

**THE INDEFINITE DETENTION OF “ENEMY COMBATANTS”:
BALANCING DUE PROCESS AND NATIONAL SECURITY IN THE
CONTEXT OF THE WAR ON TERROR**

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Executive Summary

The President, assertedly acting under his “war power” in prosecuting the “war on terror,” has claimed the authority to detain indefinitely, and without access to counsel, persons he designates as “enemy combatants,” an as yet undefined term that embraces selected suspected terrorists or their accomplices.

Two cases, each addressing a habeas corpus petition brought by an American citizen, have reviewed the constitutionality of detaining “enemy combatants” pursuant to the President’s determination:

- Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), cert. granted, Jan. 9, 2004 (No. 03-6696), concerns a citizen seized with Taliban military forces in a zone of armed combat in Afghanistan;
- Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), rev’d, No. 03-2235, (2d Cir. Dec. 18, 2003), petition for cert. filed, Jan. 16, 2004 (No. 03-1027), concerns a citizen seized in Chicago, and suspected of planning a terrorist attack in league with al Qaeda.

Padilla and Hamdi have been held by the Department of Defense, without any access to legal counsel, for well over a year. No criminal charges have been filed against either one. Rather, the government asserts its right to detain them without charges to incapacitate them and to facilitate their interrogation. Specifically, the President claims the authority, in the exercise of his war power as “Commander in Chief” under the Constitution (Art. I, § 2), to detain persons he classifies as “enemy combatants”:

- indefinitely, for the duration of the “war on terror”;

- without any charges being filed, and thus not triggering any rights attaching to criminal prosecutions;
- incommunicado from the outside world;
- specifically, with no right of access to an attorney;
- with only limited access to the federal courts on *habeas corpus*, and with no right to rebut the government's showing that the detainee is an enemy combatant.

These detentions, effected unilaterally by the executive without congressional authorization and not subject to meaningful judicial review, violate core due process rights under the Constitution, including:

- the right not to be detained except pursuant to a statute authorizing the detention;
- the right not to be detained without the prompt proffer of specific criminal charges;
- the right to test the legality of the detention in the federal courts through the writ of habeas corpus at a meaningful evidentiary hearing;
- the right to consult with and to be represented by counsel concerning the detention, and in connection with a habeas corpus hearing challenging it.

The holding of persons incommunicado in this country, without charges, indefinitely and based solely on the executive's decision, has nothing in common with due process as we know it. Though effected in the perceived interest of national security, these detentions are alien to America's respect for the rule of law. Until now, no court has ever sustained the assertion of such unilateral detention powers by a President, even in times of war.

The President's war power is insufficient to justify such detentions, in derogation of core due process rights. The only Supreme Court precedent said to establish this detention power, Ex parte Quirin, 317 U.S. 1 (1942), did not. Quirin involved only the question of whether saboteurs, members of the German army, could be tried before a military commission for alleged war

crimes, as Congress had authorized. In sustaining the prompt trial by commission of the saboteurs, who were represented by counsel, Quirin said nothing supporting the executive's unauthorized, indefinite and incommunicado detentions now at issue.

Apart from the absence of judicial support, recognizing an essentially unlimited and unilateral executive power to detain would have serious negative consequences for our country. The sharp departure from the rule of law inherent in such detentions would threaten many adverse effects beyond the violation of the detainees' rights.

There is a significant risk that persons will be detained erroneously, since they would be permitted no access to counsel or opportunity to rebut their classification as enemy combatants. This risk of error is all the graver because of the obvious potential for ethnic-based actions against men of Middle Eastern extraction, already evidenced in fact in immigration contexts, given the distinct ethnic cast of the terrorists apprehended to date.

Recognition of this unlimited detention power would impose an intolerable pressure on criminal defendants accused of terrorist-related crimes. They could be threatened, if they refuse to plead guilty, with removal from the criminal justice system, and indefinite detention with no access to a lawyer and no opportunity to contest their guilt. This is precisely the fate, to date, of one civilian non-combatant, suspected of providing (but not proven to have provided) logistical support for al Qaeda, who was designated as an enemy combatant and transferred to military jurisdiction shortly before he was to be tried on criminal charges. Al-Marri v. Bush, 274 F. Supp. 2d 1003 (C.D. Ill. 2003).

There is also the danger of further extensions of the war power to curtail other civil liberties. A jurisprudence that holds that the domestic war on terror is indistinguishable from the

“total war” circumstances of World War II and the Civil War, and on that basis defers to the President all decisions on the best means to prosecute the war on terror within the United States, leaves the door wide open to an almost unlimited expansion of executive power. Why should the First Amendment right of free speech, or the Fourth Amendment right to be free of unreasonable searches, be any less subordinate to the President’s war power than the core due process right to remain free of unilateral executive detention? Pick your favorite constitutional amendment or right: its survival during the war on terror cannot be assumed if the legitimacy of these indefinite detentions is sustained.

Nor can the assertion of this detention power be comfortably assumed to be only a temporary departure from the rule of law. The war on terror is likely to be a prolonged, if not a permanent feature of our times. Thus, extraordinary departures from due process justified by the existence of this war may prove to be enduring features of the constitutional landscape, not short-term measures easily reversed.

The fact that the administration concedes that *habeas corpus* petitions can be brought on behalf of the detainees provides cold comfort for due process rights, if the basic principle of the detentions is upheld. This is especially so if, as the administration contends, no rebuttal in court is to be permitted to its claim, supported only by “some evidence,” that the detainee is an enemy combatant. The Great Writ, under these restrictions, becomes perilously close to an empty gesture.

Finally, to sustain these lawless executive detentions would undermine the position of the United States in promoting the rule of law abroad, and would provide encouragement and cover for repression around the globe. If the United States feels justified in departing from the rule of

law in combating terrorism at home, notwithstanding our strong tradition of constitutionalism, regimes in other countries with no such tradition may see such conduct as justifying crackdowns against political dissidents.

We do not question that the President has the power to treat aspects of the war on terror as a “war,” a political question traditionally held unreviewable by the courts. Further, the President’s war power, coupled with his primacy in the realm of foreign affairs, rightly afford the President a wide discretion in prosecuting the war on terror abroad, a discretion which supports at least the initial detention of Hamdi in Afghanistan in a zone of armed combat.

But no such near total deference is appropriate with respect to the President’s actions at home, where due process and the rule of law prevail. The executive’s authority to launch military campaigns against al Qaeda and Iraq cannot be conflated with an unlimited power to take actions in this country, in alleged pursuit of the same war on terror, that trammel on core due process rights. The Constitution makes the President the Commander in Chief of the Armed Forces, not Commander in Chief of all persons within the United States.

We do not say that due process is unyielding in the face of dire circumstance. To the contrary, it can accommodate a short-term departure from its usual strictures in an imminent emergency created by terrorism, in which immediate action is essential and can be taken only by the executive. But claims of such a crisis-borne necessity must be scrutinized by the courts, and a heavy presumption weighs against them to the extent they would suspend core due process rights.

No such general claim of necessity can be sustained with respect to the detentions of suspected terrorists in the United States. The criminal laws provide ample means for prosecuting

such suspects and imposing heavy sentences upon their conviction, including the death penalty (and using the prospects of such sentences to plea bargain as a means of extracting information). Nor need a criminal prosecution wholly preempt an interrogation for intelligence purposes, if appropriate safeguards are put in place to insure that the fruits of the interrogation are not used against the defendants at the criminal trial.

The absence of Congressional authorization for these detentions further undermines their legitimacy. In other instances of disputed domestic exercises of the President's war power, including Quirin, the courts have looked to whether Congress, the other political branch, had authorized the challenged action. Here Congress has not authorized indefinite detentions. The Joint Resolution of September 2001, authorizing the President to use "all necessary and appropriate force" against al Qaeda, through the "United States Armed Forces," cannot reasonably be read as approving the suspension of basic due process rights in the United States, as distinguished from the use of military force abroad. In the USA Patriot Act passed a month later, which contains numerous expansions of executive power to combat terrorism, Congress notably did not authorize any detentions of citizens, and imposed a seven-day limitation (absent the commencement of removal proceedings) on the detention of aliens suspected of terrorism, a limitation inconsistent with the indefinite detentions now defended. Further, given that neither the Joint Resolution nor the President's war power justifies indefinite detentions, such detentions of citizens also violate 18 U.S.C. § 4001(a), prohibiting detentions of citizens "except pursuant to an act of Congress," as the Second Circuit has now held in Padilla.

There are, to be sure, limits on Congress's own war powers, to the extent legislation would seek to supplant core due process rights. But if Congress did authorize limited and conditional detentions, in specifically defined circumstances, and subject to meaningful judicial

review, such a statute would command greater deference than the executive's unilateral assertion of an unlimited detention power.

In addition to its claimed detention power, the administration asserts that alien enemy combatants may be tried at the President's discretion before special military commissions, rather than in Article III courts applying the extensive procedural protections accorded under the Constitution to defendants in criminal prosecutions. Quirin and existing statutory authorization do provide some support for the use of such commissions to prosecute violations of the law of war. Assuming that some enemy combatants could be so charged, nonetheless the use of military commissions should be minimized because of the several advantages offered by criminal prosecutions in the federal courts. Because of the public access to such federal court trials, the procedural safeguards they embrace, and the independence of the federal judiciary, the fairness of such trials and the justness of their verdicts is much more likely to be accepted, in this country and abroad, than would be the case with military trials controlled by the executive. The federal courts have successfully tried numerous terrorism cases. They should be the preferred forum for future terrorism cases.

The war on terror has created many challenges for our country. Not the least is the challenge to preserve the rule of law in acting against enemies that respect no laws. The Constitution is not a "suicide pact," as a Supreme Court justice once famously declared. But neither is it a mere compact of convenience, to be enforced only in halcyon days of civic tranquility. It should take far more than the monstrous brutality of a handful of terrorists to drive us to abandon our core constitutional values. Insistence on the rule of law will not undermine our national security. Abandoning the rule of law will threaten our national identity.

I. Introduction

Especially since the attacks of September 11, 2001, the United States has viewed itself as engaged in a “war on terror” against the forces of al Qaeda and its adherents, and other terrorist groups, both abroad and at home. The measures taken in response to the threat of terrorism have raised many issues concerning the proper balance between national security and individual liberties. This report addresses, in particular, the role the federal courts should play in striking this balance with respect to the detention and trial of suspected terrorists or their accomplices, designated as “enemy combatants” by the executive branch.

A. Hamdi and Padilla: the President’s War Power Trumps Due Process

To date, the constitutionality of detaining “enemy combatants,” pursuant to the President’s unilateral determination, has been reviewed in two cases, each addressing a habeas corpus petition brought by an American citizen:

- Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (“Hamdi”), reh’g and reh’g en banc denied, 337 F.3d 335 (4th Cir. 2003), cert. granted, Jan. 9, 2004 (No. 03-6696);
- Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (“Padilla”), adhered to on reconsideration, Padilla v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y.), rev’d, No. 03-2235 (2d Cir. Dec. 18, 2003) (“Padilla Cir.”), petition for cert. filed, Jan. 16, 2004 (No. 03-1027).

In addition, one alien, a student from Qatar, Ali Saleh Kahlah al-Marri, has been designated as an enemy combatant and transferred to military jurisdiction, shortly before he was scheduled to be tried on criminal charges. See Al-Marri v. Bush, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) (“Al-Marri”) (habeas petition dismissed in view of transfer of petitioner to military custody in South Carolina). If the reported facts concerning al-Marri are correct, he is a civilian

suspected of providing logistical support for terrorists, specifically helping “other members of al Qaeda ‘settle’ in the United States.”¹

Padilla and Hamdi, both American citizens, were seized under different circumstances, ultimately declared “enemy combatants,” and given over to the custody of the Department of Defense, where they have been held incommunicado, without any access to legal counsel, for well over a year at this point. Padilla at 571-72, 574; see Hamdi at 460.

¹ The New York Times reported as follows concerning al-Marri:

Mr. Marri 37, came to the United States a day before the 9/11 attacks on a student visa. He was held in December 2001 as a material witness in the Sept. 11 investigation and later charged with lying to the F.B.I. in an interview and credit card fraud.

Officials said the recent information from Qaeda operatives in American custody, including Khalid Shaikh Mohammed, pointed to Mr. Marri as a “sleeper” operative assigned to help other members of al Qaeda “settle” in the United States. Mr. Marri visited a Qaeda training camp in Afghanistan and met with Osama bin Laden, officials said. N.Y. Times, Wide Impact From Combatant Decision Is Seen, June 25, 2003, c. 1.

In the same article, the purpose of the detention was described as follows:

Administration officials said the decision to imprison . . . al-Marri in a brig in South Carolina . . . was intended in part to try to cull more information from him about possible links to al Qaeda. That avenue would probably have been foreclosed if Mr. Marri’s case had gone to trial the next month.

“This way,” an administration official said, “we’ll obviously be able to continue to interrogate him. We may be able to obtain valuable intelligence from him.” (Id.).

It appears al-Marri was arrested as a material witness by FBI agents in Peoria, Illinois, at the direction of the U.S. Attorney’s Office for the Southern District of New York, and transferred to New York. He was formally arrested on a complaint charging him with credit card fraud in January 2002. In February an indictment was returned with additional charges, none expressly tied to terrorism. Ultimately he was scheduled to be tried on these charges in Peoria on July 21, 2003. On June 23 President Bush designated him an enemy combatant. The indictment thereupon was dismissed and he was “immediately transferred into military custody and transported to the Naval Consolidated Brig in Charleston, South Carolina, where he continues to be held.” Al-Marri, 274 F. Supp. 2d at 1004-05. In the cited order, al-Marri’s subsequent habeas corpus petition was dismissed by the Central District of Illinois for improper venue, given al-Marri’s transfer to South Carolina and the general rule that “habeas cases should be brought in the district of confinement.” Id. at 1009-10.

No criminal charges have been filed against either Hamdi or Padilla.² The government disclaims, for now, any interest in pursuing the two “primary objectives of criminal punishment: retribution or deterrence.” Padilla at 600, quoting Kansas v. Hendricks, 521 U.S. 346, 361-62 (1997). Rather, the government asserts its right to detain them without charges indefinitely, for the duration of the war on terror, to serve two different purposes: to prevent them from returning to the enemy, and to facilitate their interrogation in the hope of obtaining information to thwart additional terrorist acts. Padilla at 573-74; Hamdi at 465-66.

