 or the reasonable limits under section 1.[8] This caveat received international criticism and, as Kent Roach notes, if contemplated in practice would place Canada in clear breach of its international law obligations.[9] Indeed, the justices' suggestion that such an exception might exist flies in the face of their own acknowledgement just three paragraphs earlier that "international law rejects deportation to torture, even where national security interests are at stake."[10] Notably, the decision fails to outline what circumstances could present themselves for the Court to theoretically contemplate invoking an exception, aside from a vague reference to the conditions under which a section 7 violation might be saved under section 1, which might include "natural disasters, the outbreak of war, epidemics and the like."[11] The Court's refusal to completely rule out the possibility that the *Charter* would permit deportation to torture and its refusal to provide guidelines on when such exceptions might be considered is a hallmark of minimalism.

The Court dealt for the first time with provisions in the federal government's *Anti-Terrorism Act*,[12] enacted in response to 9/11, in the 2004 case *Application under s. 83.28 of the Criminal Code (Re)*.[13] A majority of the Court upheld the constitutionality of investigative hearings, which give judges, upon an application from a peace officer, the power to compel a person who has information about a terrorism offense to appear before them and answer questions. The judges agreed that safeguards established by the legislation, specifically use and derivative use immunity protections, preserved the right against self-incrimination, though they extended those protections to immigration and extradition proceedings.[14] Under the Act, investigative hearings, along

8 *Ibid* at para 78.

9 Kent Roach, "National Security and the Charter" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 160 [Roach II].

10 *Suresh*, supra note 4 at para 75.

11 *Ibid* at para 78.

12 *Anti-terrorism Act*, RSC 2001, c 41.

13 *Application under s 83.28 of the Criminal Code (Re), 2004 SCC 42*, [2004] 2 SCR 248 [*Application under s 83.28*].

14 *Ibid*. In dissent, Justices LeBel and Fish argued that the provisions were unconstitutional on the grounds they violated the principle of judicial independence by involving the courts in police investigations, matters properly under the purview of the executive. Justice Binnie, with Justices LeBel and Fish concurring, also dissented on the basis that the Crown's resort to the provisions in the particular case at hand was for an inappropriate purpose at paras 179–80.

with preventative arrests, were subject to a sunset provision and expired in 2007.[15]

The 2007 *Charkaoui v Canada (Citizenship and Immigration)* case marked the first time the Court invalidated significant security-related legislative provisions in the post-9/11 period.[16] The unanimous decision, written by Chief Justice McLachlin, dealt with the security certificates regime in the *Immigration and Refugee Protection Act* (*IRPA*),[17] under which a foreign national or permanent resident can be declared inadmissible to Canada and detained pending deportation. The Court found two aspects of the certificates regime unconstitutional. First, the secrecy required by the regime prevented disclosure of evidence and information to detainees. Despite provisions ensuring the designated judge has the power to make assessments about the evidence, detainees are prevented from knowing the case against them (or challenging it), thus impairing their right to a fair hearing under section 7.[18] The Court invalidated the relevant provisions, giving Parliament a year to craft new ones to satisfy the *Charter*. Second, the legislation mandated judicial review for foreign nationals up to 120 days after a certificate is confirmed. By contrast, detainees with permanent resident status obtain review after 48 hours. Given this, the Court ruled that the foreign nationals' right against arbitrary detention was violated.[19] In a subsequent case the following year, the Court ruled that the Canadian Security Intelligence Service (CSIS) was required to retain and disclose all evidence it had gathered relating to those detained under the certificate regime to the minister, the designated judge and, subject to the limits examined in the 2007 case, the detainee.[20]

Commentators are divided on whether the 2007 *Charkaoui* case represents a non-deferential stance by the Court. James Stribopoulous contends that *Charkaoui* marks the end of "the government's honeymoon before the Supreme Court in anti-terrorism cases."[21] Stribopoulous is critical of certain aspects of the decision, noting that the Court does a poor job of distinguishing the decision from an earlier case where it had upheld a previous certificate

15 The Conservative government has made repeated attempts to re-instate the provisions. The most recent attempt, Bill C-17, was introduced in Parliament in April, 2010, but failed to reach the third reading stage prior to the 2011 Federal election.

16 *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*].

17 *Immigration and Refugee Protection Act*, RSC 2001, c 27.

