EXECUTIVE EXCESS V. JUDICIAL PROCESS: AMERICAN JUDICIAL RESPONSES TO THE GOVERNMENT'S WAR ON TERROR

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We may assume that the threat to Hawaii was a real one; we may also take it for granted that the general declaration of martial law was justified. But it does not follow from these assumptions that the military was free [to violate the] Constitution . . . especially after the initial shock of the sudden Japanese attack had been dissipated.

From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised.

The . . . constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their temporary suspension.

— Justice Murphy's concurring opinion in the U.S. Supreme Court decision against application of martial law in Hawaii *Duncan v. Kahanamoku* (1946), quoted in District Judge Edmunds' decision to open INS deportation hearings against the government's request to keep them secret. *Detroit Free Press v. Ashcroft* (2002).

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I. INTRODUCTION

In the aftermath of the September 11th terrorist attacks in the U.S., federal authorities were quickly presented with the problem of how to legally handle the diverse group of individuals taken into custody – from American citizens fighting on foreign battlefields to Americans at home with allegiances to al Qaeda, from foreign nationals of Islamic faith inside the United States to foreign combatants caught during the invasion of Afghanistan. What happens to them? Are they all treated similarly? Do they all have the same basic set of legal rights? Should they be prosecuted, detained for questioning, deported, or held indefinitely during hostilities?

Initially, there was a determination that Americans captured at home or abroad on the wrong side of the government's War on Terror would be tried in regular courts as well as foreign nationals captured inside the United States, while foreign al Qaeda and Taliban members caught abroad would be detained as "unlawful combatants" and unsympathetic Islamic foreigners found in violation of INS regulations would simply be deported.

Thus, John Walker Lindh, the American Taliban, and Zacarias Moussaoui, a French national al Qaeda member caught in Minneapolis, were arraigned and charged in federal courts. However, as the cases against them began to simultaneously unfold, tapping more government resources, and risking exposure of intelligence data, the Administration decided to switch tracks and begin shunting Americans into military imprisonment for indefinite detention without access to counsel instead of facing the specter of an unpredictable and time-consuming adversarial process. Consequently, Yassar Hamdi, another American Taliban, and Jose Padilla, an American al Qaeda member, found their way into naval brigs instead of courtrooms.[1]

Immigrants, by virtue of their status as non-citizens, are treated worse. Hundreds of Middle Eastern and South Asian men were rounded up in a huge dragnet, held in secret for months, interrogated, subjected to closed immigration hearings, and then summarily deported. Thousands of others who could not be arrested on technical visa or traffic violations were "invited" to appear

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1. *See* Jess Bravin, *White House Seeks to Expand Indefinite Detentions in Military Brigs, Even for U.S. Citizens*, WALL ST. J., Aug. 8, 2002:

> Stung by the courtroom circus that yet another accused terrorist, Zacarias Moussaoui, has created, and the aggressive defense marshaled by John Walker Lindh before he plea-bargained his way out of a possible life sentence, the Bush administration is preparing to expand its policy of indefinitely detaining in U.S. military jails people it designates as 'enemy combatants.' Such prisoners – whether Americans or foreigners captured in the U.S. – aren't afforded the same constitutional rights as criminal defendants, or even the limited rights allowed in military tribunals. . . . Officials said they selected brigs in South Carolina and Virginia [for Hamdi and Padilla] partly because they fall under the jurisdiction of courts that are more conservative and presumably more sympathetic to the administration.

Id.

before U.S. Attorneys in their districts for questioning as to any knowledge or involvement with al Qaeda, the Taliban, the September 11th attacks, or terrorism generally.

Indeed, not only has the administration been hijacked by a bunker mentality since 9/11, but the Justice Department in particular has demonstrated its zealous intent to pursue those responsible for the attacks by altering constitutional and legal checks on its power where possible and violating other constraints were necessary. Such abuse of power has not gone unnoticed by the public. When asked in an Associated Press poll conducted in August, 2002, "[h]ow concerned are you that new measures enacted to fight terrorism in this country could end up restricting our individual freedoms?" Sixty-three percent replied they were concerned or somewhat concerned and only 35% replied they were either unconcerned (15%) or not too concerned (20%), while 2% "didn't know."[2]

So whose job is it to protect individual liberties from being trampled into the dust by the government in its zealous pursuit of bogeymen, be they communist sympathizers during the Cold War or terrorist sympathizers during the War on Terror? Since the days of John Marshall, the federal judiciary has recognized its constitutional responsibility to tell Congress and the President when they are stepping over the line delineating their respective powers and order them to take a step back. Several initiatives have been undertaken in court both by and against the government in its War on Terror. However, due to the reactive and deliberative nature of our judicial system, this branch of government necessarily responds more slowly to events than the other two branches.

Thus, a year and a half after the attacks, there has been no meaningful constitutional challenge to the USA Patriot Act or other legislative initiatives: the executive has not yet empanelled any military tribunals, most of the thousand INS detainees have been released or deported, the Lindh case has been settled, the Moussaoui case has been stayed, Hamdi and Padilla have been relegated to solitary confinement, and the Attorney General's aggressive detention, surveillance, and deportation programs have enjoyed some judicial support and some sporadic judicial resistance – yielding decidedly mixed legal results.

Nonetheless, it remains useful to survey the current lay of the post 9/11 judicial landscape, if for no other purpose than to gauge the potential involvement of that branch and to get a sense of where litigation may ensue and what the outcome may be.

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2. Associated Press Poll, *War on Terrorism* conducted Aug. 2-6, 2002. (N=1001 adults nationwide, MoE ± 3), *available at* http://www.pollingreport.com/ (last visited Mar. 22, 2003); AP, *Terrorist Attacks Prompt Changes in Americans' Legal Rights After Sept. 11*, DAILY RECORD (Omaha), Aug. 29, 2002, at 4.

II. ARTICLE III FEDERAL COURTS

Long ago, the United States Supreme Court declared, "[o]urs is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end."[3] In practice, this premise is embodied in substantive and procedural mandates derived from our constitutional system of government, and applicable to all criminal proceedings.

Article III federal courts are the bulwark of freedoms in our legal system ensuring the basic canon of the Forth, Fifth, and Sixth Amendments against illegal searches, seizures, and self-incrimination, and guaranteeing a speedy trial, access to court, access to counsel, access to a jury, and the right to confront adverse witnesses and evidence. The panoply of protections emanating from these Amendments breaths life and meaning into the fundamental notions of due process and equal justice, and are applicable to all who come within the jurisdiction of American courts.

The challenge in the post-9/11 aggressive prosecutorial environment will be ensuring that two centuries of precedent interpreting constitutional protections and carving a delicate balance between truth-seeking and equal justice in the criminal process are not vitiated in the name of expediency and scapegoating.

A. Fumbling Into the Court System – The Lindh & Moussaoui Cases[4]

John Walker Lindh is an American citizen, the son of a wealthy San Francisco area family. He was captured in Afghanistan fighting for the Taliban. A convert to Islam after reading the autobiography of Malcolm X, Lindh moved to Yemen, enrolled in a madrasah and later answered the call to jihad – fighting with Islamic fundamentalist groups in Kashmir and Kunduz.[5] After his capture, Lindh was held for about a month in Camp Rhino outside

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3. Watts v. Indiana, 338 U.S. 49, 54 (1949).

4. The case of "shoe-bomber" Richard Reid is not discussed here as it raises no new significant issues not already raised in the Lindh and Moussaoui cases. The divergent areas of the Reid indictment relate to his actions on board an aircraft – namely attempting to detonate an explosive contained in the sole of his shoe. His case was heard before the federal district court in Boston and was resolved with an agreement giving him sixty years to life in exchange for a plea of guilty. Reid admitted he attended terrorist training camps in Afghanistan and was a follower of Osama bin Laden. *See Reid Indictment and Legal Documents, at* http://news.findlaw.com/legalnews/us/terrorism/cases/index2.html (last visited May. 8, 2003); *see also* Associated Press, *Venting Hate, Voicing Regret; Staying Loyal to bin Laden*, NEWSDAY (N.Y.), Oct. 5, 2002, at A4.

5. *See* Rene Sanchez, *John Walker's Restless Quest is Strange Odyssey*, WASH. POST, Jan 14, 2002, at A1.

Kabul and then transported back to the U.S. to face criminal charges for his actions on behalf of the Taliban, namely conspiracy to kill U.S. nationals outside the U.S., providing material support to a foreign terrorist organization, and engaging in prohibited transactions.[6] He was indicted in Virginia federal district court on February 5, 2002.[7]

Because Lindh was processed through the U.S. criminal justice system, he was entitled to the same constitutional protections afforded every U.S. citizen, including the right to counsel and the right to be fully advised of the charges against him.[8] Represented by competent criminal defense counsel, one of the first constitutional challenges to Lindh's detainment and prosecution alleged that the criminal charges were vague, ambiguous, and not sufficiently stated so as to provide fair notice of the charges against him. Consequently, Lindh's attorneys filed a motion for a bill of particulars requesting the government identify the:

- nationals and military personnel he is alleged to have conspired to kill
- date, time and place where he agreed to join the illegal conspiracy
- exact nature of the material support and resources he is alleged to have provided to the conspiratorial enterprise
- specific illegal activity he was alleged to have advanced by his support or services

Essentially, Lindh sought to compel the government to state its charges with more specificity to ensure the indictment alleged criminal conduct and was not simply a vehicle to prosecute him for mere association with an unpopular group.[9] The judge, however, rejected the defense motion.[10]

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6. *See* Brooke A. Masters, *American Taliban Suspect Appears in Alexandria Court*, WASH POST, Jan. 25, 2002, at A1; *see also* Brooke A. Masters & Patricia Davis, *Walker's Long Trip Ends at Alexandria Jail*, WASH. POST, Jan. 24, 2002, at A13; *see generally* 18 U.S.C. §§ 2332(b), 2339 (2003); 31 C.F.R. §§ 545.201, 545.204 (2003); Exec. Order No. 13,129, 64 Fed. Reg. 129 (July 7, 1999); 50 U.S.C. §§ 1702, 1705 (2003); 18 U.S.C. § 2 (2003).

7. *See* Brooke A. Masters & Dan Eggen, *Lindh Indicted on Conspiracy, Gun Charges*, WASH. POST, Feb. 6, 2002, at A1.

8. *See* Brooke A. Masters & Edward Walsh, *U.S. Taliban Fighter to Have His Rights, Rumsfeld Says; Experts Warn Against Preferential Legal Treatment*, WASH. POST, Dec. 5, 2001, at A13.