A brief comparison of Hamdi and Padilla, and of the al-Marri detention, arising as they do out of different factual settings, will help illuminate some of the issues presented by “enemy combatant” detentions.³

Hamdi, according to the government’s allegations that the Fourth Circuit viewed as indisputable, was “captured in a zone of active combat in a foreign theater of conflict,” namely Afghanistan. Hamdi at 459. He allegedly was captured by the Northern Alliance forces, together with other members of a Taliban fighting unit, while in possession of a weapon. The Northern Alliance forces handed Hamdi over to the American armed forces in the fall of 2001. The Department of Defense thereafter has held him in Afghanistan, Guantánamo Bay, Cuba, and ultimately, commencing in April 2002, in Naval Brigs in Virginia (id. at 460, 477) and, commencing July 2003, South Carolina. Brief for the Respondents in Opposition at 4-5, Hamdi v. Rumsfeld (U.S., No. 03-6696) (“Resp’ts Hamdi Brief”). It is not clear when and by whom

² Padilla’s alleged conduct as a saboteur undoubtedly violated numerous criminal statutes directed against terrorist acts and conspiracies (see pp. 128-29, below). Hamdi’s criminal liability as a Taliban foot soldier is less clear.

³ For a more complete analysis of the Padilla and Hamdi decisions see pp. 56-67, below.

Hamdi was formally declared to be an “enemy combatant.” Compare Hamdi at 461 (Hamdi was so designated “by our Government”) with Resp’ts Hamdi Brief at 4 (“the United States military determined that Hamdi is an enemy combatant”).

Padilla was arrested in May 2002 by Department of Justice personnel when he arrived at a Chicago airport. The arrest was pursuant to a material witness warrant issued by the Southern District of New York, pursuant to 18 U.S.C. § 3144, to enforce a subpoena to secure Padilla’s testimony before a grand jury in the Southern District. Padilla at 568-69. A lawyer appointed to represent Padilla, after consulting with him, filed a petition for a writ of habeas corpus challenging his detention as a material witness. After the motion had been fully submitted, the government suddenly withdrew its grand jury subpoena and transferred Padilla to the custody of the Department of Defense in South Carolina, pursuant to his designation by President Bush, himself, as an “enemy combatant.” Id. at 571-74.

To support the classification of the petitioners as enemy combatants, in each case the government presented an affidavit or declaration by Special Advisor to the Undersecretary of Defense for Policy, Michael Mobbs, reciting the circumstances under which each petitioner had been detained and at least some of the alleged facts said to support his designation as an enemy combatant. In Hamdi’s case, the evidence was basically his capture, bearing a weapon, as a part of the Taliban fighting forces in Afghanistan. Hamdi at 461, 472. In Padilla’s case the facts alleged included his contacts with a senior al Qaeda lieutenant in Afghanistan, allegedly proposing to steal radioactive material so as to build and detonate a “dirty bomb” in the United States, and other contacts with al Qaeda, including training and alleged instructions to journey to the United States to “conduct reconnaissance and/or conduct other attacks on their behalf.” Padilla at 572-73.

Both the Hamdi circuit court and the Padilla district court recognized, as the government ultimately conceded, the availability of habeas corpus as a procedural remedy to test the legality of the detentions of these American citizens.⁴ But, as a matter of substance, both upheld the constitutionality of the detentions, if the classification of the detainee as an “enemy combatant” were established, as proper exercises of the President’s war power as Commander in Chief under Article II, section 2, of the Constitution. Neither court viewed the detainee’s U.S. citizenship to limit the President’s power to detain them.⁵

The Second Circuit, in its recent decision reversing Padilla, disagreed. It held that, absent explicit congressional authorization, the President’s war power did not extend to the detention of American citizens on American soil, removed from any zone of armed combat. Padilla Cir., slip op. at 25-37. It also found Padilla’s detention to violate 18 U.S.C. § 4001(a), which prohibits the detention of a citizen “except pursuant to an act of Congress.” Id., slip op. at 37-44.

To sustain the enemy combatant classification, the Padilla district court would have required that the government adduce “some evidence” supporting the classification, while permitting the petitioner to rebut this showing. Padilla at 608. On its interlocutory appeal to the Second Circuit, the government urged that Padilla “has no entitlement to present facts to

⁴ The government initially contested Hamdi’s right to bring the writ. It argued, in the Fourth Circuit’s words, that the federal courts “may not review at all its designation of an American citizen as an enemy combatant” because “[the government’s] determinations on this score are the first and final word.” Hamdi v. Bush 296 F.3d 278, 283 (4th Cir. 2002). The Fourth Circuit refused to dismiss the habeas petition on this ground and remanded it to the District Court, declining to embrace by such a dismissal “a sweeping proposition, namely that, with no judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say so” (id.). After the Fourth Circuit’s remand, apparently the government revised its position and did not dispute Padilla’s or Hamdi’s right to bring a habeas petition.

⁵ Both Padilla and Hamdi are American citizens. Padilla grew up in Chicago and New York, and then moved to Egypt after serving a prison sentence (Padilla at 572). Hamdi was born in this country, but moved to Saudi Arabia as a young child. (Hamdi at 460).

challenge the basis for his detention,” because the “some evidence” standard “turns exclusively on the facts presented by the Executive” Opening Brief of Respondent-Appellant at 43, 45.

In Hamdi no rebuttal was permitted and Hamdi’s counsel was not permitted to consult with him to determine if any rebuttal was feasible: the court found the Mobbs declaration sufficient given that (in its view) the facts supporting Hamdi’s classification were beyond dispute. Thus while in its earlier remand decision the Fourth Circuit had refused to sustain the classification “on the government’s say so”, declining to accept the government’s determination as “the first and final word” on the subject (see p. 5, n.4 above), its ultimate resolution based exclusively on the Mobbs declaration -- consistent with the government’s “no rebuttal” position in the Padilla appeal -- seems to have done precisely that in the military battlefield context before it.

Neither Hamdi nor the Padilla district court attempted an all-purpose definition of “enemy combatant,” and the administration also seems not to have gone beyond the facts of the individual cases to articulate a generally applicable definition. In Padilla’s case, his alleged role in planning a bomb attack bore obvious analogy to the German saboteurs seized as illegal combatants in the World War II case of Ex Parte Quirin, 317 U.S. 1 (1942) (“Quirin”). To the Fourth Circuit, Hamdi’s classification as an enemy combatant was self-evident based on his alleged capture while fighting with Taliban forces against the Northern Alliance, America’s ally.

Neither Hamdi nor the Padilla district court held that the detainee had a due process right to consult with counsel in connection with the habeas proceeding. In Padilla, however, Judge Mukasey ordered that such consultation be allowed, as a matter of discretion, in part because Padilla had already consulted with his appointed counsel when he had been held as a material

witness. The government vigorously resisted this order, resulting in an interlocutory appeal to the Second Circuit, which found Padilla's detention itself to be unconstitutional.

As the Supreme Court is poised to review the Hamdi and Padilla rulings, we offer a review of these decisions, and an analysis of the interests and values at stake.

In different ways, and in different factual contexts, Hamdi and the Padilla district court held that certain basic limits on the power of the executive branch, treated as unquestioned "rights" in most contexts, are of limited or no applicability to accused terrorists. These holdings suggest that a system largely separate from Article III courts and the due process rights they enforce, but rather based on the war power of the President -- though still subject to some review via habeas corpus -- is appropriate to deal with terrorism. Under this system, "enemy combatants" as determined by the executive branch may be held indefinitely, without charges, perhaps with no access to a lawyer (as in Hamdi), and subject to aggressive interrogation, until the end of the "war on terror." This "enemy combatant" classification can embrace a U.S. citizen seized abroad during a military campaign and accused of fighting with enemy forces (Hamdi), a U.S. citizen accused of planning sabotage in the United States (Padilla), and, given the reported facts concerning al-Marri, a civilian non-combatant perhaps accused of providing logistical support for terrorists in the United States.⁶

The Second Circuit's opinion reversing Padilla does not speak directly to the constitutional rights of detainees to due process. But it does squarely hold that indefinite

⁶ Alternatively, such suspected "enemy combatants," or at least the foreign nationals among them, may be tried at the President's discretion before special military commissions, rather than in Article III courts, which apply the extensive procedural protections accorded under the Constitution to defendants in criminal prosecutions.

detentions are not within the President's unilateral war power, to the extent that the person detained is "an American citizen seized on American soil outside a zone of combat." Padilla Cir., slip op. at 4. The opinion necessarily does not address the President's powers with respect to non-citizens, such as al-Marri, or with respect to citizens seized abroad or in zones of combat, such as Hamdi.

B. Questions Presented

Since the war on terror has no foreseeable end, it becomes vital to reexamine the role of the federal courts, and the core principles they generally enforce, in the context of terrorism. What is the appropriate role for the courts, the President and Congress with respect to the detention and prosecution of alleged terrorists, given a proper application of the separation of powers doctrine in the light of the war power of the President and the Due Process Clause? Is it likely that denying basic due process rights to alleged terrorists would do lasting damage to those rights traditionally accorded to all persons within the reach of the Constitution? Is it unwise to apply to terrorism the due process limitations on executive power that apply in criminal proceedings? Instead, should the courts find that the President, under his war power, possesses the discretion to fight the war on terror through whatever means he deems appropriate, including here the unlimited detention and interrogation of suspected terrorists? Should the answer to this detention issue depend on whether, for example, the suspect is a citizen, or was arrested, or is detained, in the United States or abroad?

So far no trials before military commissions have been ordered, though detailed rules to govern such trials have been promulgated (see pp. 113, 123-26, below). Those rules do not provide for such military trials of citizens.

In this report we will:

- restate the basic substantive and procedural “rights” of detainees, outside of the war context (pp. 10-33);
- examine the precedents construing the war power of the President (and/or Congress), and the extent to which those powers have been held to limit or preempt basic due process rights (pp. 33-55), including in Padilla and Hamdi, (pp. 55-67);
- analyze the potential damage to civil liberties inherent in upholding the constitutionality of unilateral and indefinite executive detentions of “enemy combatants” in the United States (pp. 67-80);
- set forth our own analysis of why the President’s war power should not be construed to embrace such detentions (pp. 81-104), at least absent express authorization by Congress (pp. 104-12); and
- weigh the practical and policy advantages and disadvantages of the federal courts as a trial venue for alleged terrorists, as compared with military commissions, to the extent the use of commissions would be constitutional (pp. 112-52).

II. The Core Principles of Individual Liberty and Due Process

It is asserted by the administration that, on its determination that an individual is an “enemy combatant”, that person may be detained:

- indefinitely, for the duration of the “war against terror”;
- without any charges or proceedings being filed, and thus not triggering any rights attaching to criminal prosecutions;
- incommunicado from the outside world;
- specifically, with no right of access to an attorney;
- with only limited access to the federal courts, and no right to rebut the government’s showing that the detainee is an “enemy combatant.”

Our core constitutional principles of due process and individual liberty prohibit such indefinite and incommunicado detentions in times of peace. After discussing these clear peacetime principles, we will proceed to consider the possible limitation or inapplicability of those principles in the context of the “war on terror.”

A. Substantive Rights

**1. No arbitrary detentions;
the rule of law**

The Constitution with its Bill of Rights defines the balance between governmental authority and individual liberty in the United States.

The United States is entirely a creature of the Constitution. Its power and authority have no other source.

Reid v. Covert, 354 U.S. 1, 5-6 (1957) (Black, J., plurality opinion).

Early on, the Supreme Court sounded the rule of law as central to the Constitution:

The government of the United States has been emphatically termed a government of laws, and not of men. Marbury v. Madison, 5 U.S. 137, 163 (1803).

Fundamental to our constitutional scheme is the principle that a person can be detained by the government only pursuant to a valid law, and upon a judicial determination that sufficient cause exists to believe it has been violated. The Constitution prohibits detentions based only on the executive's subjective determination.

From at least the Magna Carta of 1215, a major stream in the history of English-speaking peoples has been the increasing protection of individuals from such arbitrary exercises of executive power. The Magna Carta recognized the right to be free from intrusions on personal security "except by the legal judgment of [one's] peers or by the law of the land." The Magna Carta, though initially benefiting only a narrow class of English barons, recognized that even the King was subject to a superior law. The rule of law was gradually extended to protect the rights of commoners. By the time of Edward III, the right to "due process of law" was recognized as protecting personal liberty. See Ingraham v. Wright, 430 U.S. 651, 673 n.41 (1977). Key later developments included the work of Sir Edward Coke in the early 17th century, and the enactment of the English Habeas Corpus Act of 1679 and Bill of Rights of 1689, the latter declaring the supremacy of Parliament and its laws over the power of the crown.

The founding fathers "were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws." Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946). The Fourth Circuit, in its Hamdi decision, well articulated the fear of arbitrary

governmental power, and specifically unrestrained executive detentions, as a central focus of the Constitution:

The Constitution is suffused with concern about how the state will yield its awesome power of forcible restraint. And this preoccupation was not accidental. Our forebears recognized that the power to detain could easily become destructive “if exerted without check or control” by an unrestrained executive free to “imprison, dispatch or exile any man that was obnoxious to the government by an instant declaration that such was their will and pleasure.” 4 W. Blackstone, Commentaries on the Laws of England 349-50 (Cooley Ed. 1899) (quoted in Duncan v. Louisiana, 391 U.S. 145, 151 (1968)).

Hamdi, 316 F.3d at 464.

The rule of law finds its most explicit constitutional formulation in the Fifth Amendment’s guarantee that no person may be “deprived of life, liberty, or property without due process of law” The “touchstone of due process is protection of the individual against arbitrary action of government.” Wolff v. McDonnell, 418 U.S. 539, 558 (1974). The right to due process has both substantive and procedural aspects:

The Due Process Clause of the Fifth Amendment provides that “No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .” This Court has held that the Due Process Clause protects individuals against two types of government action. So-called “substantive due process” prevents the government from engaging in conduct that “shocks the conscience,” Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights “implicit in the concept of ordered liberty,” Palko v. Connecticut, 302 U.S. 319, 325-326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). This requirement has traditionally been referred to as “procedural” due process.

United States v. Salerno, 481 U.S. 739, 746 (1987).

Due process requires an express statutory basis for detentions. Common law crimes, recognized in England, were held incompatible with our Constitution in United States v. Hudson, 11 U.S. 32 (1812). Much more recently, in 1971, Congress acted to rescind the Emergency Detention Act and to prevent any conduct similar to the internment of Americans of Japanese ancestry during World War II. Its remedy was to enact 18 U.S.C. § 4001(a), which provides:

No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

The Fourth Amendment protects not only against unreasonable searches for evidence, but also against arbitrary arrest and detention, in these words:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The “Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.” Gerstein v. Pugh, 420 U.S. 103, 114 (1975);⁷ County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (Fourth Amendment requires prompt judicial determination of probable cause, within 48 hours of arrest, as prerequisite to extended pretrial detention following a warrantless arrest). “Probable cause exists

⁷ The procedure used to determine probable cause, though it need not be adversarial in nature, “must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest”. Id., 420 U.S. at 125.

if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.” Henry v. United States, 361 U.S. 98, 102 (1959).