18 *Charkaoui*, *supra* note 16 at paras 64–65.

19 *Ibid* at paras 91–94.

20 *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 SCR 326 [*Charkaoui II*].

21 Stribopoulous, *supra* note 2 at 15.

regime,[22] and that it fails to provide guidelines on the constitutional threshold for disclosure rules and the opportunity of an accused to be heard.[23] While in his view the Court failed to provide a sufficiently coherent account of what the *Charter* demands in terms of due process, Stribopoulous correctly notes that the Court's prior section 7 jurisprudence gave it wide flexibility for choosing a more deferential path, one it opted to avoid.[24]

By contrast, Audrey Macklin describes the Court's approach in *Charkaoui* as "feeble," pointing out that the ruling does little to address the prospects of indefinite detention of those subject to certificates when deportation is impermissible due to a substantial risk of torture.[25] Although the decision acknowledges the importance of ongoing judicial review, it fails to set standards for when a prolonged detention under the regime constitutes cruel and unusual punishment. Instead, McLachlin's opinion refers "obliquely to the 'possibility of a judge concluding at some point'" that a particular detention no longer satisfies *Charter* safeguards.[26]

Roach notes the Court's "deferential" remedy of delaying the declaration of invalidity for one year to enable Parliament to craft an appropriate policy response that provides detainees a means of challenging the protected evidence or information against them.[27] Roach also criticizes the Court's formalistic approach to the question of whether the certificates regime violates the equality rights of non-citizens. The Court rejected such arguments by noting that the mobility rights under section 6 of the *Charter* apply only to citizens, something Roach argues "ignores the vast procedural protections that citizens accused of terrorism offences possess in contrast to non-citizens who are subjected to security certificates."[28]

Despite how the decision is sometimes characterized, *Charkaoui* is not a deferential judgment but a minimalist one. Criticism directed at the decision stems from the justices' disinclination to go beyond what was necessary to resolve the case, particularly their unwillingness to set out guidelines for determining when indefinite detention becomes impermissible under the *Charter*. The delayed declaration of invalidity is also best characterized as minimalism

22 *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 [*Chiarelli*].
23 Stribopoulous, *supra* note 2 at 17–18.
24 *Ibid* at 16.
25 Macklin, *supra* note 2 at 5–6.
26 *Ibid* at 5, citing *Charkaoui*, *supra* note 16 at para 123.
27 Roach II, *supra* note 9 at 159.
28 *Ibid*. I would argue that this part of the Court ruling reflects that plain meaning and appropriate understanding of the *Charter*'s mobility rights.

rather than deference. Providing Parliament with a year to develop a new policy does not alter the extent of judicially-imposed change; indeed, Parliament's response was to enact a scheme suggested by the Court in its decision.[29]

In 2008 the Court was confronted with the controversial situation of Omar Khadr, a Canadian citizen being held at the US detention centre in Guantanamo Bay. Khadr, then 15 years old, was taken prisoner in 2002 by American forces following a battle in Afghanistan and labelled an "enemy combatant," a classification the US applied to avoid both prisoner of war safeguards and standard criminal justice processes. He faced terrorism and murder charges after it was alleged he threw a grenade that killed an American soldier. At issue in the 2008 case was whether the Canadian government was required to disclose all relevant documents relating to the charges against Khadr following interviews conducted with him at Guantanamo by CSIS officials in 2003.[30] In a unanimous decision, the Court ruled that handing over the fruits of these interviews to US authorities made Canada a participant in a process that contravened its international human rights obligations. It determined that the *Charter* applied to the conduct of Canadian officials and ordered the disclosure of all documents, subject to a review by a designated Federal Court judge.

Two years later the Court dealt with Khadr's claim that the decision of the Canadian government not to seek his repatriation violated his *Charter* rights.[31] The justices determined that CSIS interviews conducted in 2003 and 2004 were sufficiently connected to Khadr's continued detention that Canada's participation violated the principles of fundamental justice protected by section 7. The Court thus fundamentally agreed with lower court judgments on the *Charter* issue, but where the Federal Court and Federal Court of Appeal decisions employed a remedy ordering the government to seek Khadr's repatriation, the Supreme Court took a more deferential position. Noting that the Crown prerogative in foreign affairs includes the making of representations to a foreign government, the justices opted for a simple declaratory judgment and "to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*."[32] The justices further justified this deference

29 For more on legislative responses to Court decisions, see Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights" Int'l Political Science Review (forthcoming).