9. *See* Defendants Motion for a Bill of Particulars, United States v. Lindh, Crim. No. 02-37-A (E.D. Va. 2002); *see also* Defendant's Motion of Mar. 15, 2002, *available at* http://news.findlaw.com/hdocs/docs/lindh/uslindh31502 mot4bop.pdf (last visited Mar. 24, 2003).

10. *See* Naftali Bendavid, *U.S.: No Evidence Lindh Killed Agent; Prison Riot Victim Cited in Indictment*, CHICAGO TRIB., Apr. 2, 2002, at A7.

Lindh also attacked the government's use of incriminating statements allegedly made while he was a captive in Afghanistan.[11] The legal basis for these arguments was the fifty-five-day delay between Lindh's capture and his arrival in the U.S., where he was finally allowed access to legal counsel. Lindh alleged that he was subject to coercive interrogation tactics at Camp Rhino and held incommunicado for fifty-five days. Lindh further contended that, because there was no justifiable reason for the delay in presenting him for arraignment in U.S. court (even though the government had begun preparing its case against him), any statements made during that period of unlawful confinement should be inadmissible.

The case continued for five months with the government struggling to refine and present its case against Lindh while also maintaining the secrecy of classified information. Finally, on July 15, 2002, in a move that surprised most observers, a plea agreement between the government and Lindh was announced. Under the agreement, Lindh plead guilty to two counts in the indictment (supplying services to the Taliban and carrying explosives in the commission of a felony) in exchange for serving two consecutive ten-year sentences and fully cooperating with the government in its investigation of al Qaeda. While prosecutors hailed the accord as eminently fair and a "victory in the war on terrorism," it did not escape notice that the government's willingness to bargain coincidentally escalated as constitutional infirmities in its case were gradually revealed.[12]

The second case concerns Zacarias Moussaoui, the suspected "20th hijacker" who failed to follow through on his part of the 9/11 terrorist attacks. Moussaoui, a thirty-five year-old French national of Moroccan descent, was a member of al Qaeda and alleged co-conspirator of the nineteen Islamic hijackers that carried out the attacks that destroyed the World Trade Center and damaged the Pentagon. In February 2001, Moussaoui entered the U.S. and enrolled in flight school in Norman, Oklahoma. However, he failed out of his training program and subsequently re-enrolled at another flight school in Minnesota. While at the Minnesota school, Moussaoui expressed an unusual interest in learning to fly larger aircraft, constantly peppering his instructors with questions about specifications and technical operations. Eventually, Moussaoui's detailed questions relating to complex aircraft systems aroused suspicion and those misgivings were relayed to the FBI. In August 2001, Moussaoui was arrested on visa and immigration violations.[13]

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11. *See* Brooke A. Masters & Dan Eggen, *Walker Statements a Trial Issue; Defense Will Contest Interviews with FBI*, WASH. POST, Jan. 17, 2002, at A14.

12. *See* Neil A. Lewis, *Traces of Terror: The Captive; Admitting He Fought in Taliban, American Agrees to 20-year Term*, N.Y. TIMES, July 16, 2002, at A1.

13. *See* Suzanne Daley, *Mysterious Life of a Suspect from France*, N.Y. TIMES, Sept. 21, 2001, at B1; *see also* David Johnston & Philip Shenon, *F.B.I. Curbed Scrutiny of Man Now a Suspect in the Attacks*, N.Y. TIMES, Oct. 6, 2001, at A1; *see also* Philip Shenon, *Flight School Warned F.B.I. of Suspicions*, N.Y. TIMES, Dec. 22, 2001, at B1.

As evidence of his involvement in 9-11 mounted, Moussaoui was transferred to the federal prison in Alexandria, Virginia, where, on January 3, 2002, he was arraigned on six counts of conspiracy to commit murder and terrorism in connection with the terrorist attacks. Perhaps foreshadowing the bizarre twists and turns the case would eventually take, when apprised of the charges against him and asked how he would plead, Moussaoui refused "in the name of Allah" to enter a plea, prompting the judge to enter a not guilty plea on his behalf.[14]

In the ensuing months Moussaoui has flooded the court with handwritten motions impugning the motives and competency of his attorneys and making derogatory remarks about the trial judge in his case. Indeed, his invective against his court-appointed attorneys was so offensive that the judge eventually permitted Moussaoui to represent himself on the condition that he have an attorney act as his co-counsel.[15]

After a series of legal battles concerning whether Moussaoui's proceedings would be televised and whether he was competent to stand trial, Moussaoui shocked the court by electing to plead guilty to four of the charges against him, only to abruptly shift course when advised of the consequences of his guilty plea. Due to the wrangling and legal issues connected with the preparation of his own case, Moussaoui's trial was initially delayed until January 2003 to facilitate his review of the massive amount of evidence the government plans to introduce during his trial. However, the delay was extended until March 2003 due to the embarrassing disclosure of classified FBI documents related to the case that were inadvertently left in Moussaoui's cell by government officials who were questioning him last Fall.[16]

Is it likely that Moussaoui will receive a plea deal similar to Lindh's? After all, comparing the facts of the cases, Lindh was on the battlefields of Afghanistan, bearing arms, face to face with American soldiers, prepared to fight and presumably kill on behalf of his radical beliefs. By contrast, Moussaoui was, at best, a religious zealot whose own ineptitude exposed him as a "suspicious" individual, leading to his arrest and, thereby, rendering him useless to the 9/11 plot. Indeed, his handwritten diatribes fashioned as court pleadings and his bitter outbursts in court have led many to question his mental competency.[17] Lindh's guilty conduct was witnessed first hand by soldiers who captured him in Afghanistan, while Moussaoui's alleged guilt is

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14. David Johnston, *A Nation Challenged: The Legal Case; Not-Guilty Plea is Set for Man in Terror Case*, N.Y. TIMES, Jan. 3, 2002, at A1.

15. *See* Neil A. Lewis, *Moussaoui's Defense Plan Complicates Terror Trial*, N.Y. TIMES, Apr. 26, 2002, at A12; *see also* Philip Shenon, *Sept. 11 Defendant Who Wants to Represent Himself is Busy Doing So*, N.Y. TIMES, Apr. 30, 2002, at A22.

16. *See* Philip Shenon, *Judge Agrees to New Delay In Trial in Conspiracy Case*, N.Y. TIMES, Oct. 1, 2002, at A20.

17. *See* Philip Shenon, *A Nation Challenged: The Detainees; Terror Suspect Says He Wants U.S. Destroyed*, N.Y. TIMES, Apr. 23, 2002, at A1; *see also* Neil A. Lewis, *Defense Seeks Extensive Tests on Mental Health of Suspect*, N.Y. TIMES, Apr. 25, 2002, at A16.

contained in reams of documents yet to be presented at trial and the government is seeking the death penalty against him.[18]

Both men are alleged to have known about the September 11th plot. Why then does it appear that the government is taking a hard-line aggressive prosecutorial stance in Moussaoui's case? Could it be that Moussaoui is not only the alleged 20th hijacker, but ultimately symbolic of all the other 9/11 hijackers as well? America needs a 9/11 defendant; a physical being in the defendant's chair representing those who callously inflicted pain and anguish on innocent victims through heinous acts of terrorism. With his appearance, demeanor, and resolute adherence to radical Islamic beliefs, Moussaoui fits the bill quite nicely. He is also a foreigner, whereas Lindh is American. He is one of them, he knew them, he conspired with them, and for that, he may pay with his life.

B. Americans as "Enemy Combatants" – The Hamdi & Padilla Cases

> *The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: 'Take heed what thou doest – for this man is a Roman.'*
>
> – Associate Justice Robert H. Jackson, U.S. Supreme Court[19]

It is psychologically troubling for Americans to learn that fellow Americans wish their country ill. It is more troubling to learn that these citizens would join organizations such as the Taliban and al Qaeda to carry their ill-wishes into action. However, it is shocking to learn that our federal government is stripping U.S. citizens of their supposedly guaranteed due process rights under the banner of national security. However, that is exactly what is happening to Jose Padilla and Yassar Hamdi – leading to what may become a split in the federal circuit courts over whether the executive branch is acting beyond its power by affixing labels to citizens that effectively suspend their constitutional rights.

Jose Padilla, a.k.a. Abdullah al-Muhajir, is of Hispanic origin. He is an American citizen, born in Puerto Rico, who recently left the country and joined al Qaeda. He was apprehended in May 2002, re-entering the country in Chicago with plans to detonate a "dirty" radiological bomb in furtherance of al Qaeda's unholy cause. Attorney General Ashcroft first labeled him a

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18. *See* Philip Shenon & Benjamin Weiser, *Prosecutors Seek a Death Sentence in Terrorism Case*, N.Y. TIMES, Mar. 19, 2002, at A1; *see also* Philip Shenon & Neil A. Lewis, *U.S. to Seek Death Penalty for Moussaoui in Terror Case*, N.Y. TIMES, Mar. 29, 2002, at A20.

19. Edwards v. California, 314 U.S. 160, 171 (1941) (Jackson, J., concurring).

"material witness" as a pretext to hold him indefinitely without prosecuting; however, when a New York federal judge ruled such use of the material witness statute inappropriate, Padilla was redesignated an "enemy combatant" and turned over to the Defense Department. He has since been denied access to counsel and is undergoing interrogation in a South Carolina military prison.[20]

Yasser Esam Hamdi is of Arabic origin, born in Louisiana when his father was employed there. He is an American citizen who left the country with his Saudi family as a child. It is unclear whether he ever returned. But he eventually joined al Qaeda and sought to do harm to fellow Americans. He was captured in Afghanistan, transferred to Guantanamo Bay, Cuba and then shuttled to a military base in Virginia upon discovery of his citizenship. He too has been labeled an enemy combatant and a decision by a federal judge that he is entitled to a public defender is now being challenged by the Defense Department on appeal. Meanwhile, he continues to linger in solitary confinement in a Naval brig outside of Norfolk, Virginia.[21]

What will become of the two Americans detained indefinitely, without access to counsel, incommunicado—in direct violation of their Fifth Amendment due process rights and Sixth Amendment rights to counsel? If they are not tried in federal courts like Lindh, where can they be prosecuted? President Bush's Military Order establishing tribunals in the Defense Department currently excludes the possibility of trying American citizens[22]— a political concession designed to tamp down on public resistance to the order. In hindsight, it works to block trial of either Padilla or Hamdi by military tribunal unless the order is revised, which may be politically impossible.