The requirement that probable cause be promptly determined to justify a detention is not limited to the context of criminal prosecutions.⁸ It also applies to detentions for investigatory purposes, even where there is no intention of charging the detainee with a crime. Davis v. Mississippi, 394 U.S. 721, 726-27 (1969); see Dunaway v. New York, 442 U.S. 200, 214-16 (1979); cf. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (Rehnquist, C.J., plurality opinion) (the Fourth Amendment is violated “at the time of an unreasonable governmental intrusion,” and “whether or not the evidence is sought to be used in a criminal trial. . . .”).

2. No indefinite detentions (with rare exceptions)

While recognizing exceptions, the Supreme Court has declared that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” Salerno, 481 U.S. at 755 (emphasis added). See also id. at 749 (recognizing a “‘general rule’ of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial”); accord Foucha v. Louisiana, 504 U.S. 71, 83 (1992) (“our present system . . . , with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law”); Addington v. Texas, 441 U.S. 418, 425 (1979) (“This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that

⁸ Though concerned with a criminal prosecution, the Gerstein court pointed out “consequences of prolonged detention” that are not limited to the criminal context: confinement “may imperil the suspect’s job, interrupt his source of income, and impair his family relationships.” Id., 420 U.S. at 114.

requires due process protection”); see Petition of Brooks, 5 F.2d 238, 239 (D. Mass. 1925) (“There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as a punishment for crime”).

Though from a dissenting opinion, the following comment on indefinite detentions likewise states the law of the land:

Fortunately, it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed or exiled save by the judgment of his peers or by the law of the land.

Shaughnessy v. Mezei, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting from opinion upholding indefinite detention of an excludable alien, held at the border, based on confidential information the Attorney General refused to disclose, even in camera).

The Supreme Court recently declared that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem.” Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (construing statute to authorize detention of removable aliens only for a “reasonable time,” to avoid constitutional question presented by unlimited detention).⁹ The Court explained:

Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty . . . [the Due Process] Clause protects. See Foucha v. Louisiana, 504 U.S. 71, 80 (1992). And this Court has said that

⁹ The Court distinguished Shaughnessy v. Mezei as involving the indefinite detention of an alien held at the border, and therefore not subject to the due process protection afforded to aliens within the United States. 533 U.S. at 692-93. See p. 29 n.23, below. The Supreme Court recently has granted certiorari in a case challenging the indefinite detention of an illegal immigrant from Cuba who cannot be removed to Cuba. Benitez v. Wallis, No. 03-7434 (Jan. 16, 2004).

government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, see *United States v. Salerno*, 481 U.S. 739, 746 (1987), or, in certain special and “narrow” nonpunitive “circumstances,” *Foucha, supra*, at 80, where a special justification, such as harm-threatening mental illness, outweighs the “individual’s constitutionally protected interest in avoiding physical restraint.” *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).

Id., 533 U.S. at 690.

Kansas v. Hendricks, cited by the Court, upheld the constitutionality of indeterminate civil commitments when a continuing condition of mental illness precluded release, in the interests of the detainee or of public safety. The Kansas statutory scheme passed muster, in important part, because the detainee was guaranteed periodic review by a court to determine whether the condition justifying the detention persisted. Hendricks, 521 U.S. at 364 (annual judicial hearing and finding required to continue commitment).

Dangerousness is the other basis on which the Court has found preventive detention consistent with due process. To pass muster, the detention must serve regulatory rather than punitive purposes: “For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.” Bell v. Wolfish, 441 U.S. 520, 535 (1979). Prior to trial, bail can be denied under the Bail Reform Act of 1984, 18 U.S.C. §§ 3141, 3142, after an adversary hearing, on a finding upon “clear and convincing evidence” that no conditions of release “will reasonably assure . . . the safety of any other person and the community.”¹⁰ This provision was upheld as a permissible “regulation”, and not a punitive

¹⁰ The “clear and convincing evidence” standard is required by 18 U.S.C. § 3142(e). However, cutting the other way, under § 3142(f) there is a “presumption,” subject “to rebuttal,” that the conditions justifying detention exist if the judicial officer finds “probable cause to believe” that the detainee has

measure, in United States v. Salerno, 481 U.S. 739, 746-48 (1987).¹¹ See United States v. El-Hage, 213 F.3d 74, 80 (2d Cir. 2000), cert. denied, 531 U.S. 881 (2001) (pretrial detention of 30-33 months did not violate due process given, inter alia, gravity of charges against defendant, accused of playing a vital role in al Qaeda, which poses “a substantial threat to national security”). Similarly in Schall v. Martin, 467 U.S. 253 (1984), the Court upheld a statute permitting “a brief pretrial detention” of a juvenile -- for a maximum of 17 days (id. at 270) -- on a finding that there was a “serious risk” he might commit a crime before the return date. Again, this holding was premised on the conclusion that this statute served the legitimate regulatory and non-punitive purpose of “protecting both the community and the juvenile himself from the consequences of future criminal conduct.” Id. at 264.

In its 2001 Zadvydas opinion, the Supreme Court summarized its preventive detention cases, to the extent based on the dangerousness of the detainees, as follows:

. . . we have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. Zadvydas v. Davis, 533 U.S. at 690-91.¹²

committed certain serious enumerated crimes: crimes of violence, serious drug offences, repeat offenses, and crimes for which the sentence can be life imprisonment or the death penalty. See United States v. Millan, 4 F.3d 1038, 1047 (2d Cir. 1993) (citing presumption, inter alia, in sustaining pre-trial detentions that to date of decision had exceeded two years).

¹¹ The test distinguishing permissible regulatory from impermissible punitive confinement looks at the apparent statutory purpose, and also asks whether that alleged non-punitive purpose is rationally assignable to the detention, and whether the detention is excessive in relation to such purpose. Salerno, 481 U.S. at 746-47; Schall v. Martin, 467 U.S. 253, 269 (1984).

¹² To anticipate the later portions of this report, we note the Court observed that terrorism might justify a different result:

Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and

There is one 1909 case in which no such “strong procedural protections” were present. The Governor of Colorado detained a union leader for two and one-half months during a “state of insurrection” created by labor strife, until “fears of the insurrection were at an end.” Moyer v. Peabody, 212 U.S. 78, 84-85 (1909). After the unionist had been released, he brought suit for damages, claiming the Governor’s actions had violated his due process rights. The Court, based on findings that the Governor had acted in good faith, though “without sufficient reason,” found no constitutional violation and affirmed dismissal of the damage suit. Justice Holmes’ language for the majority was expansive:

When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. . . . This was admitted with regard to killing men in the actual clash of arms; and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm.

Id. at 85 (citation omitted).¹³

for heightened deference to the judgments of the political branches with respect to matters of national security.

Id. at 696.

¹³ In Sterling v. Constantin, 387 U.S. 378 (1932), the Court cited Moyer for the proposition that the executive (the President or a Governor) has discretion “to determine whether [there existed] an exigency requiring military aid” to suppress insurrection and disorder, and possesses “a permitted range of honest judgment as to the measures to be taken in meeting force with force” Id. at 399-400.

But the Sterling Court upheld a lower court injunction against action by the Governor of Texas to enforce through the national guard a state order limiting the production of oil, a restriction the federal court had ruled arbitrary and a violation of due process. The Governor had justified this action as required by “military necessity” due to an alleged state of insurrection in the East Texas area affected by the order. The Court, based on the factual record compiled below, in essence held this justification a pretext advanced in bad faith -- there was no actual or threatened insurrection -- and therefore beyond the “permitted range of honest judgment” accorded to the Governor in responding to disorder. Id. at 399-404.

Moyer seems to stand alone in approving an indefinite detention by a local official. See, generally, Note, Riot Control and the Fourth Amendment, 81 Harv. L. Rev. 625, 632-35 (1968). However, it may have some continued relevance to the war on terror.¹⁴

B. Procedural Rights

1. Right to a hearing

A constitutional right without a remedy for its violation would be antithetical to our system of government under law. The rule of law would mean little

if the laws furnish no remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. 137, 167 (1803).

The nature of the procedural remedy available to contest a detention is governed by the due process clause. Procedural due process is not a rigid concept. “Due process is flexible and calls for such procedural protections as the particular situation demands.” Morrissey v. Brewer, 408 U.S. 471, 481 (1972); see Gilbert v. Homar, 520 U.S. 924, 930 (1997). But while flexible, the courts have evolved certain basic concepts that provide a baseline of individual rights in most circumstances.

The “fundamental right of due process,” the Supreme Court has held, “is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” Mathews v. Eldridge, 424 U.S.

¹⁴ In its 1987 Salerno decision, the Supreme Court cited Moyer for this rather sweeping dictum:

. . . in times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous.

Salerno, 481 U.S. at 748.

319, 333 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). See Nat'l Council of Resistance v. Dep't of State, 251 F.3d 192, 208-09 (D.C. Cir. 2001) (designation of terrorist organizations); cf. Yakus v. United States, 321 U.S. 414, 433 (1944) (in context of wartime price control regulations, due process requires that those affected by an administrative order be afforded “a reasonable opportunity to be heard and present evidence”).

When the Due Process Clause requires a hearing, “it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.” Wang Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). The particular kind of hearing required will vary in accordance with the relative gravity of the private and public interests at stake in the governmental action challenged. See generally Henry J. Friendly, Some Kind of Hearing, 123 U. of Pa. L. Rev. 1267 (1975).

A person cannot be detained, for more than a short period of time, without being afforded a hearing concerning the legality of his detention (see pp. 13-14, above). Aside from the immigration context, a detention requires an evidentiary hearing, generally to be conducted by the courts, rather than by an administrative agency, or subject to prompt review by the courts. See Zadvydas v. Davis, 533 U.S. at 692 (noting constitutional problem posed by unreviewable agency determinations affecting fundamental rights). In the criminal context, the initial hearing after an arrest is nonadversarial, conducted by a magistrate to determine probable cause, but the Sixth Amendment’s guarantee of a “speedy and public trial” dictates that a full blown evidentiary hearing will soon follow.

2. Habeas corpus: the right of access to the federal courts

The fundamental procedural remedy to obtain a hearing to test the legality of a detention is the writ of habeas corpus. 28 U.S.C. § 2241. The federal courts have jurisdiction to hear claims that a person is being held “in custody in violation of the Constitution or laws . . . of the United States.” 28 U.S.C. § 2241(c)(3). See Harris v. Nelson, 394 U.S. 286, 290-91 (1969):

The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.

If the petition makes specific allegations of fact that, if true, would invalidate the detention, “it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry” into those facts. Id., 394 U.S. at 300.

The writ, with origins as early as the 14th century in England, was first codified in the English Habeas Corpus Act of 1679, 31 Car. II, c. 2. See generally R.J. Sharpe, The Law of Habeas Corpus (1976). This Act required the jailer, on service of the Writ, to produce the prisoner (except in cases of treason or felony), and to “certify the true causes of his detainer or imprisonment,” which led to the release of the prisoner on bail unless the detention was upon a legal process, by a court of jurisdiction, for an offense “for which by the law the prisoner is not bailable. . . .”

The “Great Writ” was guaranteed by the Constitution in Article I, section 9:

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the public Safety may require.¹⁵

Again the Fourth Circuit's decision in Hamdi well states the role of the writ in our system:

In war as in peace, habeas corpus provides one of the firmest bulwarks against unconstitutional detentions. As early as 1789, Congress reaffirmed the courts' common law authority to review detention of federal prisoners, giving its explicit blessing to the judiciary's power to 'grant Writs of Habeas Corpus for the purpose of an inquiry into the cause of commitment' for federal detainees. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82. While the scope of habeas review has expanded and contracted over the succeeding centuries, its essential function of assuring that restraint accords with the rule of law, not the whim of authority, remains unchanged.

Hamdi, at 464-65.

More concisely put:

The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial. Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring), quoted in Zadvydas v. Davis, 533 U.S. at 699.

See also INS v. St. Cyr, 533 U.S. 289, 301 (2001):

At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protection has been strongest.

¹⁵ Some do not believe that the Constitution's prohibition of the suspension of the writ is equivalent to a constitutional mandate that the writ be recognized in the first place. The question has been academic, since Congress as one of its first acts gave statutory recognition to the writ in the Judiciary Act of 1789. William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 37 (1988) ("Rehnquist").

**3. Right to consult an attorney
(and usually to be represented by one)**

The right to file a writ of habeas corpus provides basic access to the federal courts to test the legality of a detention.¹⁶ But for that right of access and any consequent right to a hearing to be meaningful, legal representation is often a near necessity. The “right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

In criminal prosecutions in federal courts, the Sixth Amendment’s guarantee of the accused’s right “to have the Assistance of Counsel for his defense” long has been construed to require “the appointment of counsel in all cases where a defendant is unable to procure the services of an attorney” Betts v. Brady, 316 U.S. 455, 464 (1942).¹⁷

¹⁶ As noted above (p. 5), there seems to be no dispute that alleged enemy combatants detained in the United States have the procedural right to challenge their detention by means of a habeas corpus petition. The areas of procedural controversy concern the nature of the hearing to be afforded such petitioners: whether detainees have a right to counsel in connection with the hearing and a right to rebut at the hearing the government’s showing that they are enemy combatants, and what showing is required by the government to justify the detention (see pp. 56-67, below)

¹⁷ Gideon v. Wainwright, 372 U.S. 335 (1963), applied the same per se requirement to the states, through the Due Process Clause of the Fourteenth Amendment, rejecting the case-by-case approach of Betts v. Brady. See also Argersinger v. Hamlin, 407 U.S. 25 (1972).

After a conviction at a trial at which that right to counsel (and other procedural protections) has been respected, the prisoner does not have a right to appointed counsel when pressing a habeas or other collateral attack on the conviction. Coleman v. Thompson, 501 U.S. 722, 752-57 (1991); Pennsylvania v. Finley, 481 U.S. 551, 555-58 (1987); Murray v. Giarratano, 492 U.S. 1 (1989) (Finley rule applies to death penalty case). But no court appears to have denied petitioner the right, in connection with such collateral attacks, to appear through retained or pro bono counsel. Further, the government has some duty to facilitate a petitioner’s pro se efforts to pursue a habeas petition. Bounds v. Smith, 430 U.S. 817, 828 (1977) (right of access to courts requires prison authorities to provide facilities to enable prisoners to prepare meaningful legal papers).

The constitutional right to legal representation by governmental detainees not charged with a crime is measured by the Due Process Clause.¹⁸ The general test of due process rights outside the criminal and military justice contexts, including whether a right to appointed counsel should be afforded, turns on the three-part balancing test articulated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The private interests and the government interests at stake must be weighed, together with the risk of “an erroneous deprivation” of the private interest absent the additional procedural safeguard sought.