30 *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125 [*Khadr*].

31 *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr II*].

32 *Ibid* at para 39.

to the executive on the basis that the proposed remedy—an order to request Khadr's repatriation—was unclear and that the Court was not in a position to properly assess the potential impact such a request would have on Canadian foreign relations with the US.[33] This deference was widely criticized.[34] In the next section I explore why the deference the Court exhibited in *Khadr II* was misplaced.

Explaining the Court's Caution

In this section I focus on explaining the deference and minimalism that marks the Supreme Court of Canada's security decisions. The 9/11 context instigated new national security policies and brought tremendous public attention to security-related issues. Arguably, this alone places pressure on the Court to adopt a restrained approach to cases that require it to balance rights with government security objectives. Under one theory, the Court is thus a strategic actor that avoids overt conflict with political actors or judicial overreach in policy making in an effort to maintain its own legitimacy and authority.[35] The closed nature of court decision-making makes it inherently difficult to account fully for judicial motivations and behaviour. Judicial restraint might develop from the justices' acknowledgement of the political reality in the post-9/11 context, strategic considerations designed to protect the Court's legitimacy in the eyes of the public, or simply their genuine belief about the most appropriate legal approach to security issues and the *Charter*. There is little doubt that much of the caution exhibited by the Court was a result of the post-9/11 context and a desire to preserve the institution's legitimacy in the eyes of the public. Nonetheless, there are specific institutional factors that contribute to the minimalism and deference evidenced by the Court's decisions.

The first is the Court's effort to produce strong, united decisions on issues with high political salience. There is a *general* preference among the justices to speak with one voice; doing so produces more authoritative judgments, not only for the lower courts, but also for the rest of government and the public. Arguably, unanimous judgments also ensure legal clarity. Efforts to increase consensus by reducing the number of separate opinions has become more of a collegial norm since McLachlin became chief justice in 2000. The preference for unanimity does not belie the value the justices place on dissenting

33 *Ibid* at para 43.

34 McGregor, *supra* note 2; Roach, *supra* note 2; Grover, *supra* note 2; Rangaviz, *supra* note 2.

35 Vuk Radmilovic, "Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond" (2010) 43:4 Canadian Journal of Political Science 843.

and concurring opinions in instances of significant disagreement. Judicial independence at the level of the individual judge ensures that despite collegial norms that might promote consensus, individual judges remain free to decide how they see fit and to write separate opinions if they so choose. Thus, despite a broadly-held collegial goal of consensus, unanimous outcomes are not often an *explicit* goal with respect to specific cases.[36]

While the consensual norms to which the judges adhere mean that a majority of the Court's decisions are unanimous, it is more difficult for the Court to achieve unanimity in cases involving complex, controversial moral or policy issues, which often arise in the *Charter* context.[37] Where unanimity becomes an explicit goal, the justices make compromises about the wording of judgments and their underlying logic, affecting the tenor and scope of decisions. This generally results in avoiding issues on which they could not obtain agreement or setting them aside for future cases. It also often means the decision is "shallow," because the justices will allow ambiguity to seep in as they avoid making pronouncements on matters of fundamental principle. In effect, unanimity as a goal promotes judicial minimalism.

The post-9/11 security cases are notable for the high degree of consensus obtained by the justices. In fact, aside from *Application under s. 83.28*, all of the cases explored above were decided unanimously. This alone is not enough to suggest that unanimous judgments were an explicit goal. However, it is significant that three of the decisions—*Suresh* and both *Khadr* cases—were authored by "The Court" rather than particular justices. While not unheard of, unsigned opinions like these are somewhat rare and are usually reserved for the most politically sensitive decisions, such as *Reference re Secession of Quebec*.[38] The justices have noted that it is precisely these types of decisions

36 This was confirmed in author interviews with five current and retired Supreme Court Justices and 21 former law clerks conducted from July 2007 to August 2008. See also Emmett Macfarlane, "Consensus and Unanimity at the Supreme Court of Canada" (2010) 52 Sup Ct L Rev 379 [Macfarlane].