Consequently, by labeling them "enemy combatants," the government must try them, if it decides to do so, before regular military courts under the Uniform Code of Military Justice. This is provided for in the Geneva Convention.[23] But to take this route opens the door to criticism that American citizens are accorded treaty rights while non-Americans receive second-rate justice – because both Americans and non-Americans were captured as enemy combatants.[24]

Alternatively, the government can just throw away the key and let them languish indefinitely. So far, the government's justification has been merely

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20. *See* Adam Liptak, *Traces of Terror: The Courts; Questions on U.S. Action in Bomb Case*, N.Y. TIMES, June 11, 2002, at A18.

21. *See* Adam Liptak et al., *After Sept. 11, a Legal Battle on the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at A1.

22. *See* President's Military Order, 66 Fed. Reg. 57,833 (Nov. 15, 2001) [hereinafter Military Order].

23. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 287 art. 84, *available at* http://www1.umn.edu/humanrts/instree/y3gctpw.htm (last visited Mar. 24, 2003).

24. *See* Michael J. Kelly, *Understanding September 11th – An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283, 289-92 (2002).

a veiled effort to extract information from them. As the Justice Department argued in its case to dismiss Jose Padilla's *habeas* petition:

> The detention of enemy combatants is critical to preventing additional attacks on the United States, aiding the military operations, and gathering intelligence in connection with the overall war effort.[25]

In the case of enemy combatant Hamdi, whose cause has gone farther in the courts than that of Padilla, Judge Robert G. Doumar of the federal district court in Norfolk, Virginia twice ordered the government to allow Hamdi access to a lawyer. The government refused to comply and appealed the orders to the 4th Circuit Court – which stayed the orders and returned the case to the judge Doumar, who then asked the government to show him evidence that Hamdi qualified as an enemy combatant. Frustrated that they did not receive a rubber stamp, the government refused to do this as well, claiming the need to protect classified information, and appealed that order.[26]

The 4th Circuit Court of Appeals ruled on January 8, 2003, that because Hamdi was captured overseas fighting for the Taliban, he could be held indefinitely as an enemy combatant by the military, effectively without access to an attorney, based solely on the government's assertion that he is one – and this cannot be challenged by him or anyone else acting in representative capacity.[27] While acknowledging the continued right of judicial review even in wartime, the court essentially noted that this had little meaning given the sweeping deference due the President under the constitution:[28]

> The constitutional allocation of war powers affords the president extraordinarily broad authority as commander in chief and compels courts to assume a deferential posture in reviewing exercises of this authority . . . .The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. In fact if deference is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain.[29]

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25. Karen Branch-Brioso, *Fight over Rights Rages On*, ST. LOUIS POST-DISPATCH, Sept. 8, 2002, at B1.

26. *See id.*

27. *See* Neil A. Lewis, *Threats and Responses: The Courts; Detention Upheld in Combatant Case*, N.Y. TIMES, Jan. 9, 2003, at A1.

28. *See* Tom Jackman, *Judges Uphold U.S. Detention of Hamdi; Courts Must Yield to Military on 'Enemy Combatants' 4th Circuit Rules*, WASH. POST, Jan. 9, 2003, at A1.

29. Lewis, *supra* note 27, at A1.

Hamdi retains his habeas rights as an American citizen, but any inquiry into his detention must remain "extremely limited."[30] Moreover, the court held that Geneva Convention protections that guaranteeing combatants the right to have their status reviewed by a competent tribunal were unavailable to Mr. Hamdi because those treaty provisions are not self-executing and, therefore, give rise to no individually assertable rights, only state and government rights.[31]

There is no definitive ruling yet on Padilla's fate – he was captured in Chicago. The 2nd Circuit Court of Appeals is considering similar arguments on his fate. Because Mr. Padilla was being held in New York as a material witness before he was reclassified an enemy combatant, that jurisdiction has remained seized of his case despite the government's attempts to transfer the case, as it has the prisoner, to South Carolina.[32] Depending on their ruling, there could be a circuit split on the status of Americans as enemy combatants.

However, if the 2nd Circuit rules similarly to the 4th Circuit, those decisions could constitute a green light from the judicial branch for the Administration to move ahead with creation of its proposed enemy combatant designation committee, first reported last year. For Americans suspected of false allegiance, the Attorney General, Secretary of Defense, and CIA Director will decide whether a suspect is to be relegated to indefinite detention in military custody as an "enemy combatant." If the suspect is a foreigner, the National Security Advisor will join this new Ashcroft-Rumsfeld-Tenet Triumvirate in its decision.[33]

So how does the government decide who is an enemy combatant? What are the criteria? That is for the Administration to know and for Americans not to ask about. Solicitor General Ted Olsen, whose wife was killed in the 9/11 terrorist attacks, defends the decision to keep the criteria a secret, explaining "[t]here will be judgments and instincts and evaluations and implementations that have to be made by the executive that are probably going to be different from day to day, depending on the circumstances."[34]

Secret criteria, based on instinct, that change day to day? That sounds suspiciously like the secret and ever-changing criteria determined by congressional cabals led by Sen. McCarthy a half century ago to determine who was a communist sympathizer and then publicly destroy them. Indeed, history should make us wary whenever a self-anointed portion of the government presumes to define "un-American" and then hold citizens accountable for activities that fall under such a designation.

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30. *Id.*

31. *See id.*; *see also* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

32. *See* Jess Bravin, *Judge Declares Padilla Has Right to Counsel*, WALL ST. J., Dec. 4, 2002.

33. *See* Bravin, *supra* note 1.

34. Charles Lane, *In Terror War, 2nd Track for Suspects; Those Designated 'Combatants' Lose Legal Protections*, WASH. POST, Dec. 1, 2002, at A1.

Significantly, the only authority the government can show to support its retrograde detention policy is the sixty-year-old Supreme Court opinion in *Ex Parte Quirin*. There, the Court decided that Americans working in collusion with German Nazi saboteurs seeking to destroy industrial targets in the U.S. could be tried by military commissions instead of civilian courts.[35] Widely criticized, *Quirin* had rested on the trash heap of other infamous and unjust decisions like *Plessy v. Ferguson*, *(Dred) Scott v. Sanford*, and *Korematsu v. United States*, until it was resurrected by the Attorney General in his desperate attempt to justify the detention policies of his department in the absence of any other authority.[36]

Politically, however, the legal position of indefinite detention is untenable in the long term. Nevertheless, it is the likely outcome for two of these U.S. citizens. The compelling question generated by this action concerns why indefinite detention of Americans by the military inside the United States is necessary. The only reason identified beyond the government's national security rationale deduced by legal scholars is one of judicial efficiency – they simply can not or will not undertake the tremendous effort to mount full scale prosecutions and discovery efforts in each of these cases and the many more that are likely to occur.[37] In effect, they may as well have shrugged and

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35. *See* Ex Parte Quirin, 317 U.S. 1 (1942).

36. *See* Diane F. Orentlicher & Robert Kogod Goldman, *The Military Tribunal Order: When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J. L. & PUB. POL'Y 653, 657 (2002):

> Much like the Supreme Court's validation of President Roosevelt's decision to intern American citizens of Japanese descent during World War II, *Quirin* has long been criticized as an abdication of independent judicial judgment during war time and an unwarranted surrender of constitutional rights. Even the author of the Court's opinion, Chief Justice Stone, reportedly had grave misgivings about the judgment he penned.

Id.

37. *See* Adam Liptak, *Accord Suggests U.S. Prefers to Avoid Courts*, N.Y. TIMES, July 16, 2002, at A14:

> Legal scholars found it hard to identify a rationale that would call for an ordinary criminal prosecution of Mr. Lindh but military detention of Mr. Padilla and Mr. Hamdi. The search for a unifying principle becomes even more difficult if Zacarias Moussaoui and Richard C. Reid are added to the mix . . . . Efforts to distinguish the treatment of these prisoners on consistent grounds tend to fail. The distinguishing factor is not citizenship: Mr. Moussaoui is French, and Mr. Reid is British; the others claim American citizenship. Nor is it the place of arrest: Mr. Lindh and Mr. Hamdi were captured in Afghanistan, the others in the United States. Nor is it the nature of the central criminal charge: Mr. Moussaoui, Mr. Reid and Mr. Padilla are accused of attempting or conspiring to commit terrorist acts, the others of fighting on the wrong side abroad.
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> 'You do worry about equal treatment and having a consistent theory about who ends up where,' said Ruth Wedgwood, a law professor at Yale. The only factor that seems to explain the disparity in how the men were treated is time. The later detentions were military, suggesting that the government may now view ordinary trials as more trouble than they are worth.

Id.

suggested that perhaps during "wartime" anything is possible – even in America.

It was wrong in the 1940s to inter 120,000 Japanese Americans without charges, evidence, trials, or the ability to demonstrate their allegiance to America. It was wrong in the 1950s to arrest, harass, and destroy the reputations of American "communists" without evidence of traitorous intent or false allegiance. It is wrong today to snatch Americans off the street, designate them "enemies," and throw them into military brigs without access to counsel, courts, the evidence against them, or the opportunity to refute the designation, be they Taliban, communists, Japanese, purple, or polka-dotted.

C. Other Federal Court Rulings

Federal courts have begun ruling in cases beyond the "headliners" of Lindh, Moussaoui, Hamdi, and Padilla. Several members of what the Justice Department styles "al Qaeda sleeper cells" within the U.S. have been arrested and indicted in Oregon and New York.[38] District courts have also taken up cases involving the status of immigrants and closed deportation hearings within the INS system as well as cases involving the ability of captured foreign detainees at Guantanamo Bay, Cuba to petition for release.

1. Domestic Terrorist Cells – The Buffalo & Oregon Cases

On September 14, 2002, three days after the first anniversary of the devastating 9/11 terrorist attacks, federal law enforcement agents arrested six Arab-American men in Lackawanna, New York, a Buffalo suburb. All of the suspects, who are American born and of Yemeni descent, were charged with operating a terrorist cell in western New York, and knowingly and unlawfully providing material support to al Qaeda by attending a terrorist training camp in Afghanistan, where Osama bin Laden allegedly lectured the men about the alliance of the Islamic jihad and al Qaeda.[39]

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38. For the sake of brevity and to reduce repetitiveness of issues, the federal indictments of James Ujaama in Seattle in August 2002, for allegedly planning to create a training camp in Oregon, and the four foreign nationals arrested in Detroit for alleged conspiracy to obtain weaponry and intelligence and create safe houses and fake I.D.'s are not discussed. However, for further reading on these cases, please see Timothy Egan, *Riddle in Seattle: Is Man Held by U.S. a Terrorist or Just a Hustler?*, N.Y. TIMES, Oct. 6, 2002, at A24; *see also* United States v. Ujaama (W.D. Wash. 2002); *see also* Grand Jury Indictment, *available at* http://news.findlaw.com/hdocs/docs/terrorism/usujaama 82802ind.pdf (last visited Mar. 23, 2003); *see also* Danny Hakim, *4 Are Charged with Belonging to a Terror Cell*, N.Y. TIMES, Aug. 29, 2002, at A1.