While the Mathews v. Eldridge balancing test can require some nice judgments, it seems clear -- war power issues aside -- that a person faced with a significant period of physical detention has a due process right to counsel to test the legality of the detention. The “fundamental fairness” required by due process requires the appointment of counsel for any indigent litigant who “may lose his physical liberty if he loses the litigation.” Lassiter v. Dep’t of Social Servs., 452 U.S. 18, 25 (1981) (adopting a case-by-case approach to the right to appointed counsel in parental termination proceedings). It is “the defendant’s interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel” Id. See In re Gault, 387 U.S. 1, 41 (1967) (since juvenile delinquency proceeding, though civil, may result “in commitment to an institution in which the juvenile’s freedom is curtailed,” due process mandates appointment of counsel).

¹⁸ Statutes have extended a right to counsel in some circumstances where due process might or might not so require. Somewhat ironically, in light of the executive’s refusal to afford “enemy combatant” suspected terrorists access to counsel, accused terrorists are guaranteed by statute the right to appointed counsel in proceedings under the Alien Terrorist Removal Act. 8 U.S.C. § 1534(c)(1).

Generally, cases concerning a due process right to counsel have focused on the right to appointed counsel, at government expense. But occasionally the right to have retained counsel participate in hearings has been discussed. In the context of welfare benefit termination proceedings, “the recipient must be allowed to retain an attorney if he so desires.” Goldberg v. Kelly, 397 U.S. 254, 270 (1970). But the direct participation of even retained counsel may be prohibited in certain proceedings which have only limited consequences, or where an informal, non-adversarial hearing system furthers important governmental interests.¹⁹ Even in these situations where counsel may not attend a hearing, there seems no question that consultation with retained counsel outside the hearing room is permissible. The concept of incommunicado detentions appears to be without precedent, at least outside of the law of war.

4. Additional rights in criminal prosecutions

In the context of criminal prosecutions, additional fundamental rights apply. The Fifth Amendment secures the right against double jeopardy and self-incrimination. The Sixth Amendment provides other critical rights:

¹⁹ For example, in school suspension hearings, in which the maximum suspension was 10 days, the Court did not construe due process to require that the student be afforded “the opportunity to secure counsel” Goss v. Lopez, 419 U.S. 565, 583 (1973); see also Wolff v. McDonnell, 418 U.S. 539, 570 (1974) (no right to retained or appointed counsel in prison disciplinary proceedings); see Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305 (1985) (statute prohibiting more than de minimis attorneys’ fees in veterans benefit hearings upheld); Middendorf v. Henry, 425 U.S. 25 (1976) (a soldier faced with a summary court martial has no right to be represented by retained counsel; defendant could obtain counsel by demanding special court martial, thereby risking greater penalties if convicted).

The Court has twice declined to address whether a parolee, in a revocation hearing, “is entitled to the assistance of retained counsel,” or to appointed counsel if indigent. Morrissey v. Brewer, 408 U.S. 471, 489 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 783 n.6, 783-91 (1973) (adopting a case-by-case approach with respect to a right to appointed counsel, in probation revocation hearings, while not deciding whether parolee “has a right to be represented at a revocation hearing by retained counsel” under circumstances in which indigent parolee would not be entitled to appointed counsel).

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”²⁰

The Supreme Court articulated this litany of a criminal defendant’s rights in Herrera v. Collins, 506 U.S. 390, 398-99 (1993):

A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Other constitutional provisions also have the effect of ensuring against the risk of convicting an innocent person. See, e.g., Coy v. Iowa, 487 U.S. 1012 (1988) (right to confront adverse witnesses); Taylor v. Illinois, 484 U.S. 400 (1988) (right to compulsory process); Strickland v. Washington, 466 U.S. 668 (1984) (right to effective assistance of counsel); Winship, *supra* (prosecution must prove guilt beyond a reasonable doubt); Duncan v. Louisiana, 391 U.S. 145 (right to jury trial); Brady v. Maryland, . . . [373 U.S. 83 (1963)] (1968) (prosecution must disclose exculpatory evidence); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to assistance of counsel); In re Murchison, 349 U.S. 133, 136 (1944) (right to “fair trial in a fair tribunal”).²¹

²⁰ The public, including the media, has a First Amendment right of access to criminal trials independent of the accused’s Sixth Amendment right to a “public trial.” Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). That public right of access has been extended to pretrial criminal proceedings, Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986), and, by circuit court authority, to civil trials, e.g., Westmoreland v. CBS, 752 F.2d 16, 23 (2d Cir. 1984), and, with the courts divided, to some administrative proceedings. Compare Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (recognizing right of access, subject to case-by-case determination, to deportation hearings), with North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (finding no such right of access), cert. denied, 123 S. Ct. 2215 (2003).

²¹ The requirement that the state prove guilt in a criminal case “beyond a reasonable doubt,” expressly held a requirement of due process by In re Winship, 397 U.S. 358, 364 (1970), has been said to be “bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.” (Id. at 372) (Harlan, J., concurring).

All of these rights apply only to criminal defendants, and therefore do not apply to detainees against whom no criminal charges have been filed. However, as discussed above, due process precludes more than a brief detention without the proffer of charges. Thus the government is put to a prompt choice: it must either release a detainee, or institute criminal charges and thereby trigger the application of the Fifth and Sixth Amendment rights of a criminal defendant.

**C. The applicability of core principles abroad:
to citizens, but generally not to foreign nationals**

To what extent does the application of due process rights turn on whether the detainee is seized in the United States or abroad, or on where the detainee is held subsequent to his initial detention?

Broadly speaking, citizens have the same rights abroad, with respect to actions taken by agents of the United States, as they would with respect to such actions taken within the country. The constitutional rights of citizens -- or at minimum those rights deemed “fundamental” -- apply anywhere in the world, though always subject to a review of what due process requires under the “particular situation” presented. See United States v. Verdugo-Urquidez, *supra*, 494 U.S. at 275-78 (Kennedy J., concurring); Reid v. Covert, 354 U.S. 1 (1957) (plurality would so hold with respect to all constitutional rights; concurring opinions would limit to fundamental rights).

More expansively, the procedural protections of criminal law are sometimes said to reflect the sentiment that it is “better that 10 guilty persons escape than that one innocent suffer.” However, the quoted sentiment is from Blackstone. 4 W. Blackstone Commentaries § 358.

In contrast, foreign nationals subject to detention or other action abroad by United States agents generally do not enjoy constitutional protection,²² including the right to present a habeas corpus petition. The leading case is Johnson v. Eisentrager, 339 U.S. 763 (1950). The petitioners were German nationals convicted of violating the law of war in World War II by furnishing intelligence to Japanese forces in China. They were convicted by a military commission sitting in China with that government's permission, following which petitioners were sent to Germany to serve out their sentences in a military prison. From Germany they filed petitions for writs of habeas corpus, claiming that their right to due process under the Fifth Amendment had been violated. See id. at 765-66.

The district court dismissed the petitions, but the Court of Appeals reversed, holding that any person, including an enemy alien, deprived of his liberty anywhere in the world under the purported authority of the United States is entitled to the writ if he can show his imprisonment to be illegal under any constitutional right. See id. at 767. The Supreme Court reversed the Court of Appeals. The Court wrote:

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

Id. at 768.

²² See United States v. Verdugo-Urquidez, supra, 494 U.S. at 274-75 (search of Mexican national's home in Mexico by United States agents was not subject to Fourth Amendment's prohibition of unreasonable searches).

It is, principally, on the precedent of Johnson that the alien suspected terrorists and Taliban fighters held at Guantánamo Bay, Cuba, allegedly outside the sovereign territory of the United States, have been held without any access to U.S. courts via habeas corpus proceedings. Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal.), vacated in part, 310 F.3d 1153 (9th Cir. 2002). But the contrary result was reached in Gherebi v. Bush, No. CV-03-01267 (9th Cir. Dec. 18, 2003), distinguishing the legal status of Guantánamo Bay from that of the prison in Germany involved in Johnson. On November 10, 2003, the Supreme Court granted certiorari in two cases to consider the question of whether “United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Naval Base, Cuba.” Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 2003 WL 22070725 (No. 03-343); Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), cert. granted, 72 U.S.L.W. 3323 (No. 03-334).

D. The rights of foreign nationals in the United States

To what extent do the substantive and procedural due process rights reviewed above apply to foreign nationals detained in the United States? Do they have the same rights as citizens? See generally David Cole, Enemy Aliens, 54 Stan. L. Rev. 953, 978-85 (2002).

Generally, there is no distinction between the procedural due process rights of citizens and those of aliens who are within the jurisdiction of the United States.²³ Procedural due process

²³ In stark contrast, procedural due process rights do not apply to aliens who have been excluded and held at the border (and therefore not deemed to have entered the country):

. . . an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. Landon v. Plasencia, 459 U.S. 21, 32 (1981).

rights apply to any alien who has entered the country, legally or illegally. Zadvydas v. Davis, 533 U.S. 678, 693-94 (2001); see, e.g., Reno v. Flores, 507 U.S. 292, 306 (1993); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo. v. Hopkins, 118 U.S. 356, 369 (1886); Patel v. Zemski, 275 F.3d 299, 307 (3d Cir. 2001).²⁴

In contrast to these procedural protections applicable to aliens, their substantive rights to remain in the country are subject to almost unlimited restriction or termination by Congress -- “plenary power” -- and correspondingly little judicial review:

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) (upholding indefinite detention of removable alien held at border, based on national security grounds not disclosed by

“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). Even such a detained and excluded alien, however, has the right to file a habeas proceeding to challenge his detention. Ekiu v. United States, 142 U.S. 651, 660 (1892).

²⁴ Most constitutional rights have been held applicable to resident aliens, whether legal or illegal:

[P]ersons who are not citizens receive the protection of all of the civil liberties guaranties of the constitution, and its amendments, except for the privileges and immunity clauses.” R. Rotunda and J. Nowak, Treatise on Constitutional Law 528 (3d Ed. 1999).

See United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (listing cases extending rights to aliens); Harisiades v. Shaughnessy, 342 U.S. 580, 586-87 n.10 (1952) (listing the respects in which the alien is not “conceded legal parity with the citizen”, such as the right to vote and hold public office).

To be distinguished are “enemy aliens” -- citizens of a country with whom the United States is engaged in a declared war -- whom the President may detain or deport pursuant to the Enemy Alien Act, 50 U.S.C. §§ 21-24. Ludecke v. Watkins, 335 U.S. 160 (1948).

Attorney General).²⁵ The Supreme Court has observed that “Congress regularly makes rules [governing aliens] that would be unacceptable if applied to citizens,” Mathews v. Diaz, 426 U.S. 67, 80 (1976), a proposition “firmly and repeatedly endorsed,” most recently in Demore v. Kim, 538 U.S. 510, 128 S. Ct. 1708 (2003) (case involved “lawful permanent resident”). Further, “when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.” Id., 128 S. Ct. at 1720. The rationale for the great discretion accorded Congress with respect to legislation concerning the exclusion or departure of aliens -- and the deference accorded to the executive in implementing such legislation -- is that “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power and the maintenance of a republican form of government.” Id., 128 S. Ct. at 1716 (quoting Mathews, 426 U.S. at 81 n.17, quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)).

Specifically, the Court in Demore recognized that “[d]etention during removal proceedings is a constitutionally permissible part” of the deportation process.” Id., 128 S. Ct. at 1721-22. The Court sustained the constitutionality of 8 U.S.C. § 1226(c), which requires that deportable aliens convicted of aggravated felonies be detained during “the limited period” of removal proceedings, regardless of whether they constitute a flight risk or threat to the community.²⁶ The Court contrasted the “limited” and finite period of detention occasioned by

²⁵ For a critical view of this “plenary power” doctrine, see Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 Harv. L. Rev. 853 (1987).

²⁶ Justice Kennedy, providing the fifth vote in a 5 to 4 decision, in a concurring opinion stated that due process required, as a condition to continued detention, that the alien be afforded a hearing at which the government would need to meet a “minimal, threshold burden” of showing there was “at least some

removal proceedings -- about 47 days on average, plus another four months in the event of an appeal (id., 128 S. Ct. at 1721) -- with the “indefinite” and “potentially permanent” detention held constitutionally suspect in Zadvydas of an alien already found to be removable, but not removable as a practical matter. Id., 128 S. Ct. at 1720. In Zadvydas, the Court had found that such continued detention “no longer bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.” Id., quoting Zadvydas, 533 U.S. at 690, quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972).

Thus an alien can be deported on any ground sanctioned by Congress, but is entitled to procedural due process with respect to such deportation proceedings. While detention is permissible for the “limited period” during which removal proceedings are pending, this detention must be based on specific charges warranting removal by statute, and on which a hearing will be held resulting in removal if sustained. An indefinite detention without charges would appear no more constitutional for an alien within the country than for a citizen.

E. Hierarchy of rights

We believe that the above discussion confirms that there is a hierarchy of rights recognized in times of peace, firmly imbedded in our constitutional structure and case law. These rights include, with respect to citizens or aliens detained in the United States or its sovereign territory:

- the right not to be detained except pursuant to a statute authorizing the detention;

merit” to its claim that the alien was within the class subject to mandatory detention, and that, consistent with Zadvydas, the alien “could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable and unjustified.” (Demore, 128 S. Ct. at 1722).

- the right (subject to inapplicable exceptions noted above) not to be detained without the prompt proffer of specific criminal charges;
- the right to test the legality of the detention in the federal courts through the writ of habeas corpus and, where the matter has not been previously adjudicated, at a meaningful evidentiary hearing;
- the right to consult with and to be represented by counsel concerning the detention, and in connection with a habeas corpus hearing challenging it.

Our system precludes -- again, before considering the implications of the war powers -- indefinite detentions without charges, with the detainee held incommunicado without access to a lawyer. Further, the legality of any detention should be testable through the writ of habeas corpus made effective through the assistance of counsel, at least where the detainee is able to retain counsel.

III. Possible Limitations and Exceptions to Core Due Process Rights, Based on the War Powers

We now review the possible restraints and limitations upon the above core due process values and rights when the President acts in the exercise of his war-making power under Article II of the Constitution. Do the precedents require or suggest that the core rights discussed above, at the heart of our self-identity as a society existing under the rule of law, are inapplicable to persons designated “enemy combatants” by the President, as Commander in Chief prosecuting the war on terror? To what extent can the President so act without congressional authorization? Are these questions for the courts, or rather for the political process?

A. The War Powers

Article I, section 8, of the Constitution grants Congress the power to “provide for the common Defense and general Welfare of the United States . . . To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and

support Armies . . . and To provide and maintain a Navy.” Article II, section 2, declares that “the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States.”

The Constitution is held to invest “the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.” Quirin, 317 U.S. at 26. But the scope of the President’s powers as Commander in Chief is not clearly defined by Article II, section 2: “These cryptic words have given rise to some of the most persistent controversies in our constitutional history.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring). Few cases -- other than Hamdi and Padilla -- have considered the authority of the President to detain “enemy combatants” or similar individuals. However, a review of the main stress periods faced by the country reveals some limited case law construing the President’s war power and discussing the role of the courts in reviewing exercises of that power.