37 *Ibid.*

38 *Reference re Secession of Quebec* [1998] 2 SCR 217 [*Reference re Secession*]. Some observers may question whether *Reference re Secession* fits my argument that unanimity-as-a-goal might lead to minimalism; indeed, in the decision, the Justices went beyond the terms of the question, finding that the rest of Canada has a duty to negotiate in the event of a clear majority voting to secede on a clear question. However, as other scholars have pointed out, the decision is remarkable for what it left unanswered, including the issue of what constitutes a clear majority on a clear question. The Justices provide no guidance on a host of other issues: what amending formula should be used to achieve secession; the rights of Aboriginals or other minorities; and the content of negotiations between Quebec and the rest of Canada. Peter Leslie writes that the "*Secession* case actually resolved almost nothing, in the sense of removing any critical questions from the realm of political controversy.

where unanimity becomes a goal.[39] Further, *Charkaoui* was authored by McLachlin, who, as noted, is particularly keen on achieving consensus where possible (and who, as Chief Justice, is responsible for assigning decision authorship). That case—the first in which the Court was faced with anti-terror legislation crafted in response to 9/11—would surely have merited a strong effort from the Chief Justice to achieve a unanimous outcome.

Collegiality is an institutional variable often overlooked in analyses of Court decision-making, but my intent is not to suggest that it is an *alternative* explanation for judicial minimalism. Indeed, there is little doubt that the post-9/11 security context itself produced caution on the part of the Court that promoted judicial minimalism. My argument is that regardless of whether there was a conscious, strategic effort by some or even all of the justices to adopt a minimalist approach to protect the Court's legitimacy, the collaborative nature of decision writing to achieve consensus contributes to and exacerbates the degree of minimalism ultimately reflected by the decisions.

The second institutional factor at work in these decisions is a heightened sensitivity among the justices to the idea that particular branches of government are better suited to making certain types of decisions. Under the *Charter*, and in the course of making particularly controversial decisions, the Supreme Court has often avoided establishing strong precedents that explicitly favour deference based on the notion that some issues fall outside of the Courts' purview. The explicit logic in the *Suresh* and *Khadr* cases in support of deference to the executive, grounded in notions of appropriate institutional roles and competencies, are thus somewhat unusual. This is not to say that employing such logic is necessarily inappropriate. In *Suresh*, the Court advanced deference to ministerial determinations of the risk to deportees of torture on the basis of ministerial expertise, the highly contextual and fact-based nature of making such determinations and the absence of clear legal rules governing them. The Court thus gives a nod to the idea that judges may lack the resources and expertise to make certain decisions.

Yet while the deference in the *Suresh* decision rests on sound institutional logic,[40] the deference to Crown prerogatives elaborated by the Court in *Khadr*

Even the 'obligation to negotiate,' highlighted by so many commentators (certainly by the *indépendentistes*), left in place almost all the existing ambiguities and uncertainties surrounding the process that could lead to secession." See: Peter Leslie, "Canada: The Supreme Court Sets Rules for the Secession of Quebec" (1999) 29(2) Publius at 149–50. This is the hallmark of judicial minimalism.

39 Macfarlane, *supra* note 36 at 401.

40 It is worth noting that although the institutional logic may be sound, one could still make the normative critique that the rights of deportees are insufficiently protected. I address this issue in the

II is highly problematic. The Crown's prerogative powers are described as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."[41] They are rooted in the common law and formally exercised by the Governor General on the advice of cabinet. As unwritten powers they can be restricted, modified or completely replaced by Parliamentary statute. Most significantly, as made clear by Justice Wilson's decision in the 1985 case *Operation Dismantle v The Queen*, prerogative powers fall within the scope of the *Charter* and decisions made under those powers are subject to judicial review.[42]

The Court's ruling in *Khadr II* seems to backtrack from *Operation Dismantle* and its broader approach to the *Charter*, at least as it pertains to remedies for *Charter* violations. Roach argues that *Khadr II* raises 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," something he refers to as a "mini political questions doctrine."[43] The fact that the Court has repeatedly rejected the idea of a political questions doctrine (something it did for the first time, ironically, in *Operation Dismantle*) only further illustrates the inconsistency of adopting a deferential stance premised on similar logic with respect to prerogative powers.

The Court has supported deference to legislative choices in very specific circumstances, such as severe financial crisis[44] or in examining justifications for limits on rights in the context of electoral laws,[45] but it has rejected deference premised on the type of institutional logic it suddenly applied to prerogative powers in *Khadr II*.[46] For example, in striking down federal prohibitions

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next section.