39. *See* United States v. Goba, Mosed, Taher, Galeb, Al-Bakri and Alwan (W.D. NY 2002); *see also* Grand Jury Indictment of May 2002, *available at* http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf (last visited Mar. 24, 2003).

Coincidentally, the Buffalo suspects are alleged to have attended the same terrorist training camp as John Walker Lindh, who, as part of his plea arrangement with the government, agreed to cooperate fully with authorities investigating terrorism at home and abroad. It is not known what role Lindh might have played in leading the government to its investigations in Buffalo. Pleas of not guilty have been entered for all of the men, and their cases are currently pending in the federal criminal court system.[40]

A month later, four more Americans were arrested in Portland, Oregon and indicted in federal court along with two others (one citizen extradited back to the U.S. from Malaysia and another non-citizen still at large) for plotting to join al Qaeda and Taliban fighters in their "jihad" against America.[41] The six individuals allegedly developed a plan to go to Afghanistan and take up arms against coalition forces, having trained with Chinese rifles in Oregon to prepare for the trip, but the plan never came to fruition.[42]

According to the FBI, there was no indication that the alleged members of the Portland cell sought to attack targets within the United States, "[t]hey had not gotten to a point where they were identifying targets or anything like that." The tip that led to these arrests came from a Hamas sympathizer of Palestinian origin who is serving thirty months in prison on weapons and fraud charges.[43]

Why were the alleged members of neither the Buffalo nor Portland cells tagged with the label "enemy combatant" and transferred to the Defense Department? That is an open question. However, three possible reasons present themselves. First, there was clearly much more FBI surveillance undertaken in these cases, several months' worth actually, to build up a strong evidentiary case against them. In contrast, there was little evidence compiled against Hamdi and Padilla – certainly not enough to withstand an Article III federal court's scrutiny.

Second, when the alleged terrorist cells in Buffalo and Portland were broken up and their cadre arrested, the courts hearing challenges in the Hamdi and Padilla cases had not spoken on the extent of the executive's power to do what it had done with those two citizens. Consequently, the cautious approach

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40. One of the defendants, Faysal Galab, entered a plea agreement on January 10, 2003, with prosecutors. In exchange for dropping his indictment to a lesser charge, he supplied information on the other five cell members and agreed to testify against them, admitting attending the al Farooq terrorist training camp in Afghanistan with them and was told afterwards to deny it. *See* Robert F. Worth, *Accused Member of Terror Cell Near Buffalo Agrees to Guilty Plea*, N.Y. TIMES, Jan. 11, 2003, at A9.

41. *See* United States v. Battle, Ford, Bilal, Al Saoub and Lewis, No. CR 02-399 HA (D. Or 2002); *see also* Grand Jury Indictment of Oct. 31, 2002, *available at* http://news.findlaw.com/hdocs/docs/terrorism/usbattle100302ind.pdf (last visited Mar. 24, 2003); *see also* Associated Press, *Malaysia to Deport 5th Oregon Suspect*, N.Y. TIMES, Oct. 8, 2002, at A15.

42. *See* Eric Lichtblau, *4 in U.S. Charged in Post-9/11 Plan to Join al Qaeda*, N.Y. TIMES, Oct. 5, 2002, at A1.

43. *See id.*

was to proceed along the path of charging these new defendants with multiple violations of Title 18 Section 2339 prohibiting support of a terrorist organization. But if the 2nd Circuit follows the lead of the 4th Circuit and extends judicial approval of the government's enemy combatant designation and detention policy to citizens captured in the homeland, it would be no surprise if the Attorney General directs agents to detain and then turn over future terrorist-supporting suspects to the military.

Third, the secret criteria for designating an American as an enemy combatant may require positive action in furtherance of an attack. Hamdi was captured abroad with a weapon fighting against coalition forces, and Padilla was captured in Chicago seeking targets for a radiological bomb plot. Conversely, there is no indication that any of the suspects apprehended in either Buffalo or Portland were physically participating in a terrorist action against the U.S. Of course, this is mere guesswork since the criteria for deciding who falls into enemy combatant status is unknown to the public and could change on a daily basis according to Solicitor General Olsen.[44]

Nonetheless, the chief law that these and future defendants not designated enemy combatants will face as they are prosecuted by Assistant U.S. Attorneys is a constitutionally problematic one. The Antiterrorism and Effective Death Penalty Act of 1996 criminalized providing "material support" to any group designated by the government as a terrorist group.[45] Material support is statutorily defined as providing to the illegal organization any of the following: "[C]urrency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials."[46]

According to Georgetown's Professor David Cole, this statute is unconstitutionally overbroad – effectively chilling protected activities.[47] Moreover, he argues, the lack of any intent element in the crime itself unfairly relieves the prosecution of proving in court that defendants actually meant to do the country harm through their perhaps misguided actions:

> It allows the government to obtain convictions for so-called terrorist crimes without proving any intent to engage in or further terrorism. The government need only show that the individual provided a proscribed group with some 'material support,' which . . . can be mere attendance at a training camp. The law is written so broadly that it would make it a crime to write a column or to file a lawsuit on behalf of a

44. *See* Lane, *supra* note 34, at A1.
45. *See* 18 U.S.C. § 2339A (2003).
46. *Id.* § (b).
47. *See* David Cole, Opinion, *Fight Terrorism Fairly*, N.Y. TIMES, Oct. 19, 2002, at A17.

> proscribed organization, or even to send a book on Gandhi's theory of non-violence to the leader of a terrorist group in an attempt to persuade him to forego violence.[48]

At least two federal district courts in California have ruled this part of the statute unconstitutional. Prior to the War on Terror, in 1998, the court for the Central District of California held the portion of the statute's material support definition in section (b) that prohibits providing personnel and training to terrorist organizations was impermissibly vague and thus stricken from the statute.[49] In that case, several American groups were "supporting" two foreign groups listed as terrorist organizations – the Kurdistan Worker's Party (PKK), an ethnically distinct secessionist group in southeast Turkey, and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka.[50]

The court's reasoning for finding the act vague was that the statute did "not . . . appear to allow persons of ordinary intelligence to determine what type of training or provision of personnel is prohibited. Rather, [it] appears to prohibit activity protected by the First Amendment—distributing literature and information and training others to engage in advocacy."[51]

Four years later, in June 2002, the federal district court in Los Angeles dismissed the Justice Department's case based on the same statute against seven individuals accused of diverting charitable donations to the People's Mujahedeen[52] – a group implicated in the takeover of the U.S. embassy in Iran in 1979 that is still listed as a terrorist organization even though it opposes the current regime in Teheran.[53] The basis for his determination that the statute was unconstitutional rested on the inability of such groups designated as "terrorist" to contest that designation:

> [T]he law gives these groups 'no notice and no opportunity' to contest their designation as a terrorist organization, a violation of due process, Judge Takasugi ruled. 'I will not abdicate my responsibilities as a district judge and turn a

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48. *Id.*

> America has had these kinds of laws before. In the McCarthy era, Congress and the states passed numerous statutes that made it a crime to have an association with the Communist Party. But the Supreme Court repeatedly ruled that only those individuals who specifically intended to further the party's unlawful ends could be punished. Guilt by association, the court proclaimed, is 'alien to the traditions of a free society and to the First Amendment itself.'

Id.

49. *See* Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176 (C.D. Cal. 1998).

50. *See id.* at 1180-81.

51. *Id.* at 1204.

52. *See* Greg Winter, *Judge Drops Case Against 7 Tied to Group Called Terrorist*, N.Y. TIMES, June 24, 2002, at A13.

53. *See* Greg Winter, *A Nation Challenged: Fund-Raising; Aiding Friend or Iranian Foe is Issue in Case*, N.Y. TIMES, Mar. 22, 2002, at A13.

> blind eye to the constitutional infirmities' of the law . . . . Because the government made its list of terrorist organizations in secret, without giving foreign groups a chance to defend themselves, the defendants, 'are deprived of their liberty based on an unconstitutional designation that they could never challenge,' he said.[54]

It is unclear whether the government will appeal this case;[55] but it is clear that the administration cannot continue to rely principally on a flawed statute without risking the loss of significant convictions. Consequently, it would not be surprising to find this case taken up by the 9th Circuit Court of Appeals – the first step in making it way to the Supreme Court; nor would it be surprising to hear Attorney General Ashcroft proposing some amendments to the existing law or new anti-terrorism laws altogether in the next legislative session.

2. Immigrant Status – The Haddad & North Jersey Media Cases

> And if a stranger sojourn with thee in your land, ye shall not do him wrong. The stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself.
> — Leviticus 19:33

During the months immediately following 9/11, the federal government dispersed its agents throughout the country to implement the largest single dragnet in American history. It succeeded in rounding up approximately 1200 men of mostly Arabic and South Asian origin that it then detained for questioning. Many of these individuals were arrested for technical violations of their immigration status. No names were released of those detained and all hearings on their immigration status and requests for deportation were held in secret.[56]

By November 2001, a federal gag order had been issued prohibiting officials from discussing the detainees and even forbidding defense attorneys from taking documents out of the courtroom. Due to the secrecy of the process, no government oversight or review of the actions occurred. There was no possibility of appeal from the hearings. Immigration courts, as executive branch bodies that are part of the Justice Department—not part of the Article III federal judiciary—had no choice but to comply with the Department's directives.

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54. Winter, *supra* note 52, at A13.

55. *See id.*

56. *See* Susan Sachs, *Judge Rejects U.S. Policy of Secret Hearings*, N.Y. TIMES, May 30, 2002, at A21.