B. An Historical Perspective

1. Cases before the Civil War

Before the Civil War the government used military forces on a number of occasions as a domestic policing force, seizing and holding rebellious or otherwise threatening citizens by a process neither commenced nor supervised by the civilian courts. See Ex parte Milligan, 71 U.S. 2, 50-53 (1866) (“Milligan”) (referring to instances of military arrests during Revolutionary War, Shay’s Rebellion, and Gen. Andrew Jackson’s occupation of New Orleans). The early Supreme Court opinions that discussed the degree of deference owed the President in a national security

crisis did not directly address the executive's power to deprive individuals of their liberty. Nonetheless, those decisions concerned related problems occasioned by coercive executive action, and they provided a portion of the analytical framework that has been followed in later cases governing the seizure of individuals suspected of posing a threat to public safety in times of crisis.

The first of these decisions was triggered by President Madison's call-up of the state militias during the War of 1812. Martin v. Mott, 25 U.S. 19 (1827). That step was authorized by a 1795 statute permitting the President to activate the state militias for duty in time of "imminent danger of invasion" or insurrection. Mott had refused to report for militia duty, and as a result was court-martialed, fined and then sentenced to prison by the military authorities when he failed to pay the fine. He sought relief from the civilian courts, in which, among other things, he challenged the validity of the call-up order.

The Supreme Court rejected the notion that the civilian courts may review the President's decision, instead characterizing the President's power as "exclusive" and his decision as "conclusive upon all other persons." Id. at 30. In reaching this conclusion, the Court emphasized not only the wording of the statute, which it read as conferring unlimited discretion on the President to determine whether the danger of invasion existed, but also the impracticality of vesting final authority on that question in the courts. Speed was key:

The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopardize the public interests. Id.

According to the Court, any other interpretation of the President’s powers would undermine his authority, delegated by Congress, to “regulat[e] the militia and to command[] its services in times of insurrection and invasion.” Id. at 30 (quoting The Federalist No. 29).

Apart from the dangers posed by delay inherent in any resort to the courts, the Supreme Court noted other potential inadequacies of the court processes as an instrument of review in such an emergency. Thus, it observed that the grounds for the President’s decision “might be of a nature not constituting strict technical proof” and that the disclosure of such information “might reveal important secrets of state, which the public interest, and even safety might imperiously demand to be kept in concealment.” Id. at 31.²⁷

The inclination of the Supreme Court to defer to the President during a military confrontation, both for constitutional and for practical reasons, was subsequently reiterated in Luther v. Borden, 48 U.S. 1 (1849). The case arose out of the so-called Dorr’s Rebellion in Rhode Island. The narrow issue in Luther involved a claim for trespass asserted by a Rhode Island resident in the wake of a state militia’s entry into his home during an armed confrontation between two political factions, each claiming to represent the state government. The principal holding of the Court concerned its interpretation of the so-called Guarantee Clause of the Constitution (Art. IV, § 4), which it viewed as leaving to the political branches of the federal government the determination of which faction was the legitimate government of the state. Id. at 41-43.

²⁷ The concern about the release of state secrets is relevant to the current debate over whether terrorist suspects should be tried in Article III courts or by military commissions (see pp. 135-46, below).

The Court noted that, under the Guarantee Clause, the Congress is responsible for determining the legitimate government of each state, and has specific responsibility for ensuring the protection of such government against “invasion” and, on request of the state legislature or governor, against “domestic violence”. Congress in turn had delegated to the President, by the Act of 1795, the authority to decide whether to call out the militias of the various states to protect a state government against “insurrection” as well as “invasion”. Id. at 42-43 (citing Act of Feb. 28, 1795). This constitutional and statutory arrangement required the President to decide which competing faction is the legitimate state government, since that would be a predicate to his determination whether to provide federal protection upon the request of the ostensible state authorities. Id. at 43. Once the President made that decision, practical limitations precluded judicial review:

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order.

Id. The judicial process was manifestly inadequate to decide these sorts of issues in the midst of conflict:

When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little

value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis.

Id. at 44.

Having concluded that the courts have no role to play in reviewing a President's recognition of a state faction "when the conflict is raging," the Luther Court went on to conclude, as a logical extension, that such judicial power also cannot be constitutionally invoked "when the contest is over." Id. at 43. In short, this type of decision was left to the unreviewable discretion of the political branches of Government.²⁸ Significantly, the court likened the power of the President to choose among competing state factions to his unquestioned authority to determine which foreign governments to recognize. Id. at 44.

2. Civil War cases

Prior to the Civil War, such matters as the applicability of the Bill of Rights in wartime were "unstudied in law schools, ignored in universities, and unknown in West Point," since such questions had not previously arisen. Harold Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution 66 (1973) ("Hyman"). Early in the War, President Lincoln declared martial law to be applicable to citizens engaging in disloyal conduct, thus subjecting them to prosecution by courts martial or military commission, and, at the same

²⁸ It bears noting, however, that the Court then acknowledged, albeit in dictum, some legal limits to the military authorities' power to intrude on the property and liberty of civilians, even during a period of civil unrest or insurrection. The Court said the state militia members "were justified in breaking and entering the plaintiff's house" if they acted upon "reasonable grounds." Id. at 45-46. The Court went on to specify that "[n]o more force . . . can be used than is necessary to accomplish the object," and that if "the power is exercised for the purposes of oppression, or any injury willfully done to person or property, the party by whom or by whose order it is committed would undoubtedly be answerable," id. at 46, though the Court did not specify in what forum or at whose behest. See also Mitchell v. Harmony, 54 U.S. 115, 134-35 (1851) (claim in trespass sustained against lieutenant-colonel in army for seizure of private goods to facilitate lawful U.S. military expedition in Mexico; such seizures lawful only if officer has "reasonable ground for believing" they are required by an "immediate and impending" danger).

time, suspending the writ of habeas corpus for such individuals. See Milligan, 71 U.S. at 15-16 (quoting Proclamation dated Sept. 24, 1862).²⁹ Persons suspected of disloyalty or at least sympathy towards the Confederacy were arrested by federal military and local authorities. These individuals were typically not processed through any civilian court, but rather were either released after subscribing to a loyalty oath, or tried by a military commission, or simply held under some other ad hoc arrangement. See, e.g., Ex parte Vallandigham, 68 U.S. 243, 244-47 (1863). Trials by commission are said to have been extremely rare, in areas where the regular courts were functioning, “since the normal method of dealing with persons suspected of treasonable activity was arrest without warrants, detention without trial, and release without punishment. . . .” Clinton Rossiter, The Supreme Court and the Commander in Chief 28 (1951) (“Rossiter”). Where the military authorities did not trust the civil courts, the practice was “to keep the suspects locked up until the danger had passed.” Id. at 36.³⁰

While a number of individuals swept up by these measures challenged their detentions in the courts,³¹ few challenges resulted in judicial decisions. The Supreme Court, in Ex parte

²⁹ There was substantial political opposition to President Lincoln’s wartime measures: “evidence from secession notwithstanding . . . educated Americans were convinced that Americans lived always under a rule of law.” Hyman at 67. By the end of the war, it is said that the public seemed supportive of Lincoln’s position that wartime necessity did not permit strict observance of peacetime legal restrictions on executive action. Id. at 131-40.

³⁰ In 1863 Congress regularized Lincoln’s procedures to a degree by formal legislation. It authorized the President to suspend the writ whenever during “the present rebellion” he judged that the public safety so required, while requiring that “political prisoners,” as listed by the Secretaries of State and War within 20 days of their detention, be released unless indicted by a succeeding grand jury. Milligan, 71 U.S. at 114-15; see generally Hyman at 249-56. Excluded in practice from these lists of political prisoners were civilians facing courts-martial or military commission trials for military offenses, including guerrillas, saboteurs and spies, the closest analogues to today’s terrorists. Hyman at 253-54.

³¹ It quickly became customary, and later official policy, to allow “prisoners who could afford the luxury to enjoy access to lawyers”. Hyman at 82.

Vallandigham, *supra*, held itself without jurisdiction to review proceedings before military commissions. *See Hyman* at 261-62.

One decision of note, though of little practical consequence, was rendered early in the war by Chief Justice Taney, sitting in his capacity as circuit judge. Ex parte Merryman, 17 F. Cas. 144 (1861). The petitioner, a civilian seized by the military in Baltimore,³² sought release by a habeas petition. Justice Taney ordered the United States Marshal to produce Merryman, but the Marshal proved incapable of doing so because the military authorities in Baltimore would not surrender their prisoner. *Id.* at 147-48. Taney settled for issuing an opinion in which he held that Merryman's detention violated due process and that the courts had the authority to so rule.

Taney first held that the President himself was not authorized to suspend the writ, a power assigned by the Constitution exclusively to Congress. *Id.* at 148-50. He then went much further, holding that, regardless of whether the writ was suspended by Congress, the President lacked the authority to arrest a private citizen -- that is, "a party not subject to the rules and articles of war" -- without judicial process. *Id.* at 149. The only pertinent authority of the President was to "take care that the laws are faithfully executed", which required him to come to the aid of the judiciary, not to bypass it.³³

The fact that the country faced a military emergency was, in Justice Taney's view, inconsequential for this point: "I can see no ground whatever for supposing that the president, in

³² Merryman was accused of trying to block the passage of Union troops by railway from the north to the beleaguered Washington, D.C.

³³ Chief Justice Taney's narrow view of the President's wartime powers may be viewed as in some tension with the general tenor of the Supreme Court's analysis in Luther, which Taney also authored. His hostility to the increase in federal power in service of the Union cause, and his enduring sympathy for states rights, is well documented. *Hyman* at 256-60.

any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power.” Id. The federal courts and criminal justice system were functioning, without “the slightest resistance or obstruction,” and “there was no reason whatever for the interposition of the military.” Therefore the controlling requirements of the Constitution, including due process and the right to a public trial “in a court of justice” still applied, precluding petitioner’s seizure and detention by the military. Id. at 152. To Taney, this conclusion flowed from English constitutional law as well as from the Fifth Amendment’s guarantee of due process. Id. at 149-50 (citing inter alia “the great habeas corpus act”, 31 Car. II).

The full Court gave a broader reading to the President’s war power the next year in The Prize Cases, 67 U.S. 635 (1862). An executive order imposing a maritime blockade on a number of Confederate states had led to the seizure of numerous ships and their cargoes. In upholding the President’s powers against the claims of cargo and ship owners -- including some who disclaimed any sympathy for the Confederate secession -- the Supreme Court emphasized traditional principles of international law regarding an executive’s powers in wartime, as well as the President’s statutory power to use the military to defend against invasion or insurrection. Id. at 668 (citing Acts of Feb. 28, 1795 and March 3, 1807). There had been no formal declaration of war by Congress, but a state of war plainly existed, a war “all the world acknowledges to be the greatest civil war known in the history of the human race” Id. at 669. The Court emphasized that the determination of what measures were required to counter the insurrection was left to the judicially unreviewable discretion of the President:

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection has met with such armed hostile resistance, and a civil war of such alarming proportions as

will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. ‘He must determine what degree of force the crisis demands.’ The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case.

Id. at 670 (emphasis in original).³⁴ Thus, although the Court, echoing Merryman in this respect, defined a civil war in terms of hostilities that prevented the functioning of the “Courts of Justice” (id. at 667-68), it effectively left to the executive the determination of whether such a state of war existed, as well as the degree of force to be used in responding to the insurrection.

3. After the Civil War: Milligan

A year after the Civil War, the pendulum swung back toward a narrow reading of the President’s war power in Milligan. During the War, Milligan had been arrested by order of the commander of the military district of Indiana, tried before a military commission for crimes relating to his membership in a secret organization sympathetic to the Confederacy, found guilty and sentenced to be hanged.³⁵ Milligan then proceeded by petition for a writ of habeas corpus in the federal circuit court, challenging the authority of the military to try him given his status as a citizen of a non-belligerent state.

³⁴ The Court indicated that legislative recognition of a state of war was not required, but observed that if such congressional assent were needed, it could be found in many pieces of legislation enacted since the start of the war to assist in its prosecution. Id. at 670.

³⁵ Lambdin P. Milligan, a well-known lawyer sympathetic to the Confederate cause, was convicted and sentenced to death for planning and organizing an attack upon the Democratic convention which was to be held in Chicago in 1864. Rehnquist at 21-23; Alex Abella & Scott Gordon, Shadow Enemies 140 (2002) (“Shadow Enemies”).

The government, in its brief, boldly asserted that the Bill of Rights was inoperable in wartime:

[T]hese provisions of the Constitution, like all other conventional and legislative laws and enactments, are silent amidst arms, when the safety of the people becomes the supreme law.

Quoted in Rehnquist at 21.

The Supreme Court, however, upheld Milligan's challenge to his conviction, holding that the military commission had no jurisdiction to try and convict a civilian resident of a non-belligerent state. The constitutional guarantees against trial and punishment except in accordance with the Bill of Rights were unaffected by the War: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers . . . all classes of men at all times, and under all circumstances." Id. at 120-21. The fact of civil disorder only emphasized the need to preserve these protections:

[I]f the society is disturbed by civil commotion -- if the passions of men are aroused and the restraints of law weakened, if not disregarded -- these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws.

Id. at 121-22.³⁶

³⁶ The Court's clarion words echoed those of Milligan's brief, authored by future President James Garfield. Of a decision favorable to Milligan, he wrote:

It will establish forever this truth, of inestimable value to us and to mankind, that a republic can wield a vast engine of war without breaking down the safeguards of liberty; can suppress insurrection, and put down rebellion, however formidable, without destroying the bulwarks of law; can by the might of its armed millions, preserve and defend both nationality and liberty. Quoted in Rehnquist at 23.

The Court summarily rejected the contention that the military commission could try Milligan “under the law and usages of war,” holding that such law and usages “can never be applied to citizens in states [such as Indiana] which have upheld the authority of the government, and where the courts are open and their process unobstructed.” Id. at 121. Cf. Caldwell v. Parker, 252 U.S. 376, 386-87 (1920) (soldier may be prosecuted in state court, since local courts were open and functioning; military law did not supplant them in wartime). If citizens in non-battlefield states plotted to aid the enemy, they could be arrested and held for trial in the regular courts, which must be deemed adequate to deal with such criminal conduct. Milligan at 126-27. Only in battlefield areas -- where the civilian courts were effectively closed -- could the military substitute its processes for those of the courts, and only until those courts resumed operation. Id. at 127.

The Milligan holding thus limited the executive’s power to proceed by military commission. But the Court in dictum went further, stating that even Congress could not, consistent with the Constitution, authorize the use of military commissions in the fashion that led to Milligan’s conviction. Id. at 122. In contrast, four justices in a concurring opinion concluded to the contrary:

We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy.