41 Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*" (2002) 47 McGill LJ 435 at 440, citing AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1959) at 424.

42 *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 50 [*Operation Dismantle*].

43 Roach, *supra* note 2 at 148. In American constitutional law, the political questions doctrine is premised on the idea that courts should only resolve legal questions, not political questions. The distinction is, of course, not always obvious.

44 *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381.

45 *Libman v Quebec (AG)*, [1997] 3 SCR 569; *Harper v Canada (AG)*, 2004 SCC 33, [2004] 1 SCR 827; *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527.

46 Early attempts to limit the issues reviewed under section 7 of the *Charter* along similar lines quickly evaporated. Section 7, as noted above, protects life, liberty and security of the person, and was originally understood to apply only to matters relating to the administration of justice (as opposed to substantive issues). At the time of the *Charter*'s adoption, it is generally understood that the phrase "principles of fundamental justice" was restricted to issues of procedural fairness. See *Re BC Motor Vehicle Act*,[1985] 2 SCR 486 (in this first section 7 case, the Justices of the Supreme Court unanimously decided to ignore the intention of the framers and allow for a substantive interpreta-

on prisoner voting for the second time in 2002, a majority of the Court rejected government arguments that it was owed deference because the decision involved competing social ideas and political philosophy.[47] In the 2005 health care case *Chaoulli v Quebec (Attorney General)* the majority struck down a provincial law prohibiting the purchase of private medical insurance. The decision rejected the notion that deference was owed to legislatures in areas of complex policy, with McLachlin writing that "the mere fact that this question may have policy ramifications does not permit us to avoid answering it."[48] Moreover, the Court has also been willing to use aggressive remedies in the statutory context to correct rights infringements that were the product of deliberate choices of the legislature, such as when it "read in" sexual orientation as a protected ground, effectively re-writing Alberta's *Individual Rights Protection Act* in response to the violation of the *Charter*'s equality guarantee.[49]

The underlying logic for the deference the Court espouses in *Khadr II* effectively privileges executive prerogative powers over legislative authority. In *Operation Dismantle*, Wilson correctly notes that "the royal prerogative is 'within the authority of Parliament' in the sense that Parliament is competent to legislate with respect to matters falling within its scope" and that "there is no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative."[50] The decision in *Khadr II* defies this straightforward understanding. In fact, a plain reading of the Court's opinion suggests that had the decision been made within the ambit of authority granted to the executive by statute then a more forceful remedy would have been forthcoming.[51] There is no convincing ratio-

tion of the clause. At the time, at least some of the Justices were concerned that opening section 7 to substantive interpretation risked placing the Court in a position of dealing with matters of pure policy. Lamer acknowledged that such an approach would raise "the spectre of a judicial 'super-legislature'." He thus restricted the scope of the guarantee to matters pertaining to the administration of justice, which he described as "the inherent domain of the judiciary" at paras 19 & 31). As Jamie Cameron notes, this institutionally-grounded distinction between matters of justice and those of public policy quickly dissolved over time and the Court has delved deeper into more pure policy matters in its section 7 jurisprudence. See Jamie Cameron, "From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7," (2006) Sup Ct L Rev 34:2.

47 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519.

48 *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791 at para 108.

49 See *Vriend v Alberta*, [1998] 1 SCR 493. The Court has used strong remedies in relation to executive power as well. See also *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 (for a critical discussion of the Court's remedial activity in this case, see Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010) at 139–44).

50 *Operation Dismantle*, *supra* note 42 at para 50.

51 I draw this conclusion based on the fact that the Court explicitly notes that the prerogative power over foreign affairs has not been displaced by statute and by its repeated assertion that courts have

nale for granting deference to residual and discretionary powers that can be subject to Parliamentary amendment or removal, but resisting deference based on the same logic in regards to laws passed by Parliament itself.

This is not to say there are no good reasons for deference to the government's foreign affairs decisions. Indeed, most commentators would agree that only in highly unusual circumstances should courts interfere with the executive's prerogative powers to make appointments, declare or terminate wars or engage in diplomatic affairs. In *Khadr II* the Court attempts to further justify its remedial deference on the basis that an order to request Khadr's repatriation might harm Canada's foreign relations and an uncertainty over whether ordering the remedy would actually result in his return. However, this too is highly specious reasoning on both counts. As David Rangaviz points out, Khadr was the last citizen of a Western country at Guantanamo Bay because all other countries had sought repatriation of their citizens.[52] The justices give no explanation for why they think the American government might refuse a similar request from Canada. In fact, the US made efforts to get Canada to accept Khadr's return.[53] The notion that requesting his repatriation might negatively impact foreign relations is groundless.