Several court challenges were mounted against the government's detention policies – specifically attacking the decision not to release the names of individuals held, secrecy of the immigration hearings, and misuse of the material witness statute to hold individuals indefinitely without filing charges against them and allowing them access to counsel. The results have been decidedly mixed, as the courts continue to wrestle with the proper balance between equal justice and national security. Consequently a split in the Circuits has occurred that can only be resolved with a Supreme Court ruling. At the end of October 2001, the ACLU filed a request for information under Freedom of Information Act (FOIA) concerning the identity of the individuals. The executive branch remained non-responsive. In December, the group filed suit in federal district court, seeking to compel the government's compliance with FOIA. To justify its secrecy, the Justice Department argued that the nature of its actions were necessary for national security reasons—that identifying the detainees would alert terrorists as to how the investigation was proceeding and could aid in future terrorist plots. The decision by Judge Gladys Kessler came down in August of 2002 against the Justice Department, holding that the government had to release the names of the detained individuals. However, she stayed her order pending appeal.[57]

She noted that "[s]ecret arrests . . . are a concept odious to a democratic society."[58] Judge Kessler's rationale rested on the importance of verification that the government was operating within the bounds of the law, and it was her sworn duty as a member of the judicial branch to make sure that the executive branch acted appropriately. She said:

> The court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. . . . [But] the first priority of the judicial branch must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish our democracy from a dictatorship.[59]

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57. *See* American Civil Liberties Union, *ACLU Joins in FOIA Request for Information on Detainees, Says Government Has Refused to Answer Previous Inquiries*, *available at* http://archive.aclu.org/news/2001/n102901a.html (Oct. 29, 2001) (last visited Mar. 24, 2003); *see also* Amy Goldstein, *A Deliberate Strategy of Disruption; Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror*, WASH. POST, Nov. 4, 2001, at A01; *see also* American Civil Liberties Union, *In First Lawsuit Filed Regarding Mass Detentions, Civil Liberties Groups Demand Release of Essential Information Under FOIA*, *available at* http://archive.aclu.org/news/2001/n120501b.html (Dec. 5, 2001) (last visited Mar. 24, 2003).

58. Adam Liptak et al., *After Sept. 11, a Legal Battle On the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at A1.

59. Linda Greenhouse, *Judicial Restraint; The Imperial Presidency vs. The Imperial Judiciary*, N.Y. TIMES, Sept. 8, 2002, at D3. *See also*, Neil A. Lewis, *Judge Orders U.S. to Release Names of 9/11 Detainees*, N.Y. TIMES, Aug. 3, 2002, at A1.

On behalf of the Ashcroft Justice Department, an Assistant Attorney General chastised the judge for her ruling in a remarkably strong-worded statement that questioned not only the judge's patriotism, but also accused her of helping terrorists succeed in their mission:

The Department of Justice believes today's ruling impedes one of the most important federal law enforcement investigations in history, harms our efforts to bring to justice those responsible for the heinous attacks of September 11 and increases the risk of future terrorist threats to our nation.[60]

By the time of Judge Kessler's ruling, all but seventy-four of the detainees had been deported or released. Most, like the 131 Pakistani's who were secretly spirited back to their homeland on a chartered Portuguese jet, left the U.S. quietly, without fanfare and without a public hearing of their cases.[61] Later that month, the American Bar Association voted to oppose the secret detention of foreign nationals within the U.S. Unfortunately, neither of these actions came in time to help the other one thousand nameless individuals who were held, interrogated and disposed of by the government without judicial or public scrutiny.[62]

Five months after the ACLU action was filed, the *Detroit Free Press* together with the *Detroit News* and Michigan Congressman John Conyers commenced an action in Detroit's federal district court to open up the secret immigration hearings against Ann Arbor resident Rabih Haddad – a native of Lebanon who had overstayed his tourist visa. In April, Judge Nancy G. Edmunds ruled in favor of the newspapers to open the hearings. In so doing, she relied on both history and practice in the absence of law to the contrary:

> The statutory and regulatory history of immigration law demonstrates a tradition of public and press accessibility to removal proceedings. From the start of the federal government's regulation of immigration in the last quarter of the nineteenth century, the governing statutes and regulations have expressly closed exclusion hearings (i.e. hearings to determine whether an alien may enter the United States), but have *never* closed deportation hearings (i.e. hearings to determine whether an alien already within the country may remain . . .).[63]

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60. Steve Fainaru & Dan Eggen, *Judge Rules U.S. Must Release Detainees' Names*, WASH. POST, Aug. 3, 2002, at A1.

61. *See* Steve Fainaru, *U.S. Deported 131 Pakistanis In Secret Airlift; Diplomatic Issues Cited; No Terror Ties Found*, WASH. POST, July 10, 2002, at A1.

62. *See* Josh Meyer, *Bar Assn. Assails U.S. on Detainees*, L.A. TIMES, Aug. 14, 2002, at 1.

63. Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 943 (E.D. Mich 2002) (emphasis in original).

On appeal, the 6th Circuit agreed with Judge Edmunds. The decision, handed down at the end of August, found that the modicum of enhanced national security argued by the government as a basis to continue deportation hearings in secrecy was vastly outweighed by society's interest in public and press oversight of how the government wields its delegated power. Indeed, Judge Damon J. Keith scolded the Justice Department, stating that "[d]emocracies die behind closed doors."[64] He specifically emphasized the rationale of this important concept in his opinion:

> Since the end of the 19th Century, our government has enacted immigration laws banishing, or deporting, non-citizens because of their race and their beliefs. While the Bill of Rights zealously protects citizens from such laws, it has never protected non-citizens facing deportation in the same way. In our democracy, based on checks and balances, neither the Bill of Rights nor the judiciary can second-guess government's choices. The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty.
>
> Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them 'special interest' cases. The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door . . . . The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings.
>
> When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment 'did not trust any government to separate the true from the false for us' (citing prior Supreme Court opinions). They protected the people against secret government.[65]

New Jersey's federal district court judge John Bissell essentially agreed with Judge Kessler's determination to open government immigration hearings when he ruled in May 2002 that the government could only close such

64. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).
65. *Id.* at 682-83. (emphasis added)

hearings on a case-by-case basis, not under a blanket secrecy order.[66] In the case of *North Jersey Media Group v. Ashcroft*, several media outlets and the ACLU sued to open the hearings on the basis of due process violations and the public's right to monitor the actions of government officials.[67]

The government appealed the decision to the 3rd Circuit Court of Appeals and sought a stay during appeal. A three-judge panel from the 3rd Circuit denied the government's motion,[68] but the Justice Department appealed this to the Supreme Court, arguing in its brief that "[t]his is an extraordinary case, touching on the nation's very ability to defend itself against the continuing threat of hostile attack from myriad and unknown sources" – referring to the value that releasing the names of those detained could have for terrorist cells.[69] The Justices eventually granted the stay to keep the hearings secret during appeal. No opinion accompanied the Supreme Court's order.[70] Three months later, the 3rd Circuit ruled in Philadelphia that the INS blanket secrecy order was appropriate[71] given the deference due to the executive branch – reversing Judge Bissell's decision to open the hearings on a vote of two to one.[72] Chief Judge Edward Becker, writing for the court, noted:

> We are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis . . . . On balance, however, we are unable to conclude that openness plays a positive role in special-interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.[73]

The plaintiff's attorney criticized the court for accepting the government's "parade of horribles" and Hofstra University law professor Eric Freedman added that "Closed proceedings are always more convenient to the executive branch . . . . The real scandal here . . . is that history, law, policy and the precedents of the Supreme Court, to say nothing of the Constitution,

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66. *See* Sachs, *supra* note 56, at A21.

67. *See id.*

68. *See Appeals Panel Upholds Ruling for Open Court*, N.Y. TIMES, June 19, 2002, at A19.

69. Susan Sachs, *Ashcroft Petitions Justices for Secrecy in Deportations*, N.Y. TIMES, June 22, 2002, at A9.

70. *See Supreme Court Allows Secrecy to Stand in Deportation Cases*, N.Y. TIMES, June 29, 2002, at A10.

71. *See* North Jersey Media Group, Inc, et al. v. Ashcroft, No. 02-2524 (3rd Cir. 2002), *available at* http://news. findlaw.com/hdocs/docs/terrorism/ashnjmg10802opn.pdf (last visited May 8, 2003).

72. *See* Adam Liptak & Robert Hanley, *Court Upholds Secret Hearings on Deportation*, N.Y. TIMES, Oct. 9, 2002, at A1.

73. *Id.*

require the opposite result."[74] Most of the 752 people specifically detained on immigration violations have been deported or released – only 81 remain in custody.[75]

3. The 'Material Witness' Dilemma

The government's alternate policy of indefinitely detaining people in secrecy as "material witnesses" when there are no immigration violations to hold them on was also questioned by a New York federal district court in May. Judge Shira A. Scheindlin ruled that the Justice Department overreached its power in detaining a Jordanian man, Osama Awadallah – a student in California with a green card, as a material witnesses who authorities believe might have information for grand juries investigating terrorism. The judge determined that a person may only be held with probable cause under the material witness statute – which the judge ruled had not been applied correctly. Moreover, Judge Scheindlin ruled that such "witnesses" could only be detained after an indictment was returned.

The material witness statute was designed to allow for detention of an individual who had information critical to criminal proceeding that was in progress if that individual could not be compelled to testify in any other way. The judge wrote, "Since 1789, . . . no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation." She relied on a prior statement by Attorney General Ashcroft that he would utilize this rarely invoked law aggressively to prevent, disrupt and delay new terrorist attacks to support her conclusion that this misuse was improper: "*Relying on the material witness statute* to detain people who are presumed innocent under our Constitution *in order to prevent potential crimes* is an illegitimate use of the statute."[76] Ashcroft rejected the decision as an anomaly.