Id. at 140.³⁷

³⁷ The majority’s dictum against congressional power was highly controversial, regarded “as a gratuitous salvo against the plans of the Radicals for congressional reconstruction. . . .” Rossiter at 30-31.

Several Reconstruction cases offered the Supreme Court the opportunity to expand upon its holding in Milligan, but those cases were decided solely on jurisdictional grounds.³⁸ Some later decisions by state courts and lower federal courts upheld military trials of civilians in the context of violent labor unrest and declarations of martial law by Governors. But the “basis of those decisions was definitely held erroneous in Sterling v. Constantin, 287 U.S. 378 [1932], where the Court said: ‘What are the allowable limits of military discretion and whether or not they have been overstepped in a particular case, are judicial questions.’ Id. at 401.” Duncan v. Kahanamoku, 327 U.S. 304, 321 n.18 (1946). See p. 18, n.13, supra, discussing Sterling.

4. World War II: Quirin

World War I did not result in any Supreme Court decision directly focusing on our subject,³⁹ but the extent of the President’s (and Congress’s) war powers was revisited in a number of decisions during and after World War II.

In Ex parte Quirin, 317 U.S. 1 (1942) (“Quirin”), the Court upheld the President’s use of a military commission to try enemy saboteurs who had been arrested by the FBI after entering the country surreptitiously and in civilian garb for the purpose of carrying out acts of sabotage,

³⁸ See Ex parte McCardle, 74 U.S. 506 (1868) (challenge by civilian facing military commission in Mississippi; Court holds it lacks appellate jurisdiction under Judiciary Act of 1867 in view of 1868 repeal of jurisdiction); Ex parte Yerger, 75 U.S. 85 (1868) (challenge by civilian held for military tribunal; Court finds continuing appellate jurisdiction under 1789 Judiciary Act).

To the extent that these jurisdictional decisions have relevance to our inquiry, they emphasize the strong reluctance of the Supreme Court to treat even a congressional enactment as effectively depriving the court of habeas appellate jurisdiction. See e.g., Yerger, 75 U.S. at 94-98, 100-02; Sandoval v. Reno, 166 F.3d 225, 231-32 (3d Cir. 1999) (discussing McCardle and Yerger). See also Felker v. Turpin, 518 U.S. 651, 660 (1996).

³⁹ Decisions after the termination of hostilities in World War I did uphold the power of the political branches to decide when the consequences of the war, and therefore the need for wartime emergency statutes, had expired. See, e.g., Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919). See generally Note, Judicial Determination of the End of the War, 47 Colum. L. Rev. 255 (1947).

operating under German military command. The FBI turned these “illegal belligerents” (id. at 35) or “unlawful combatants” (id. at 31) over to the military for trial before a military commission, pursuant to a Presidential order. The order seemed at odds with the Milligan holding, for clearly the civilian courts were open and functioning. Id. at 23-24. But unlike Milligan, which concerned actions taken by military commanders, the commission reviewed in Quirin had been specifically authorized by the President, and the President, in turn, had been generally authorized by Congress to convene military commissions to try offenses against the law of war. Id. at 26-27.

At the close of the evidentiary presentation before the commission, the saboteurs sought a writ of habeas corpus in federal district court, contending that the commission had no jurisdiction to try them. In opposition the government contended that the petitioners, as illegal combatants, had no right to habeas review by the courts.⁴⁰ Alternatively the Government contended that the President had permissibly exercised his powers as Commander in Chief in ordering a military trial for violations of the law of wars. The Court phrased the “question for decision” before it as follows:

whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 4, 1942, on charges proffered against them purporting to set out their violations of the law of war and of the Articles of War, is

⁴⁰ The Government’s position was clearly stated in its brief:

“The fact is that ordinary constitutional doctrines do not impede the Federal Government in its dealings with enemies.” [citations omitted]

The President’s power over enemies who enter this country in time of war, as armed invaders intending to commit hostile acts, must be absolute. 317 U.S. at 12.

in conformity to the laws and the Constitution of the United States.
Id. at 18-19.⁴¹

The answer was affirmative, because violations of the law of war⁴² were, by long tradition, triable by a military commission, as authorized by Congress and ordered by the President.

Petitioners had contended that their seizure by civilian authorities within the United States entitled them (or at least the one said to be an American citizen) to a jury trial, under the Fifth and Sixth Amendments. The Court, however, held that pre-existing law at the time of the adoption of these Amendments allowed the use of military commissions for violations of the law of war and that the Amendments did not specifically overrule that legal tradition. “We must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.” Id. at 40.⁴³

⁴¹ The district court had denied leave to file a petition, and the case was then heard within a few days by the Supreme Court. The Court announced its decision on the day after oral argument had been completed, summarily ruling against the petitioners on the merits. Id. at 11. At the same time it promised a written decision, which it issued several months later, after sentence had been pronounced by the Commission and a number of the detainees had been executed.

⁴² The law of war is a centuries’ old branch of international law that “prescribes the rights and obligations of belligerents,” and which “define[s] the status and relations not only of enemies -- whether or not in arms -- but also of persons under military government or martial law and persons simply resident or being upon the theatre of war, and which authorizes their trial and punishment when offenders.” William Winthrop, Military Law and Precedents 773 (2d ed. 1920). “Such laws and customs would especially be taken into consideration by military commissions in passing upon offences in violation of the laws of war.” Id. at 42.

⁴³ The Court read the Constitution in this light even though the Amendments do contain a specific exception for “cases arising in the land and naval forces,” and do not otherwise restrict the scope of the grand jury and civil jury guarantees for any other persons. Id. at 41-44. The Court held: “We cannot say that Congress in passing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of

Quirin addressed, albeit briefly, the specific issue of whether a United States citizen could be tried as an unlawful combatant. One of the saboteurs (Haupt) claimed to be a United States citizen, and argued that his citizenship made it improper for him to be tried by a military commission rather than a civil court. The Court rejected this argument:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. . . . It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Id. at 37-38. See Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) (citing Quirin, and holding a military commission had jurisdiction to try a citizen illegal combatant who had secretly landed in Maine from German submarine).

a. Lawful vs. unlawful combatants

The Quirin Court recognized a fundamental distinction under the law of war between lawful and unlawful combatants, a distinction first codified in 1863 in the so-called Lieber Instructions.⁴⁴ Lawful combatants are members of an organized army who, if captured in an armed conflict, are entitled to be treated as prisoners of war. Their conduct as combatants is

alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces. . . .” Id. at 44.

⁴⁴ See Instructions for the Government of Armies of the United States in the Field, promulgated as General Orders No. 100 by President Lincoln, April 24, 1863, reprinted in The Laws of Armed Conflicts 3 (D. Schindler & J. Toman, eds., 1988). The Lieber Instructions were prepared by Francis Lieber, then a professor of Columbia College. They became a strong influence on later codifications of the law of war by other states and international tribunals.

deemed to be lawful and not subject to punishment. Unlawful combatants, in contrast, are not members of a duly organized national military force, do not wear uniforms or other distinctive insignia and do not bear arms openly. As such, if captured, they are not entitled to be treated as prisoners of war and may be tried for violating the law of war:

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

Quirin, 317 U.S. at 35-36 (footnote omitted). See Spencer J. Crona & Neal A. Richardson, Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism, 21 Okla. City U. L. Rev. 349, 360-61 (1996).

The Third Geneva Convention of 1949,⁴⁵ in Article 4, defines persons entitled to treatment as prisoner of war⁴⁶ as members of the armed forces of a belligerent nation, or of militia and other volunteer corps, including organized resistance movements, provided they are commanded by a person responsible for his subordinates; bear a fixed distinctive sign

⁴⁵ Convention (III) Relative to the Treatment of Prisoners of War, signed at Geneva, August 12, 1949 (consented to by the United States Senate on July 6, 1955, with reservations). 6 U.S.T 3316, 75 U.N.T.S. 136 (“Third Geneva Convention”).

⁴⁶ Prisoners of war are entitled to various rights and privileges as set forth in the Third Geneva Convention. As lawful combatants they are not subject to prosecution and “shall be released and repatriated without delay after the cessation of active hostilities.” Art. 18. See Ruth Wedgwood, al

recognizable at a distance; carry arms openly; and conduct their operation in accordance with the laws and customs of war. By inference, unlawful combatants, a term not used in the Third Geneva Convention, are combatants not satisfying those conditions. Cf. Quirin, 317 U.S. at 35 (by defining lawful combatants entitled to prisoner of war status, the Government “has recognized that there is a class of unlawful belligerents not entitled to that privilege. . .”).

b. Military commissions: Quirin v. Milligan

It is not easy to harmonize the holdings of Quirin and Milligan with respect to the constitutionality of the use of military commissions in the United States.⁴⁷ Milligan certainly suggested that a citizen could never be tried by military commission when the civilian courts were open and functioning. However, Quirin distinguished Milligan on the ground that, unlike the Quirin saboteurs, who were “enemy belligerents” acting pursuant to orders from the German military and intelligence authorities (id. at 45-46), Milligan was not a combatant: he had not been “a part of or associated with the armed forces of the enemy,” and, hence, was a “non-belligerent, not subject to the law of war (id. at 45).⁴⁸

Qaeda, Terrorism and Military Commissions, 96 Am. J. Int’l L. 328, 333 (April 2002) (hereafter cited as “Wedgwood”).

⁴⁷ The Supreme Court’s decision in Duncan v. Kahanamoku suggests that Milligan remained good law after Quirin, to the extent that Milligan prohibits the trial of civilians by military commission for actions not constituting violations of the law of war. The majority opinion cited Milligan with approval (id. at 322, 324), and Justice Murphy, concurring, expressly reaffirmed Milligan’s “open court” rule (id. at 328-35).

⁴⁸ But see Mudd v. Caldera, 134 F. Supp. 2d, 138, 145-47 (D.D.C. 2001), appeal denied, 309 F.3d 819 (D.C. Cir. 2002) (military commission had jurisdiction to try Dr. Samuel Mudd for aiding and abetting assassination of Lincoln, a military offense violating the law of war; Quirin does not limit the jurisdiction of military commissions to persons acting under direction of enemy armed forces).

Another distinction is that Quirin relied on congressional authorization for the use of military commissions,⁴⁹ while there had been no such authorization in Milligan (though the majority in Milligan opined that such authorization would have been unavailing -- see p. 45, above).

Aside from these distinctions, Quirin also appears to reflect a greater deference to the political branches in the midst of a war, in contrast to Milligan's vigorous assertion of judicial authority after the Civil War had ended. Quirin may reflect in part "the reluctance of courts to decide a case against the government on an issue of national security during a war." Rehnquist at 221; see p. 87 n.78, below.

Regardless of the cogency of Quirin or Milligan, it is important to note that neither addresses whether a President has authority to detain enemy combatants indefinitely, without charges. The question did not arise, for in each case the purpose of the detention was to proceed -- even with precipitous speed -- with a military trial on proffered charges.

5. World War II: Hirabayashi and Korematsu

The other major war powers landmarks of World War II reflected extremely broad deference to the President and Congress. In Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944), the Court faced challenges to the wartime restrictions imposed by the government on American citizens and residents of Japanese ancestry. The Congress and the President had delegated to the military the authority to exclude from any

⁴⁹ Quirin found it did not need "to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation," for "here Congress has authorized trial of offenses against the law of war before such commissions." 317 U.S. at 29.

militarily sensitive area any category of persons deemed a potential threat. The military in turn had declared the entire Pacific Coast to be a sensitive area, and excluded all persons of Japanese ancestry from portions of those areas -- choosing to confine those residents in camps -- and placed curfews on their out-of-doors activities in other areas. Hirabayashi was convicted of violating militarily-imposed curfew regulations, and Korematsu of refusing to comply with so-called exclusion regulations, which effectively confined Japanese-Americans to detention camps for the duration of military hostilities with Japan.

The Court upheld both convictions and the validity of these national-origin-specific regulations, and did so in terms of broad deference to the war-making powers of Congress and the President. In Hirabayashi, while acknowledging that distinctions based on national origins are “odious”, 320 U.S. at 100, the Court nevertheless went on to note that the country was in the midst of a national emergency, and that the political branches had the authority and obligation to take whatever measures they thought necessary to protect against feared invasion or sabotage:

Since the Constitution commits to the Executive and to the Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Where, as they did here, the conditions call for the exercise of judgment and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warring, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

320 U.S. at 93 (internal citations omitted). This substantial deferral to the judgment of the executive branch and Congress was based on a broad reading of the war powers, referred to as “the power to wage war successfully.” Id. at 92 (quoting Charles Evans Hughes, War Powers

Under the Constitution, 42 A.B.A. Rep. 232, 238). The Court held that it need satisfy itself only that the military authorities had “a reasonable basis for the actions taken” (id. at 101), which basis it found by relying on stereotypical characterizations of the Japanese-American community and the unquestioned fact that Japan was waging a war of aggression against the United States. Given “the facts and circumstances with respect to the American citizens of Japanese descent residing on the Pacific Coast”,⁵⁰ it was rational to suspect a greater loyalty to the enemy among Americans of Japanese ancestry than among others. Id. at 102.

The next year the Court followed further along the same path in upholding in Korematsu the exclusion of all people of Japanese ancestry from large areas of the Pacific Coast and relegating them to detention camps. 323 U.S. at 217-18 (relying on Hirabayashi). Although the Court conceded that exclusion from one’s home and community is a far greater deprivation than was inflicted by the Hirabayashi curfew (confinement for ten hours at night in one’s home), its foreshortened analysis rested on the same forgiving formula that allowed the executive very broad discretion to protect national security in a crisis:

As in the Hirabayashi case, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a

⁵⁰ The Court referred to the asserted facts, inter alia, that (i) “social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented assimilation as an integral part of the white population,” (ii) many children of Japanese parentage were sent to after-school Japanese language training, sometimes at schools “generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan,” and (iii) Japan recognized dual citizenship. Id. at 96-97.

menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Id. at 218.⁵¹

6. Youngstown (the steel seizure case)

In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (“Youngstown”), the Court rejected President Truman’s claimed exercise of his war power during the Korean War in seizing steel mills to ensure against disruption of production resulting from labor unrest. The Court rejected the notion that “broad powers in military commanders engaged in day-to-day fighting in a theater of war” translated into a right of the President “to take possession of private property in order to keep labor disputes from stopping production.” Id. at 587 (holding that President could not so act without congressional authorization).

This rhetorical limitation of the war power to battlefield decisions is, in general tenor, in some tension with the Court’s sensitivity in Korematsu to the dangers lurking on the home front. Youngstown probably owes something to the less threatening nature of the Korean conflict, and particularly the absence of any suggestion that the enemy, rather than inflexible corporate management, posed a threat within the country.

It also is significant that in Youngstown, unlike in Quirin, Hirabayashi and Korematsu, the President had acted without any congressional authorization, and, in the view of several

⁵¹ Korematsu, widely condemned in retrospect, was not without vigorous dissents. Justice Murphy, for one, opined that the exclusion order “‘goes over the very brink of constitutional power’ and falls into the ugly abyss of racism.” Id. at 233.