It thus bears repeating that my argument is not against judicial deference *per se*, but against deference premised on institutional logic that privileges executive prerogative powers in a manner that is wholly inconsistent with the Court's overall approach to the *Charter*. A consideration of appropriate institutional roles and competencies would no doubt lead to judicial restraint in foreign affairs matters in many instances. Yet contrary to the Court's assertion that the case evinces the limitations of its institutional competencies,[54] Omar Khadr's situation rests within the confines of a criminal process in which the Canadian government participated, an area that the Court is not only qualified to resolve but which falls under the traditional and inherent domain of the judiciary. Having determined that a Canadian citizen, who was a child at the time he was apprehended, was due legal rights under the *Charter* in this criminal process, the Court was compelled to provide a meaningful remedy. It did not.

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only a "limited" or "narrow" power of judicial review as it pertains to prerogative powers (*Khadr II*, *supra* note 31 at paras 35, 37, 38).

52 Rangaviz, *supra* note 2 at 266.

53 Errol P Mendes, "Dismantling the Clash between the Prerogative Power to Conduct Foreign Affairs and the *Charter* in *Prime Minister of Canada et al v. Omar Khadr*" (2009) 26 NJCL 67 at 73.

54 *Khadr II*, *supra* note 31 at para 46.

Appraising the Rights and Security Balance

The Court's record in balancing rights with security policy since 9/11 is best described as mixed. Normative disagreements about the posture the Court ought to adopt in interpreting and enforcing the *Charter* are everlasting. Setting those broader debates aide, it is important to note that neither deference nor minimalism necessarily produces "good" or "bad" decisions on their own. In other words, while critics might differ on the need for a more assertive and liberal enforcement of *Charter* rights, the consistency and institutional logic of the Court's decisions are, on their own, important factors for appraising the Court's record in evaluating security policies under the *Charter*. In this section I briefly explore the impact minimalism and deference have for the Court's security decisions and their implications for evaluating the rights-security balance.

As noted above, judicial minimalism is distinct from deference even if the two are often premised on similar logic. The most glaring distinction is that a minimalist Court is still willing to impinge on government policy objectives in the instance of a *Charter* infringement. The *Charkaoui* decision, for example, remedies two substantial rights issues implicated by the security certificates regime. The first concerned the ability of detainees to know and respond to the case against them. Parliament enacted new legislation that better ensures detainees are represented and that presiding judges hear full arguments before determining which evidence is ultimately disclosed. The second provided that cases in which foreign nationals are detained are subject to judicial review as promptly as those involving permanent residents. The decision thus rectified important issues of justice and equality.

Critics of the Court's minimalist approach, however, contend that the ruling did not go far enough. One of their central concerns is that the justices avoided laying out specific guidelines regarding the prospect of indefinite detention in the security certificate regime. Yet the justices do acknowledge the potential for a *Charter* violation in this regard and point to the process of ongoing judicial review, something they elaborate should be conducted with regard for a number of relevant factors, including the reasons for and length of detention, reasons for delay in deportation, anticipated future length of detention and availability of alternatives.[55] Critics, as explored above, dismiss this as insufficient.[56]

55 *Charkaoui*, *supra* note 16 at paras 110–117.

56 Macklin, *supra* note 2 at 5.

Those who reject the Court's reasoning as inadequate gloss over the fact that the reason the prospect of indefinite detention under security certificates exists is because the courts are (appropriately) unwilling to allow detainees to be deported in instances where they likely face torture. This produces cases that can drag on for years, itself a highly problematic situation in the context where criminal charges are not formally laid. Nevertheless, the ongoing process of review the Court highlights (and which its critics dismiss) has resulted in all of those detained under security certificates being released and, in some cases, having the certificates dismissed. The release of these individuals has often come with strict bail conditions, itself an imperfect solution from an individual rights perspective. Yet it should be noted that the *Charter* does not demand perfect policy solutions to difficult problems. In fact, the *Charter* does not prevent any and all infringements on individual rights, only unreasonable ones. Thus in evaluating the rights and security balance, it is important to acknowledge that sometimes there is no objectively identifiable equilibrium that happily reconciles rights with the relevant policy objectives.