Two months later, while the government was appealing Scheindlin's decision to the 2nd Circuit Court of Appeals, Judge Michael B. Mukasey, also of the New York federal district court, ruled in favor of the administration – characterizing the previous ruling by Scheindlin as an incorrect interpretation of the statute. According to Mukasey's decision, the government could proceed to use the statute to indefinitely detain individuals in secrecy in pursuit of its war on terror. With such conflicting decisions at the district level, it will

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74. *Id.*

75. *See id.*

76. *See* Benjamin Weiser, *Judge Rules Against U.S. on Material Witness Law*, N.Y. TIMES, May 1, 2002, at A10 (emphasis added); *see also* Steve Fainaru & Amy Goldstein, *Judge Rejects Jailing of Material Witnesses; Ruling Imperils Tool in Sept. 11 Probe*, WASH. POST, May 1, 2002, at A1.

be up to the 2nd Circuit to clarify whether the law is being manipulated or followed appropriately.[77]

Nonetheless, public opinion is steadily coalescing against Mr. Ashcroft's legal initiatives to detain non-citizens. Professor David Cole of Georgetown University Law Center, summed it up this way, "It's really unprecedented that we have locked up several hundred individuals in secret. It's as close to 'disappearing' individuals [like in South American dictatorships] as we in this country have ever come. They don't want us to know how much they're just shooting in the dark on this investigation."[78] And editorials, such as this one from the St. Louis Post-Dispatch, have begun to pepper newspapers across the country since litigation against secret detentions by the government has ensued:

> I[n] this country, we don't imprison people unless there is evidence they committed a crime. We don't hold detention hearings behind closed doors. We don't imprison people for crimes they might commit in the future. All these things are fundamental.
>
> Yet since Sept. 11, Attorney General John D. Ashcroft has used the federal material witness law in exactly those ways, locking up two dozen people. Last week, a federal judge in New York called Mr. Ashcroft's tactics 'illegitimate.'
>
> A material witness is not a crime suspect, but has information that is important to a prosecution. If the witness might flee, prosecutors can lock him up to get a sworn statement. But Mr. Ashcroft has used the law more broadly, imprisoning people he thinks might commit a crime.
>
> Last week's ruling freed Osama Awadallah, a Jordanian with a legal resident alien's green card who attended college in California. The FBI found his first name and old telephone number in a car used by one of the Sept. 11 hijackers. The government says he lied when asked during a polygraph exam if he had advance knowledge of the Sept. 11 attacks. A judge held him as a material witness.
>
> For 20 days, Mr. Awadallah was shuttled among four prisons, held in solitary confinement, shackled, strip-searched and held incommunicado. On Oct. 10, while handcuffed to a chair, he testified before a grand jury he had met two of the hijackers, but could remember the name of only one, Nawaf

77. *See* Steve Fainaru, *Judge: U.S. May Jail Material Witnesses; N.Y. Ruling Conflicts with Decision in Prior Case in Same Federal Court*, WASH. POST, July 12, 2002, at A12.

78. Margaret Graham Tebo, *Courts Wrestle with Keeping Secret Detainees*, 88 A.B.A.J. 46 (2002).

> Al-Hazmi. He denied knowing another hijacker, Khalid Al-Mihdar, even after the government produced a college examination book in which Mr. Awadallah had written 'Khalid.' He was charged with perjury.
>
> Last week, U.S. District Judge Shira A. Scheindlin ruled the detention illegal. She said the material witness law only applied after a criminal case starts -- not to the grand jury investigation before it starts. Holding an innocent person during a grand jury investigation might violate the Fourth Amendment's requirement that an arrest be based on evidence of a crime, she said.
>
> Mr. Ashcroft is appealing. He notes that many other judges have approved the use of the material witness law during grand juries. He says that locking up material witnesses is essential to disrupting new terrorist attacks.
>
> But even if Mr. Ashcroft's use of the law was justified in the first confusing days after Sept. 11, it certainly has been abused since. Consider the case of Abdallah Higazy, an Egyptian-born student who was arrested as a material witness on Dec. 17 when he returned to a hotel near the World Trade Center to retrieve possessions left behind on Sept. 11. The FBI confronted him with a ground-to-air radio found at the hotel.
>
> After three weeks of detention, Mr. Higazy seemed to confess and was charged with interfering with an investigation. But a few days later, another hotel guest claimed the radio. The government released Mr. Higazy in prison garb and with a $3 subway fare.
>
> Compounding these abuses is the secrecy that has shrouded the use of the law. The Justice Department won't say how many people have been held as material witnesses. Nor are the court proceedings involving material witnesses open to the public.
>
> We all want to be safe, but in this country, we hold certain values fundamental. The Justice Department's tactics are fundamentally wrong.[79]

As of November 2002, the government had jailed forty-four people as "material witnesses" – holding them indefinitely without access to counsel or under indictment by a grand jury. Nine of these are still known to be in

79. Editorial, *At What Cost?*, ST. LOUIS POST-DISPATCH, May 6, 2002, at B6.

custody, twenty-nine have since been released and it is unclear what happened to the other six. The Justice Department has no comment on the matter.[80]

4. Battlefield Detainees – The Guantanamo Bay Cases

Camp Delta, a prison camp at the U.S. Naval Base in Guantanamo Bay, Cuba, is home to 620 detainees captured largely during the American-led invasion of Afghanistan in 2001. The newly constructed Camp Delta is a more permanent facility than Camp X-Ray, the makeshift maze of cages that served as the original detention center. The detainees are either members of al Qaeda or Taliban fighters – most are Saudi Arabian, but there are at least forty-three nationalities represented. None have appeared before any sort of tribunal to have their status determined as combatants, none have access to counsel or their home governments, and none have been accorded legal rights guaranteed under international law – although all have been treated humanely and are kept in good physical condition.[81]

The basic rule is that both citizens and non-citizens who are arrested as suspects in criminal activity are arraigned and processed through Article III civilian courts. Both are usually accorded *habeas corpus* relief. Outside the United States, the rules change. In wartime, non-citizen prisoners of the enemy's forces who are captured in battle and detained abroad are processed for any criminal activity according to the terms of the Uniform Code of Military Justice – which is brought into application through the terms of the Third Geneva Convention on Treatment of Prisoners of War.[82]

Because the Bush administration did not want its detainees accorded POW status, even though they were captured as byproducts of America's war on terrorism, the invasion of a foreign country and the occupation of that country,[83] the Defense Department labeled them "unlawful combatants" and argued that the treaty protections do not apply,[84] therefore the UCMJ process does not apply. Consequently, the administration believes it can run them through the military commissions to be established under the President's November 13th Military Order,[85] where they will enjoy fewer rights as

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80. Washington Post, *Nearly Half of 'Material Witnesses' Haven't Testified*, OMAHA WORLD-HERALD, Nov. 24, 2002, at 16A.

81. *See* Jeffrey Kaye, *The Detainees*, NEWSHOUR WITH JIM LEHRER – PBS, Jan. 22, 2003, *available at* http://www. pbs.org/newshour/bb/military/jan-june03/detainees_1-22.html (last visited Apr. 6, 2003).

82. *See generally* Geneva Convention, *supra* note 23.

83. *See* Thom Shanker & Katherine Q. Seelye, *Behind-the-Scenes Class Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12: "By denying captives full Geneva protections, the administration said, it could more thoroughly interrogate them to uncover future terrorist plots, bring a wide array of charges against them, try them before military tribunals and administer the death penalty." *Id.*

84. *See* William Glaberson, *Critics' Attack on Tribunals Turns to Law Among Nations*, N.Y. TIMES, Dec. 26, 2001, at B1.

85. *See generally* Military Order, *supra* note 22.

defendants what they would enjoy in front of a regular Court Martial or Article III federal court.

The administration's definition and use of the legal status "unlawful combatant" is broad. Apparently, Taliban detainees (who the government now recognizes as covered by the Geneva Convention as the *de facto* army of Afghanistan, but not as POW's) and al Qaeda detainees (who the government says are not covered by the treaty) are both "unlawful combatants" because they failed to follow the rules of warfare.[86] If they are not POW's, then by implication, they are not recognized as members of the armed forces – which would make them civilians.

As civilians, their status would be covered by the Fourth Geneva Convention protecting of civilians during armed conflict.[87] These treaty terms would accord them rights to be tried, if they are to be tried, by regularly constituted civilian courts (Article III federal courts). The administration has not specifically addressed this argument, but is likely to broaden its definition of "unlawful combatant" even further – analogizing the detainees to spies and mercenaries who could traditionally be summarily executed under historical practice in warfare. What does this process do to American justice? What does it do to how America is perceived by other people around to the world?

VI. NON-ARTICLE III COURTS

Beyond the normal courts established by Congress under Article III of the Constitution, other judicial bodies either have already impacted the government's War on Terror or may do so in the near future.

A. Foreign Surveillance Intelligence Court

In May 2002, the Foreign Surveillance Intelligence Court (FSIC), a statutorily created body pursuant to an act of the same name, handed down a shocking decision. Although the government was granted the eavesdropping authority it requested, (none have been turned down in the court's twenty-two-year history, including the 932 requests made last year),[88] the decision was surprising because it actually castigated the Justice Department for breaching the wall separating intelligence gathered for criminal prosecution and that gathered for actual foreign intelligence purposes. It also chastised the FBI and Justice Department for providing it with false or erroneous information on

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86. *See* Thom Shanker & Katherine Q. Seelye, *Word for Word/The Geneva Conventions, Who is a Prisoner of War? You Could Look it Up. Maybe.*, N.Y. TIMES, Mar. 10, 2002, at D9.

87. *See generally* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *available at* http://www1.umn.edu/humanrts/instree/y4gcpcp.htm (last visited Mar. 24, 2003).

88. New York Times, *New Power in Terror Inquiries Put to Use*, OMAHA WORLD-HERALD, Nov. 24, 2002, at 16A.

which to base search warrants and wiretap authorizations on at least seventy five occasions. The court rejected the Attorney General's assertion that the new USA Patriot Act allowed the FBI much more leeway in its domestic surveillance capability.[89]

However, on appeal to a three-judge review panel selected by Chief Justice Rehnquist, the ruling by the lower panel on the government's surveillance capability was overturned, and the lower court was ordered to "issue a new ruling giving the government the powers it seeks."[90] The review panel held that no such artificial wall continued to exist between intelligence use by investigators and prosecutors. Digesting the opinion of the review panel that comports with the Attorney General's argument, Creighton University's Professor Mack notes the problematic consequences:

> Essentially, the FISA review court's opinion would have the American public believe that the government has been obstructed at every twist and turn in its pursuit, investigation, and prosecution of terrorist activity, when, in fact, history reveals that just the opposite is true. The courts have been extraordinarily solicitous of the government's efforts, providing them with broad latitude to pursue counterterrorism objectives. It bears repeating that the lower FISA court has *never denied* a request for a FISA warrant. . . . What the lower FISA court recognized and, indeed, what all Americans should legitimately fear is that the Executive branch is disingenuously using its September 11th failures in conjunction with the hastily drafted and poorly crafted Patriot Act to 'give the government a powerful engine for the collection of foreign intelligence information targeting U.S. persons.'
>
> There is no question that Congress bungled its legislative responsibility by hurriedly enacting a far-reaching statute without debate or analysis. There is also no question that the Executive Branch, which goaded Congress into its haste, now seeks to use this legislative failure as a means to specifically target U.S. citizens. But perhaps most importantly, there is also no question that a secret FISA appellate court structure, with judges hand selected by the Chief Justice . . . that hears only the government's evidence, and grants only the government a right to appeal is a singularly inappropriate forum to resolve issues that threaten the fundamental rights

89. *See Feds Get Wide Wiretap Authority*, CBS News, *available at* http://www.cbsnews.com/stories/2002/08/23/attack/printable519606.html (Nov. 18, 2002) (last visited Apr. 6, 2003).