It also bears noting that, on the same day it upheld the exclusion order in Korematsu on constitutional grounds, the Court, in Ex parte Endo, 323 U.S. 283 (1944), construed the regulations governing the relocation centers to require the release of “citizens who are concededly loyal.” Id. at 297.

justices, even contrary to the evident intent of Congress in the Taft-Hartley Act. Id. at 598-604 (Frankfurter, J., concurring). Justice Jackson’s concurring opinion argued persuasively that, as a general matter, a President’s power is at a maximum when exercised in a manner expressly authorized by Congress, in a “zone of twilight” if taken in the absence of congressional authorization, and at “its lowest ebb” when incompatible with congressional will. Id. at 635-38.

Youngstown has been called “perhaps the Court’s most important attempt to fit the needs of executive branch decisionmaking at times of crisis within our constitutional tradition,” Neal K. Katyal & Lawrence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259, 1273 (2002) (“Katyal & Tribe”), and “a landmark case affirming not only that the President must obey the law but that in general he may act only on the basis of statutory authority.” David Currie, The Constitution of the United States 40 (2d ed. 2000). These accolades more properly belong to Justice Jackson’s concurring opinion, which has proven widely influential. E.g., Dames & Moore v. Regan, 453 U.S. 654, 668-69 (1981) (adopting the three-tier Jackson analysis of Presidential power). As will be seen, the Second Circuit’s opinion reversing Padilla relies heavily on that concurrence and its distinction between the war power of the President at home and his war power abroad (see p. 95, below).

7. Hamdi and Padilla: indefinite detentions under the President’s war power

The Hamdi and Padilla courts were required to apply the above limited case law on the President’s war power to the declared “enemy combatants” before them, both United States citizens. Recall: Hamdi allegedly had been captured in a zone of armed combat in Afghanistan, carrying a gun and in the company of other Taliban fighters, while Padilla was seized in Chicago and ultimately accused of conspiring with al Qaeda operatives abroad to build and detonate a

“dirty bomb” in this country (see p. 3-4 above). Counsel for each detainee urged that due process barred their indefinite and incommunicado detentions, while the government urged that the President’s war power permitted them, based on the government’s hearsay representation of the basic facts justifying the detainee’s “enemy combatant” status.

As Judge Mukasey noted in Padilla, “it would be a mistake to create the impression that there is a lush and vibrant jurisprudence governing these matters. There isn’t.” Padilla, 233 F. Supp. 2d at 607. Applying this sparse jurisprudence, and faced with very different factual contexts, Hamdi and the Padilla district court reached somewhat different results, but both sustained the constitutionality of indefinite detentions of “enemy combatants.” The Second Circuit, reversing Padilla, held the detention of Padilla unconstitutional.

In Hamdi the petition was denied without an evidentiary hearing, the Fourth Circuit finding that the government’s representation of the facts, indisputable in the court’s view, was sufficient to justify the enemy combatant classification without the need for further inquiry (or permitting Hamdi any access to counsel), given the deference due the President’s exercise of his war power.

In Padilla Judge Mukasey, while similarly according great deference to the President’s war power, withheld ruling on the merits of the petition before him. Instead, he granted Padilla a limited right to consult with his counsel for the purpose of submitting a rebuttal to the Mobbs declaration (Padilla at 599-602), which rested on hearsay reports from “unnamed confidential sources” concerning Padilla’s alleged contacts with al Qaeda operatives. Id. at 573. Padilla’s “right to present facts” was found “firmly rooted” in the habeas statute, 28 U.S.C. § 2241, and related statutes. Id. at 599. However, the court held that the government ultimately need meet

only a low “some evidence” standard to justify Padilla’s continued detention. Id. at 608. The Second Circuit did not reach these questions, since it held the President without power to detain Padilla in the first place.

Before turning to our own analysis of the issues posed by enemy combatant detentions, we review the manner in which Hamdi and the two Padilla courts dealt with those issues.

**a. Separation of powers;
deference to political branches**

The Hamdi circuit court and Padilla district court opinions share much in common. In particular, both decisions place heavy stress on the need for the courts to defer to the political branches in the exercise of their war-making powers, and to avoid any intrusion that would hamper the effective discharge of those powers.

In dismissing Hamdi’s petition, the Fourth Circuit stressed the battlefield context of his classification: “an American citizen captured and detained by American allied forces in a foreign theater of war during active hostilities and determined by the United States military to have been indeed allied with enemy forces.” Hamdi at 476. The court rejected any “broader categorical holdings on enemy combatant designations” (id. at 465), and disclaimed “placing our imprimatur upon a new day of executive detentions.” Id. at 476.⁵² It specifically distinguished

⁵² The Fourth Circuit’s opinion, in fact, is notable for its several rhetorical flourishes recognizing the importance of civil liberties and the writ of habeas corpus, even in times of war. It was emphatic that “the detention of United States citizens must be subject to judicial review” by means of the writ of habeas corpus, consistent with the writ’s “essential function of assuring that restraint accords with the rule of law, not the whim of authority. . . .” Id. at 464-65. See also:

The duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict. Id. at 464.

the Padilla situation, *i.e.*, “the designation as enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding.” Id. at 465.

Hamdi proceeds to analyze at some length what it believes would be unacceptable intrusions in the conduct of military field operations were military commanders required to litigate back in the United States over the factual circumstances of a detainee’s capture, detention and interrogation. Id. at 469-71. Because of the deference due to “executive branch decisions premised on military determinations made in the field,” and “because Hamdi was indisputably seized in an active combat zone abroad,” the Hamdi court did not require any supplementation (or permit any rebuttal) to the Mobbs declaration. Id. at 473. It was persuaded that “a factual inquiry into the circumstances of Hamdi’s capture would be inappropriate,” and “would entail an unacceptable risk of obstructing war efforts authorized by Congress and undertaken by the executive branch.” Id. at 474-75.⁵³ The Constitution required deference:

The constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels the courts to assume a deferential posture in reviewing exercises of this authority.

Id. at 474.

The Hamdi court’s deference to the executive hence was the product of both institutional deference, which it believed was required by the Constitution’s separation of powers, and

⁵³ The court vigorously criticized the district court’s orders in connection with that court’s plan to conduct an evidentiary hearing on the legality of the detention, *i.e.*, that Hamdi have unmonitored access to his court-appointed lawyer and that the government disclose detailed information concerning Hamdi’s seizure and interrogation. The Fourth Circuit found those orders, which it had earlier stayed, unacceptably to intrude into the President’s authority and to show insufficient deference to the war-making powers of the two political branches. Id. at 462, 469-71.

practical considerations that it found powerfully supported the necessity of such deference in the factual context presented.

In Padilla, which did not involve an overseas military campaign, the practical considerations played much less of a role in the court's analysis. "The prospect of courts second-guessing battlefield decisions . . . does not loom in this case." Padilla, 243 F. Supp. 2d at 57. In fact, Judge Mukasey noted that federal judges do have the expertise to make and review the sort of factual determinations on which Padilla's classification as an enemy combatant rested. Id. at 608. However, the court found deference required by the Constitution's separation of powers. It was beyond the appropriate scope of the court's "commission" to consider de novo whether the enemy combatant classification had properly been applied to Padilla:

The "political branches," when they make judgments on the exercise of war powers under Articles I and II, as both branches have here, need not submit those judgments to review by Article III courts.

Id. at 607.

This observation did not lead the court to deny all review, but rather to craft a highly deferential scope of review. The court's commission, it held, extended "only to deciding two things:"

(i) whether the controlling political authority -- in this case, the President -- was, in fact exercising a power vouchsafed to him by the Constitution and the laws; that determination in turn, is to be made only by examining whether there is some evidence to support his conclusion that Padilla was . . . engaged in a mission against the United States on behalf of an enemy with whom the United States is at war, and (ii) whether that evidence has not been entirely mooted by subsequent events

Id. at 608.⁵⁴

The Second Circuit, on appeal, answered the constitutional question in the negative, holding the President did not have the power, absent express congressional authorization, to detain an American citizen on American soil (see pp. 62, 66, 96, 105-06 n.93, below).

The Hamdi court, while recognizing that the government urged the “some evidence” standard, found it unnecessary to decide that question. It held that, in response to a habeas petition challenging a detention as unlawful, the courts should appropriately “ask that the government provide the legal authority upon which it relies for the detention and the basic facts relied upon to support a legitimate exercise of that authority.” Hamdi at 472. It found the requisite legal authority in the “executive’s . . . power to detain under the war powers of Article II,” and the basic facts adequately set forth in the Mobbs declaration. Id. at 472-73.

b. Existence of a state of war

None of the three courts viewed itself as entitled to second-guess the government’s position that the “war on terror” invoked the President’s “war power.” All courts treated the question of whether a state of war existed and determinations as to its cessation to be political matters essentially within the authority of the President and/or Congress and not the courts. Padilla at 588-91; Padilla Cir., slip op. at 27; Hamdi at 476.

⁵⁴ In United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002), the District Court was similarly deferential to the President’s finding that an American citizen fighting with the Taliban and captured in Afghanistan was an ‘unlawful combatant’ and so not subject to immunity from prosecution as a prisoner of war under the Geneva Convention. The court found that “conclusive deference, which amounts to judicial abstention, is plainly inappropriate.” Id. at 556-57. The court proceeded to examine the President’s finding in light of Geneva Convention Article 4, which sets forth the criteria for determining unlawful combatant status (see pp. 49-50, above), and held that the Taliban forces were unlawful as lacking a command structure, distinctive uniforms and compliance with the law of war. Id. at 557-58.

Both Padilla courts placed important reliance for this point on The Prize Cases. Padilla at 589, 595-96; Padilla Cir., slip op. at 27. See pp. 41-42 above. None of the courts placed any significance on the unconventional nature of the war on terror as compared to previous wars, involving massed troops of opposing sovereign states. None found it necessary to probe the question of when the war on terror might come to an end. Hamdi and the Padilla district court expressly found that it plainly had not, given the continued presence of United States troops in Afghanistan. Padilla at 590; Hamdi at 476. Padilla held expressly that the challenge to the alleged indefinite nature of the detention was premature. Padilla at 590-91.⁵⁵

c. Detention of U.S. citizens arrested on U.S. soil

The Padilla district court posed as the “central issue” before it this question:

whether the President has the authority to designate as an unlawful combatant an American citizen, captured on American soil, and to detain him without trial.

⁵⁵ Padilla did refer to Padilla’s potential ability to demonstrate, at some point in the future, that the evidence used to support his enemy combatant classification had been “entirely mooted by subsequent events.” Id. at 608. This may envision a possible showing that operations against al Qaeda had ended, or that “the operational capacity of al Qaeda [had been] . . . effectively destroyed” (id. at 590), or that Padilla’s usefulness as a source of intelligence had been exhausted, at which point continuing the detention might no longer bear “a reasonable relation to the purpose for which the individual [was] committed.” Zadvydas, 533 U.S. at 690.

Judge Wesley’s dissenting opinion in the Second Circuit strikes a somewhat similar note with respect to the purpose of the detention:

Certainly, a court could inquire whether Padilla continues to possess information that was helpful to the President in prosecuting the war against al Qaeda. Presumably, if he does not, the President would be required to charge Padilla criminally or delineate the appropriate process by which Padilla would remain under the President’s control. See, e.g., Zadvydas v. Davis, 533 U.S. 678 (2001).

Slip op. at pp. 12-13.

Padilla at 593. In reaching an affirmative answer to this question, the Padilla court placed heavy stress on Quirin. Since the Court in Quirin drew no distinction between the alleged American citizen and the other German saboteurs,

it matters not that Padilla is a United States citizen captured on United States soil.

Id. at 606.

In relying on Quirin, the court adopted as well its limitation of Milligan to “non-belligerent[s].” Quirin, 317 U.S. at 45. The Padilla court held petitioner within the reach of Quirin, not Milligan, since he, “like the Quirin saboteurs, is alleged to be in active association with an enemy with whom the United States is at war.” Padilla at 594. See also id. at 608 (relevant showing is whether “Padilla was . . . engaged in a mission against the United States on behalf of an enemy with whom the United States is at war”).

It is on this point that the Second Circuit reversed. Drawing heavily on Justice Jackson’s Youngstown concurrence, the Court held that the detention of a citizen was in violation of an express statute, 18 U.S.C. § 4001(a), and hence involved an exercise of Presidential power at its lowest ebb, i.e., Jackson’s third category (see p. 55, above). The President’s war power did not support the detention in the United States because the Constitution allocated to Congress, not the President, emergency powers to act in this country, and Congress had not authorized the detention, distinguishing Quirin and The Prize Cases where such authorization had been present. Padilla Cir., slip op. at 28-37. Surprisingly, the infringement of individual due process rights inherent in the detention was not a main focus of the opinion (see pp. 105-06 n.93 below).

d. Access to counsel

As noted, the Padilla district court did not dismiss the writ but rather authorized further proceedings in which Padilla could attempt to rebut the allegations in the Mobbs declaration, and communicate with his counsel for the limited purpose of preparing such a rebuttal. This result proceeded in part from a recognition that normally the purpose of a habeas petition is to allow the presentation of facts (Padilla at 599-602), and the court's view that "Padilla's need to consult with a lawyer to help him do what the statute permits him to do is obvious." Id. at 602. The court, in its opinion on reconsideration, rejected the government's argument that the "some evidence" standard meant that Padilla need be given no opportunity to respond to the government's allegations in support of its enemy combatant classification. Padilla, 243 F. Supp. 2d at 54-56.

The court found it unnecessary to determine whether Padilla had a due process right to counsel. Rather, it authorized counsel as a discretionary matter pursuant to the All Writs Act, 28 U.S.C. § 1651(a), finding that counsel's participation would aid the court in ruling on the merits of the habeas petition, and that its exercise of discretion could be at least informed by the Sixth Amendment right-to-counsel jurisprudence. Padilla at 602-03. The court rejected the government's position that Padilla's contact with counsel would interfere with its ongoing interrogation of Padilla, finding any such interference "would be minimal or nonexistent" since the court was permitting only limited consultations to facilitate the presentation of the facts in the habeas proceeding. Id. at 603. The court also noticed that Padilla, unlike Hamdi, already had

consulted with counsel when earlier held as a material witness, and thus there was “no potential prophylactic effect of an order barring access by counsel.” Id. at 605.⁵⁶

The Second Circuit had no need to reach the right-to-counsel issue, but Judge Wesley, in dissent, made plain his lack of sympathy for the government’s position:

No one has suspended the Great Writ. See U.S. Const. art. I, § 9, cl. 2. Padilla’s right to pursue a remedy through the writ would be meaningless if he had to do so alone. I therefore would extend to him the right to counsel as Chief Judge Mukasey did. [citation omitted]. At the hearing, Padilla, assisted by counsel, would be able to contest whether he is actually an enemy combatant thereby falling within the President’s constitutional and statutory authority.