It is for that reason that I argue the Court's minimalist approach in *Charkaoui* does a good job of balancing the concerns with respect to indefinite detention (ensuring continued judicial review and an evidentiary basis for detentions or conditions for release) and preventing the serious rights infringements noted above. Further, a minimalist approach by definition does not prevent the Court from redressing other rights infringements in the future, as illustrated by the Court's ruling in *Charkaoui II*, which required CSIS to retain and disclose evidence. At the same time, the decision's impact on the government's legitimate security objectives is minimal. Parliament's response necessitated creating new special advocates and devoting resources to ensure timely judicial review. The security certificates regime itself was otherwise left untouched.

Nonetheless, minimalism is problematic where it leads to unwarranted uncertainty on the part of the Court, such as the vague notion that there might one day be exceptional circumstances allowing deportation to torture in *Suresh*. The justices' decision to leave that dubious door ajar, however slightly, is troubling. Torture is unequivocally rejected by domestic and international legal norms, something the Court acknowledges while simultaneously leaving the prospect open that the Canadian government might legitimately flout them. Carving an ambiguous exception to the fundamental—even obvious and uncontroversial—notion that the Canadian government should not participate in torture is an abdication of its responsibilities by the Court. The idea diminishes the moral force of the rhetorical support for rights the Court

evinces in *Suresh* and *Charkaoui* (where it mentions, but fails to reverse, its support for the possibility of an exception). Even from a purely practical or strategic perspective, the Court could easily remove itself from such controversy by maintaining an absolute position and noting that if the government were ever to find itself in a situation so severe as to contemplate deportation to torture it has the constitutional option of passing legislation in Parliament that invokes the notwithstanding clause.

Deferential judicial decisions are not necessarily an indication that rights are insufficiently protected or that the wrong balance between rights and governmental security objectives has been struck. Decisions where the Court has assessed whether there are adequate safeguards for *Charter* guarantees, such as its ruling in *Application under s. 83.28*, are not worrying. Put simply, not all *Charter* challenges represent genuine *Charter* violations. In fact, despite an ostensibly "deferential" outcome, the decision in that case actually resulted in the extension of immunity safeguards to the immigration and extradition contexts.

In the previous section I argued that deference premised on a consistent and logical understanding of the respective responsibilities and capacities of the different institutions of government can be appropriate. The confused and distorted logic the Court applied in *Khadr II* represents a failure in this regard. As described in the previous section, the remedial deference in this case cannot be reconciled with the Court's overall approach to deference under the *Charter*. Further, even though there are good reasons to favour a deferential attitude towards foreign affairs decisions, the details of Khadr's case make it an entirely inapt context in which to validate deference.

The justices make it clear that Khadr's rights were violated. The decision to provide no remedy resulted from two interrelated considerations. First, the Court recognized the political and legal catch-22 in which they were ensnared. Ordering the government to repatriate Khadr necessarily meant either charging him for his crimes (a difficult prospect given his status as a child soldier) or releasing him. His alleged activities make the latter option politically unpalatable, to say the least. Second, the Court clearly wished to avoid an open confrontation with the government, which, according to some critics, might have refused a direct order to seek Khadr's repatriation.[57] These factors may explain the Court's deference, but they do not justify it. In failing to provide Khadr with a remedy, the justices ignored his status as a child soldier

57 Rangaviz, *supra* note 2 at 265.

(the only time the Court references Khadr's age is to note that he was interrogated as a "youth").[58] As Roach argues, they also failed to articulate what compliance with the *Charter* would require.[59] This, in spite of the lower court's prior ruling that "no other remedy would appear to be capable of mitigating the effect of the *Charter* violations in issue or accord with the Government's duty to promote Mr. Khadr's physical, psychological and social rehabilitation and reintegration."[60]