90. *Id.*

> and values of all U.S. citizens. The only question that remains is how much further our justice system will be derailed in pursuit of the war on terrorism.[91]

B. Executive Military Tribunals

As of this writing, the Bush administration has not empanelled any of the military commissions that it has laid the legal groundwork for by promulgating its Military Order[92] and the supporting DOD regulations.[93] Thus, it remains unclear how these courts will function in reality beyond the rules that establish them. However, it is becoming clear that Article III federal courts are reluctant to interfere in their jurisdiction or operation so long as the defendants remain outside the sovereignty of the U.S.

At least two federal district court judges have determined they have no jurisdiction to issue writs of *habeas corpus* in response to requests on behalf of detainees in Guantanamo Bay. A. Howard Metz of the federal bench for California's Central District Court, ruled in February 2002, that neither he nor any other federal court judge could exercise their jurisdiction outside the sovereignty of the United States – which is where the naval base at Guantanamo Bay legally sits. He relied on prior decisions in the 1990s by the 11th Circuit Court of Appeals and the federal district court for Connecticut to determine that Guantanamo Bay, while under U.S. jurisdiction and control of the U.S., remained under the sovereignty of Cuba according to the terms of the lease agreement between those two countries.[94]

Judge Colleen Kollar-Kotelly, of the U.S. District Court for the District of Columbia agreed in July 2002, ruling that the Kuwaitis, Australians, and Britons seeking habeas relief for their relatives being detained in Cuba could not seek it in the federal courts for the same reasons articulated by Judge Metz. In dismissing their case, she suggested that international law might provide them some relief, but that would have to be worked out at the government-to-government level through their home countries.[95]

Given this ruling, it is apparent that the administration will not seek to empanel a military tribunal and begin a trial inside the United States or its

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91. Raneta Lawson Mack, *First Time Unlucky: The Jurisprudential Misadventures of the Foreign Surveillance Intelligence Court of Review*, Op-Ed, *Jurist Law Professors' Forum*, *at* http://jurist.law.pitt.edu/forum/ forumnew75.php (Nov. 26, 2002) (last visited Apr. 6, 2003).

92. *See generally* Military Order, *supra* note 22.

93. *See* Katharine Q. Seelye, Government Sets Rules for Military on War Tribunals, N.Y. TIMES, Mar. 21, 2002, at A1; *see also* Dep't of Defense, Military Comm'n Order No. 1 (Mar. 21, 2002), *available at* http://www.defenselink. mil/news/Mar2002/d20020321ord.pdf (last visited Mar. 24, 2003).

94. *See* Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (D. Ca. 2002).

95. *See* Neil A. Lewis, *Judge Rebuffs Detainees at Guantanamo*, N.Y. TIMES, Aug. 1, 2002, at A20.

territories, even though the President's Military Order allows it to do so. They simply would not want to risk interference from a federal court. Thus, if and when such tribunals appear, they will likely be "off site" in Afghanistan, another country, or in Camp X-Ray on Guantanamo Bay itself. An aircraft carrier or other warship would not likely suffice as a viable venue immune from the reach of federal district courts as warships are commonly considered part of the territory of the sovereign to whom they belong.[96]

C. A National Security Court?

Harvey Rishikof, a law professor at Roger Williams University and former FBI counsel has proposed the creation of a new national security court dedicated to handling the difficult issues that have confronted federal courts and embroiled the government in a nest of legal challenges over its actions since the September 11th attacks. The basis for his proposal is two-fold: (1) the continuing war on terrorism is taking its toll on the federal court system, which is not designed to hold secret trials based on classified national security-related evidence, and (2) the alternative of trying terrorists in non-UCMJ tribunals only alienates our allies, who are vehemently against it, and creates a double-standard for non-Americans.[97]

While he concedes that federal courts functioned well in the Oklahoma City bombing case and the first World Trade Center attack, Rishikof argues that the system itself is unable to adapt in the long-term to such a continuing terrorist conflict as we now find ourselves in:

> The people we are fighting do not fit into our traditional legal classifications. We can continue to improvise our way through, compromising our federal criminal procedures and alienating our allies, or we can demonstrate our commitment to the rule of law by creating an institution that can handle new challenges without damaging our constitutional principles.[98]

As to structure, Rishikof suggests expanding the jurisdiction of the current Foreign Intelligence Surveillance Court, which is staffed by eleven federal judges on a rotation basis and approves secret search and seizure warrants based on classified intelligence and providing for a route of appeal up to the Supreme Court. Moreover, a pool of specialized defense attorneys with prior clearances to participate could be drawn from to provide counsel.

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96. *See* Lauritzen v. Larsen, 345 U.S. 571 (1952) ("a ship is constructively a floating part of the flag-state"); *see also* U.N. Convention on the Law of the Sea, Art. 91 & 92, 21 I.L.M. 1261 (1982).

97. *See* Harvey Rishikof, *A New Court for Terrorism*, N.Y. TIMES, June 8, 2002, at A15.

98. *Id.*

The advantages he cites that would stem from such a court include designation and fortification of an existing courthouse to hold terrorism trials – thus, streamlining physical security concerns, and the possibility of taking the court on the road to conduct hearings in remote locations – such as Camp X-Ray.[99]

While Professor Rishikof must be commended for the creativity of his suggestion, it must be noted that such a proposal runs directly counter to our American culture of open judicial proceedings, the fairness and legality of which are guaranteed by public scrutiny. This proposal, though well-intended, likely raises more thorny constitutional and judicial process questions than it ultimately answers. Would there be a specialized pool of pre-screened jurors that have special clearance? What would that do to the *voir dire* selection process?

Rishikof correctly points out that there are other specialized courts in the federal system for bankruptcy, tax, patents, international trade, and copyrights. However, these examples fail to support creation of a secret tribunal because they do not operate outside public scrutiny. Allowing secret hearings for issuance of search and seizure warrants, as now happens with the FISA court, sets the outside limits of what our legal and political values permit. Allowing secret trials based on secret evidence with secret outcomes and no public scrutiny to ensure fairness breaches those limits.

A federal courthouse, designated and fortified, as Rishikof suggests, holding unidentified prisoners in cells below ground, sitting as a massive windowless concrete bunker to which access is restricted – be it in downtown Boston or rural Virginia, belongs more to the landscape of Soviet Russia or Communist China than to America. The Bush administration has, in its responses to 9/11, provided enough legal symbols of what the American legal system is *not* fundamentally about (the USA Patriot Act, the Military Tribunals, and the withdrawn TIPS program to enlist neighborhood informants). America does not need a lasting physical symbol such as this National Security Court to give it permanent form.

VII. THE SUPREME COURT – AN ULTIMATE DESTINATION

While cases challenging the government's authority to indefinitely detain individuals, secretly surveil them, hold them as material witnesses, or summarily deport them are percolating in the lower federal courts, no case derived from America's post 9/11 War on Terror has yet made its way to the Supreme Court. However, given the gravity of civil liberty abuse at stake, it is extremely likely that several soon will. Consequently, it is important to gauge the tenor of the current bench on such subjects. Since Chief Justice Rehnquist has given these issues considerable thought, albeit in historical context, his are the most significant writings to consider here.

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99. *See id.*

In 1998, Rehnquist published a book entitled *All Laws but One* that discusses the place of civil liberties in wartime. He could not have known three years later how relevant that legal analysis would be. This book discusses civil liberties in wartime within the United States. Most of it covers the Civil War, with the remainder discussing both World Wars. Rehnquist's proposition is that one of war's necessities for a successful conclusion may be the temporary curtailment of civil liberties.[100]

This amounts to a sophisticated chicken and egg argument – if our country is not secure, then freedom does not matter because there is no country. In fact, the title of the book refers to a speech by Lincoln where he asked the rhetorical question: "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?" when he was justifying the suspension of *habeas corpus*. Rehnquist allows for this silence of the laws in time of war because it has always been balanced with responses by both the public and the legal community.

His whole argument, then, essentially rests on faith that this will always continue to be the case, handily disregarding Justice Brandeis' admonition, "experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."[101] Shortly after his book's publication, Rehnquist noted in an address to the students at Drake University Law School:

> The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over. Again, we see the truth in the maxim Inter Arma Silent Leges – in time of war the laws are silent. To lawyers and judges, this may seem a thoroughly undesirable state of affairs, but in the great scheme of things it may be best for all concerned. The fact that judges are loath to strike down wartime measures while the war is going on is demonstrated both by our experience in the Civil War and in World War II. This fact represents something more than some sort of patriotic hysteria that holds the judiciary in its grip; it has been felt and even embraced by members of the Supreme Court who have championed civil liberty in peacetime. Witness Justice Hugo Black: he wrote the opinion for the Court upholding the forced relocation of Japanese Americans in 1944, but he also wrote the Court's opinion striking down martial law in Hawaii two years later.

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100. *See generally* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

101. Olmstead v. United States, 277 U.S. 438, 478 (1928).

> While we would not want to subscribe to the full sweep of the Latin maxim – Inter Arma Silent Leges – . . . perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.[102]

In a review of the book four years after its publication, New York Times reporter Adam Cohen noted,

> if Mr. Rehnquist the jurist sees the world as Mr. Rehnquist the historian does, there's cause for concern . . . . [The book's] central message is that in wartime, the balance between order and freedom tips toward order. In recounting the history, Justice Rehnquist gives all the arguments for order, and far too few for freedom. The people whose liberties are taken away are virtually invisible.[103]

As the U.S. Supreme Court begins to consider questions of equal justice and civil liberty as they are balanced against the executive's wartime administrative prerogatives, prior articulated opinions on the matter become increasingly important as a barometer of where the justices stand. Consequently, the Chief Justice's book, together with his public statements like those delivered at Drake above and his court opinions on citizenship and its content like in the *Verdugo-Urquidez* case, corroborate one another as reflective of his mind regarding this critical balance.

In the 1990 case of *United States v. Verdugo-Urquidez*, the Supreme Court held that the Fourth Amendment did not apply to search and seizure by federal agents of property owned by a nonresident alien that was located in Mexico. Writing for the majority, Rehnquist concluded that the term "people" in the Fourth Amendment referred only to U.S. citizens – who were, therefore, the only individuals in whom Fourth Amendment rights could possibly vest. Conversely, Fifth Amendment rights that vested in "persons" and Sixth Amendment rights that vested in "the accused" could be relied on by citizens and non-citizens alike. This dichotomy together with the territorial limitation of constitutional rights mitigated against Verdugo-Urquidez being protected.[104]

This holding is consonant with his book's determination disapproving the Supreme Court's *Korematsu* line of cases in 1942-43 authorizing a curfew and detention of Japanese on the West Coast only because those cases lumped together Issei (Japanese immigrants) with Nisei (Japanese Americans). In his

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102. William H. Rehnquist, *Remarks of the Chief Justice of the United States*, 47 DRAKE L. REV. 201, 208 (1999) (delivering the Dwight D. Opperman Lecture at Drake University School of Law, Sept. 18, 1998).

103. Adam Cohen, *Justice Rehnquist's Ominous History of Wartime Freedom*, N.Y. TIMES, Sept. 22, 2002.

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

view, the government had much more leeway to deal with the prior class of individuals rather than the latter class based simply on their status.[105]
While the Chief Justice has not spoken on such issues definitively since 9/11, it may be assumed that he holds to the reasoning presented in his 1998 book and his 1990 opinion in the *Verdugo-Urquidez* case. Although he is just one of nine justices who may decide how civil liberties are balanced against national security, or equal justice is balanced against maintaining order, his persuasive effect on the conservative wing of the Supreme Court cannot be underestimated. Thus, it appears that defenders of the USA Patriot Act, and administration officials issuing orders and rules under it, will at least find a sympathetic ally in the Chief Justice should they find themselves in the Supreme Court while the war on terrorism is in progress.

VIII. CONCLUSION

In his testimony before the Senate Judiciary Committee following the September 11th terrorist attacks, Attorney General Ashcroft warned against questioning the Administration's conduct of its War on Terror:

> To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve.[106]

It is precisely a deep sense of patriotism that motivates authors such as me to question the exercise of power by my government. The arrogance of power demonstrated by the Bush Administration in its legal responses to the terrorist attacks suffered by this country on September 11th 2001, encapsulated by the notion demonstrated time and again that it holds a monopoly on the right course of action and any opposition to or fair questioning of that course amounts to treason, cannot be allowed to continue unchallenged in this, the greatest of the world's democracies.

History is littered with the remains of shattered nations whose leaders consolidated power in times of adversity while entreating the people to "trust them" to do the right thing. Crassus manipulated the Roman Senate into making him Consul to defeat the revolt of Spartacus, which he engineered to threaten the city – the first step in transforming Republican Rome to Imperial Rome. Lenin implored the Russians to trust him and his provisional committee to lead them through the interim phase of socialism toward communism when the Bolsheviks took over in 1917. Stalin repeated this entreaty several years

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105. *See generally* Rehnquist, *supra* note 100.

106. Dan Eggen, *Ashcroft Defends Anti-Terrorism Steps; Civil Liberties Groups' Attacks 'Only Aid Terrorists,' Senate Panel Told*, WASH. POST, Dec. 7, 2001, at A1.

later. Hitler used it to calm the German people on his accession to power in 1933. While we may trust the current executive to lead this country's war on terror, does that mean we write a blank check? What about the next executive, and the one after that? Does accumulated power get handed back when the present executive's term is over?

The executive branch's accrual of power to itself has not been checked by the legislature, which is paralyzed for fear of seeming unpatriotic; and the first decisions by the federal judiciary, the only remaining bulwark against increasing executive power,[107] are just now beginning to come down – with mixed results and clearly not enough force to restore the balance yet.[108] The administration's entreaty to trust it not to abuse its growing authority has not been challenged by a cowed public – only the press has dared question it, as in this New York Times editorial of December, 2001:

> The administration has argued that even if the powers it is seizing are broad, it will not use them abusively. This has been a constant theme of Mr. Ashcroft and the administration in general – that they are people who can be trusted to use these broad, repressive rules wisely. That is not the way the American system works. This is a nation built around the rule of law, not faith in the goodness of particular officials.[109]

Fundamental rights of American citizens have been curtailed without their knowledge. By rewriting FBI rules crafted to curb abuses of the J. Edgar Hoover era, the Justice Department has given that agency the power to unleash its agents into the private lives of Americans without any indicia of illegal activity, let alone the former low-level pre-snooping requirements of reasonable suspicion or probable cause. Citizens can also now be detained as "material witnesses" indefinitely, without being charged, without access to counsel, incommunicado and in solitary confinement.[110]

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107. *See* Greenhouse, *supra* note 59.

> I[n] its aggressive conduct of the war on terrorism's domestic front, the Bush administration has encountered few obstacles from Congress or public opinion. Rather, it is federal judges, across the ideological spectrum, who have responded with skepticism . . . it actually should come as no surprise to find the judiciary in a restraining role.

Id.

108. *See id.* The Bush administration's legal strategy has been to defend its positions "categorically: no judicial review, no right to counsel, no public disclosure, no open hearings." *Id.*

109. Editorial, *Justice Deformed: War and the Constitution*, N.Y. TIMES, Dec. 2, 2001, at 14.

110. *See* Michael Moss & Ford Fessenden, *America Under Surveillance: Privacy and Security; New Tools for Domestic Spying, and Qualms*, N.Y. TIMES, Dec. 10, 2002, at A1; *see also* Philip Shenon & David Johnston, *Threats and Responses: The Investigation; Seeking Terrorist Plots, the F.B.I. is Tracking Hundreds of Muslims*, N.Y. TIMES, Oct. 6, 2002, at A1.

Alternatively, when courts have challenged the use of that method, Attorney General Ashcroft has substituted in the label of "enemy combatant" to justify handing those Americans over to Secretary Rumsfeld's Defense Department – which threw them into military brigs and wrapped their detention in the shroud of secrecy. Does that mean that these Americans have been stripped of their citizenship? No. However, it does mean that the U.S. military is holding American civilians against their will. Whatever happened to the doctrine of *posse comitatus*, restricting the military's domestic police powers? The Bush Administration vowed in its 2002 National Security Strategy to review that doctrine for possible alteration.[111]

Are these Americans being interrogated? Are they being tortured? We don't know the answers to these questions. All we know is that they are Americans who have been summarily denied their rights as citizens. The government contends that it has the ability to use either of these labels to apprehend Americans off planes, streets and even out of their own homes based on undisclosed surveillance, secretly "process" them and them into prison or a military jail indefinitely without a lawyer.

Court rulings that may find their way onto the Supreme Court's docket next term are growing. The Foreign Surveillance Intelligence Court has approved the secret collection of evidence against citizens not associated with criminal activity. The 4th Circuit has determined their indefinite detention by the military to be appropriate for citizens overseas. The 2nd Circuit must decide whether this is appropriate for citizens detained at home. The 6th Circuit demanded an end to secret deportation hearings by the INS, but the 3rd Circuit approved this process.

Basic rights of non-citizen residents in the U.S. have also been infringed wholesale. Protection against preventive or indefinite detention, privacy of the attorney-client relationship, rights to a jury trial, appeal and public hearings have all been swept aside by more Ashcroft initiatives implemented by the INS. Non-citizens outside the U.S. are not even accorded hearings guaranteed them under the Geneva Conventions. Hundreds now languish at Camp Delta in Guantanamo Bay, Cuba undergoing military, FBI and CIA interrogation without access to counsel.

These detainees, known by the new sobriquet "unlawful combatants" could remain at this improvised but expanding prison forever – just beyond the territorial reach of American federal courts, where no *habeas corpus* rights apply. They are victims of a legal status created by our government that refuses to acknowledge them as prisoners of war even though they were captured in the War on Terror which Congress acknowledged through Joint Resolution as the constitutional equivalent of a declared war.

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111. *The National Security Strategy of the United States of America* (Sept. 2002), *available at* http://www. whitehouse.gov/nsc/nss.pdf (last visited Apr. 6, 2003).

The government is also using its power to control information as a means of restricting public access to public records. Under new rules issued by Ashcroft to executive agencies directing them to read the parameters of the Freedom of Information Act as narrowly as possible while the administration's war on terrorism continues, many formerly available documents are being reclassified and withheld from public scrutiny.[112] As the following newspaper account shows, even mundane requests are increasingly denied:

> When United Nations analyst Ian Thomas contacted the National Archives in March to get some 30-year-old maps of Africa to plan a relief mission, he was told the government no longer makes them public. When John Coequyt, an environmentalist, tried to connect to an online database where the Environmental Protection Agency lists chemical plants that violate pollution laws, he was denied access. And when civil rights lawyer Kate Martin asked for a copy of a court order that has kept secret the names of some of the hundreds of foreigners jailed since Sept. 11, the Justice Department told her the order itself was secret. 'They say, 'there's a secrecy order barring us from telling you this. But the language of the secrecy order is secret, so you'll just have to take our word for it." she says.[113]

Without access to basic information, the public, the press, non-governmental organizations and civil society itself cannot sufficiently assess the motives, actions or justifications of our public officials. And if we cannot do that, then we cannot challenge those motives, actions or justifications as illegal or otherwise unacceptable. Public debate in this free democracy is thereby reduced to charges and countercharges based on hearsay and speculation. This is the breeding ground of paranoia. Indeed, this is why individuals routinely avoided talking to Western reporters in closed societies.

All Americans, indeed most people around the world, understand that there is an inherent tension between the desire to have a free society and a secure one. In a time of clear threat to our nation, there is a natural tendency to favor a secure one. However, if we compromise our most basic freedoms in order to have this "secure" society, are we truly any better off? Are we consciously trading one type of society for another? Did not the free societies emerge victorious over the closed societies in World War II? In the Cold War? Were not the excesses by our government in the name of security during those times later condemned as unnecessarily excessive? Is it not true now

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112. *See* Adam Clymer, *Government Openness at Issue as Bush Holds on to Records*, N.Y. TIMES, Jan. 3, 2003, at A1.

113. Laura Parker et al., *Secure often Means Secret; Post 9/11 Government Stingy with Information*, USA TODAY, May 16, 2002, at 1A.

that how we as a society react to the threat we face inevitably defines us as a people? Thomas Jefferson prophetically noted in his first inaugural address, delivered in 1801 - a time when it was still very much unclear whether this grand experiment known as "America" would succeed:

> Equal . . . justice; . . . freedom of religion; freedom of the press, and freedom of person under protection of habeas corpus, and trial by juries impartially selected. These principles form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation. The wisdom of our sages and blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps to regain the road which alone leads to peace, liberty, and safety.[114]

114. Thomas Jefferson, *First Inaugural Address*, Mar. 4, 1801, *available at* http://www.homeofheroes.com/ presidents/inagural/3_Jeff_1.html (last visited Apr. 6, 2003).