Any faith the Court had that the government would resolve the *Charter* violation through the political process was ultimately misplaced. As Roach notes, the government appeared to consider doing nothing to respond to the Court's decision when it was first released.[61] Ultimately, it decided to send a diplomatic note to the American government requesting that Khadr's prosecutors not use the information given to it by his Canadian interrogators. The US reply made no promises, thus essentially ignoring the request.[62] Six months after the Supreme Court's ruling, the Federal Court held that the government had failed to provide a sufficient remedy and ordered Canada to propose, within seven days, a list of potential remedies that would cure or ameliorate the breach.[63] The government's appeal of that decision was rendered moot by Khadr's decision to enter into a plea agreement in October 2010. He will serve an eight-year prison sentence (serving the first year at Guantanamo and then returning to Canada to serve the remainder). Although the Canadian government has agreed to the terms of the plea bargain, it has asserted that it took no part in the negotiations leading to the settlement.[64]

Ultimately, then, the Canadian government did nothing to address the *Charter* violations identified by the Court. It may be the case that the plea bargain was the most politically palatable solution to the problem the government faced in dealing with Omar Khadr, but it came after Khadr spent eight years trapped in a blatantly unconstitutional legal vacuum in which the Canadian government participated. Nor should the Court's remedial deference be credited with giving the government room to assist in reaching this

58 *Khadr II*, *supra* note 31 at paras 25 & 30.

59 Roach, *supra* note 2 at 147.

60 McGregor, *supra* note 2 at 493, citing *Khadr v Canada (Prime Minister)*, 2009 FC 405 at para 78.

61 Roach, *supra* note 2 at 147.

62 See Rangaviz, *supra* note 2. Rangaviz explains that the "State Department's response simply reiterated the relaxed evidentiary standards for military commissions in the Military Commission Act of 2009 and made no specific reference to the information obtained in the 2003 interrogations" at 264–265.

63 *Khadr v Canada (Prime Minister)*, 2010 FC 715.

64 Parliament of Canada, *Hansard* 40th Parl, 3rd Sess, No 091 (1 November 2010) at 1420–1425.

political compromise, not only because Canada apparently played no part but also because it is likely that Khadr only agreed to the plea deal upon realizing he was not going to get any assistance from the Canadian government. In this respect, the plea bargain itself is merely the final fruit of a poisonous tree, tainted by the events and processes that necessitated it in the first place.[65]

Khadr II is a sizable stain on the Court's record in balancing rights and security concerns (indeed, on its overall record under the *Charter*). It is important to acknowledge, however, that it is but one case, and an exceptional one at that. It is for this reason that the Court should have avoided using the case as a platform for a rather broad statement on judicial deference to executive prerogative powers. If anything, the Court could have made clear the exceptional circumstances of the case and the egregious nature of the rights infringements, and highlighted that any remedy it imposed on the executive would itself be exceptional. Instead it chose deference.

Judicial caution can be a positive thing, particularly when the Court provides a strong voice for the relevant rights issues and articulates a clear and logical case for deference to legislative or executive decision making. It has the added benefit of acknowledging that courts are not always the best venue for policy making. Yet when issues arise that are not beyond judicial competencies and when it is clear that the elected branches have not provided sufficient safeguards—or are responsible for flagrant violations of rights—the Court should not shy away from providing effective remedies. Nor should judges allow a desire for consensus or a concern for the institution's reputation to prevent them from making clear judgments about rights.

Ultimately, the Court's successes and failures in this regard hinge on whether it develops a consistent and sensible understanding of its appropriate role under the *Charter*. If the justices' sensitivity to the political dimensions of the cases they confront result in deference premised on flawed logic, or their desire to achieve consensus results in compromises that obviate the core dimensions of the rights in question, rights are put at risk. The unjustified deference in *Khadr II* and the faltering choice to put forward the vague notion of an exception for deportation to torture in *Suresh* are flagrant failures in

65 Some may extend the argument as follows: Khadr, as a child soldier, is best viewed as a victim in this process and thus should not be subject to any sanctions for his actions. I am not sure I would go this far. The issue of culpability of minors for their crimes is not just a legal question but a moral and philosophical one. I would assert that minors should be held to account, but that their ages and the context of their crimes should influence sentencing accordingly. Nonetheless, whether we consider Khadr's sentence itself "just" is entirely separate from whether the process by which it was arrived at was acceptable.

the Court's post-9/11 jurisprudence. Aside from these two significant failures, the Court has expanded and strengthened procedural safeguards in spite of a broadly cautious approach. As the justices deal with future cases they are likely to remain cautious. It is incumbent on them to ensure their minimalist and deferential approach is rooted in principle and appropriate institutional considerations, lest the Court fails to live up to its rhetoric on rights.