The Hamdi court, given its conclusion that the Mobbs declaration was not subject to challenge, never expressly addressed the right-to-counsel issue, nor the government’s related claim that its ability to interrogate Hamdi would be harmed if, as a result of contacts with counsel, the detainee was placed in an “adversary relationship with the captor.” Hamdi at 466 n.4. The court noted that “a capable attorney could challenge the hearsay nature of the Mobbs declaration and each and every paragraph for incompleteness or inconsistency”, but found that such “instinctive skepticism, so laudable in the defense of criminal charges,” would

⁵⁶ As to the government’s argument that Padilla might use his lawyer to pass messages to terrorists -- echoing charges in an unrelated pending case (see pp. 144-45 n.147, below) -- the court found, after reviewing the sealed Mobbs declaration, that such conjecture amounted to only “gossamer speculation.” Id. at 604. It noted that the military would be able to monitor the attorney-client communications, so long as the monitors were insulated from any further involvement with court proceedings. Id. The court cited in this regard the procedures for monitoring attorney-client communications recently promulgated at 28 C.F.R. § 501.3(a).

risk a “constitutionally problematic intrusion into the most basic responsibilities of a coordinate branch.” Id. at 473.⁵⁷

e. **Congressional authorization or prohibition:
the Joint Resolution and 18 U.S.C. § 4001(a)**

Both Hamdi and the Padilla district court rejected, while the Second Circuit adopted, petitioners’ arguments based on 18 U.S.C. § 4001(a), which provides that “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress” (see p. 13 above). Judge Mukasey found that § 4001(a) did in fact unambiguously require congressional authorization for “enemy combatant” detentions, and the Second Circuit agreed. But while Judge Mukasey found that Congress had provided such authorization in the Joint Resolution adopted by Congress on September 18, 2001, Authorization for Use of Military Force, Pub. Law 107-40 § 2(a), 115 Stat. 224 (2001) (the “Joint Resolution”), the Second Circuit held it had not.

⁵⁷ Since these decisions, in December 2003 the government announced it would permit Hamdi to consult with his attorneys. The Department of Defense announced on December 2, 2003, that Hamdi “will be allowed access to a lawyer” because it had “completed its intelligence collection with Hamdi.” Its press release billed this decision as a matter of discretion,” and “not required by domestic or international law” The government, in its unsuccessful brief in opposition to Hamdi’s petition for a writ of certiorari, described the new position in these words:

As a matter of discretion and military policy, the Department of Defense (DOD) has adopted a policy of permitting access to counsel by an enemy combatant who is a United States citizen and who is detained by the military in the United States, when DOD has determined that such access will not compromise the national security of the United States, and when DOD has determined either that it has completed intelligence collection from the enemy combatant or that granting access to counsel would not interfere with such intelligence gathering. In accordance with DOD’s policy and the military’s ongoing evaluation of Hamdi’s detention, DOD has determined that Hamdi may be permitted access to counsel subject to appropriate security restrictions. See <http://www.dod.gov/releases/2003/nr20031202-0717.html>.

Resp’t Hamdi Brief at 25-26 n.11.

The Joint Resolution, fully titled “To authorize the use of the United States Armed Forces against those responsible for the recent attacks launched against the United States,” empowers the President:

to use all necessary and appropriate force against those . . . organizations or persons he determines planned, authorized, committed or aided the terrorist acts that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such . . . organizations or persons.

Because Padilla was alleged “to have been an unlawful combatant in behalf of al Qaeda,” itself deemed responsible for the September 11 attacks, Judge Mukasey held the detention of Padilla authorized by the Joint Resolution and thus in compliance with 18 U.S.C. § 4001(a). Padilla at 596-98.

The Second Circuit, reversing, construed the Joint Resolution only to authorize combat abroad and, possibly, detentions in a battlefield context. It relied on the Supreme Court’s opinion in Ex parte Endo for the proposition that the Joint Resolution should be construed to impose no greater restraint on citizens than “clearly and unmistakably indicated” by its language. Padilla Cir., slip op. at 45, quoting Endo, 323 U.S. at 300.

The Hamdi court was unwilling to read 18 U.S.C. § 4001(a) as potentially applicable to Hamdi, believing the statute was not intended to override the “well established precedent” authorizing the capture and detention of enemy combatants as an inherent part of warfare. Hamdi at 468. But, in the alternative, the Fourth Circuit also held that the Joint Resolution authorized the detention. Id. at 467.

f. The Geneva Convention

Hamdi and the Padilla district court treated differently the Third Geneva Convention. Padilla held that the detainee's designation as an "enemy combatant," if sustained, meant that he was an "illegal combatant," and thus would not be within the protections of the Geneva Convention as a prisoner of war. Padilla at 592-93, 599. The Hamdi court found the distinction between lawful and unlawful combatants irrelevant to the case before it, since either could be detained under the authority of Quirin. Hamdi at 469. It held, further, that the Geneva Convention afforded no private right of action to any detainee, but rather was enforceable only through diplomatic and reciprocal measures between the warring parties. Id. at 468-69.⁵⁸ The Second Circuit had no need to reach this question.

IV. War Powers and Due Process: Indefinite U.S. Detentions by Unilateral Executive Action Violate the Constitution

We turn now to our own analysis of how the competing considerations of due process and the war power should be applied in the unique and present circumstances of the "war on terror." Our conclusion, in agreement with the Second Circuit's but for somewhat different reasons, is that the Constitution does not permit the President unilaterally, without congressional authorization, to effect indefinite and incommunicado detentions of suspected terrorists seized in the United States (see pp. 69-112, below).⁵⁹ The serious negative consequences of recognizing

⁵⁸ As a practical matter the Hamdi court's holding would mean that the Geneva Convention is unenforceable in the war on terror, since neither the defeated and dissolved Taliban nor the terrorist organization al Qaeda is capable of diplomacy.

The Lindh court held, consistent with Padilla, that the Geneva Convention was enforceable by the defendant before it, but that he was an unlawful combatant and thus not entitled to immunity from prosecution under the Convention. Lindh, 212 F. Supp. 2d at 553.

⁵⁹ Some urge that the principles of international law should be applied by American courts in reviewing or limiting the purported exercise of the war power by the President. See Jordan J. Paust, Judicial Power to Determine the Status and Rights of Persons Detained Without Trial, 44 Harv. Inter. L.J.

such an executive power -- damaging the rule of law in ways not easily confined to terrorism, opening the door to other abuses of due process, and offering an invitation by example to repressive regimes around the globe -- strongly supports not giving the war power such an expansive reading (see pp. 69-80, below). The limited war power jurisprudence does not justify indefinite detentions in this country of either citizens, as the Second Circuit has now held, or non-citizens (see pp. 81-104, below), at least until and unless Congress addresses and affirms the President's claim that the national security requires such extraordinary departures from long accepted due process standards. See pp. 104-12, below.

Much the same could be said with respect to the use of military commissions, based solely on the President's determination of who should be so tried, and in the absence of specific congressional authorization. However, the constitutional question is a closer one. Quirin and the generally worded statute on which it relied do support the use of such commissions to prosecute violations of the law of war (see pp. 113-15, below). But in any event, after reviewing the military commission orders promulgated for enemy combatant trials (pp. 123-26, below), we urge that the use of military commissions be minimized. There are important advantages offered by criminal prosecutions in the federal courts, which have successfully tried many terrorism cases (see pp. 128-29, below). The most important is that the enhanced fairness of such civilian

G4 (2003). But the invocation of "customary international law" as part of American law is problematic, for there often is no clear consensus on its content. See generally Flores v. Southern Peru Cooper Corp., No. 02-9008 (2d Cir. Aug. 29, 2003) (construing the Alien Tort Claims Act's embrace of torts "committed in violation of the law of nations," 28 U.S.C. § 1350). No principles of customary international law -- "those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern" (id., slip op. at 20) -- appear to either clearly permit or prohibit the detention of illegal combatants in the context of the war on terror. Like the law of war, customary international law speaks with an especially uncertain voice in the context of stateless terrorism. See Paust, supra, at G11 n.30.

proceedings will result in a likely greater acceptance in this country and abroad of the justness of their results (see pp. 129-35, below).

A. The Serious Negative Consequences of Recognizing a Unilateral Executive Power to Detain

As we show below, the less than “lush” war power jurisprudence surveyed above does not resolve how to balance the war power and due process in the context of indefinite detentions and the war on terror (see pp. 81-92, below). Before further discussing this sparse case law, therefore, we look at the possible consequences, legal and practical, of a decision sustaining the constitutionality of such executive detentions. Those serious negative consequences, as we see them, argue strongly against interpreting the war power precedents to sanction the detentions.

1. The sharp departure from the rule of law

Indefinite detentions constitute a sharp departure from core due process principles and the rule of law. The detentions have no finite term, and may continue for as long as the war on terror, which has no foreseeable end. They are effected solely by the executive, without any “probable cause” or other judicial finding. The executive expressly disclaims any intention of bringing charges against the detainees, and thus rules out any assessment by some neutral decision-maker of guilt or innocence. The detainees are isolated, including from any relatives or attorneys, thus precluding any factual challenge by the detainees to the claimed basis for their classification as “enemy combatants”. Further, the executive urges that, on any habeas corpus petition brought by a “next friend” of the detainee, no rebuttal should be permitted to its enemy combatant classification.

The holding of persons incommunicado, without access to an attorney, without charges or statutory basis, indefinitely and based solely on the executive’s subjective determination, has

nothing in common with due process as we know it. The policy has an almost medieval ring to it, harkening back to the days when the sovereign recognized no limitations on its power to detain subjects for whatever reason, uncontrolled by any superior rule of law (see pp. 11-15, above).

Nor has the term “enemy combatant” even been defined, or limited to persons suspected of planning or carrying out terrorist attacks. Padilla may fit that description as an alleged saboteur. But al-Marri, a civilian in this country legally, seems suspected of providing logistical support for al Qaeda sleeper cells: presumably criminal activity, if proven, but not “combatant” activity under any likely definition of the term (see p. 2, above). The scope of the indefinite detentions, in the executive’s conception, thus appears to extend to any person believed -- on the basis of “some” hearsay -- to have provided some form of assistance to al Qaeda, e.g., any form of “material support or resources” to a designated terrorist organization, such as “expert advice or assistance,” “currency” or “lodging”, 18 U.S.C. § 2339B(g)(4).⁶⁰ If the courts sustain the constitutionality of such detentions, the technique may be used against far more people than the three so detained in this country (so far as is known) to date.⁶¹

⁶⁰ The Central District of California recently enjoined the enforcement of the “expert advice and assistance” clause of the cited section of the USA PATRIOT ACT, finding it to be unconstitutionally vague. Humanitarian Law Project v. Ashcroft, No. CV 03-6107 (C.D. Cal. Jan. 22, 2004). For an analogous holding by the Southern District of New York, see p. 129 n.134, below.

⁶¹ It may well be that the “enemy combatant” detentions have been infrequently employed in the United States to date because the executive has been able to detain other suspects in other ways. Numerous aliens have been detained on immigration charges (see p. 74, below) and a lesser number have been detained as “material witnesses,” Padilla’s initial status, under 18 U.S.C. § 3144. Further, a large group of alleged “enemy combatants” seized abroad is being held at the Guantanamo Bay Naval Base in Cuba (see p. 29, above), detentions which present distinct issues not addressed in this report.

Already the use of such a technique by the government appears to have had an impact well beyond the persons detained. It opens the door to the intimidation of non-detainees. Defendants or potential defendants facing charges in criminal proceedings can be threatened, should they not plead or otherwise cooperate, with indefinite detention as enemy combatants terminating their due process rights, as indeed happened to al-Marri on the brink of his criminal trial (see pp. 1-2, above). Wholly deprived of any protection of the rule of law, or of the interposition of judge and jury, such persons would be subject to an intolerable pressure well beyond the pressure of a criminal prosecution.

We are not sanguine about the practical ability of the courts to cabin the use of such indefinite detentions on a case-by-case basis, if the general technique is accepted as constitutional. While the courts could review evidence concerning whether an alleged terrorist is one in fact, even here the courts' ability to provide meaningful review is dependent on the burden of proof applied to the government. The "some evidence" standard found applicable in Padilla to review of enemy combatant determinations may not provide meaningful review.⁶² Surely it will not if, as the government contends, the detainee is not permitted to consult counsel or rebut the government's minimal required showing. Padilla, 243 F. Supp. 2d at 54-56 (rejecting this government contention).

But assuming that the enemy combatant classification is sustained, questions concerning the length and conditions of incommunicado detentions designed to facilitate interrogation may

⁶² The usual predicate for the "some evidence" standard is a review of administrative fact-finding. In that context, "some" evidence can be "meager" evidence. See Superintendent v. Hill, 472 U.S. 445, 457 (1985) (review of prison disciplinary decision). The "some evidence" standard "is not intended as a substantive check on the accuracy of administrative fact-finding." Butler v. Oak Creek-Franklin School District, 172 F. Supp. 2d 1102, 1118 (E.D. Wis. 2001) (school disciplinary hearing).

not be subject to effective control by the courts. Our whole tradition is opposed to coerced confessions, including by extended detentions designed to extract information. Once that Rubicon is crossed, the courts are poorly positioned to second-guess executive decisions as to the utility or necessity of extracting information from a particular detainee, or the tactics -- including the length and conditions of the detentions -- best calculated to perform the extraction.⁶³ These are largely subjective judgments, based on experience and hunches, informed by whatever has been gleaned from interrogations of other detainees, classified intelligence intercepts and other non-evidentiary information. The courts, on such matters of tactical judgment, would “tend to defer to the executive’s assumed greater knowledge and expertise.” Katyal & Tribe, 111 Yale L.J. at 1275. Cf. Korematsu v. United States, 323 U.S. 214, 245 (1943) (Jackson, J., dissenting): “In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal.”

Nor can the public through the political process, rather than the courts, reasonably be expected to rein in executive excess. That may be a practical possibility in the context of exercises of the President’s war power that impact widely on many citizens, such as mobilization, the draft, rationing or higher taxes.⁶⁴ But where the exercise of the war power

⁶³ Truly extreme instances of abuse might be held to violate substantive due process, but the vagueness of that standard makes it a poor vehicle for controlling exercises of the war power.

⁶⁴ Compare this observation by Justice Stewart, concurring in the “Pentagon Papers” case, commenting on the Executive’s “enormous powers in the two related areas of national defense and international relations”:

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry — in an informed and critical public opinion which alone can here protect the values of democratic government.

focuses on a discrete minority -- the Japanese-Americans in World War II or Arab-Americans and other Muslims in the war on terror -- it is unrealistic to expect too much of the political process.⁶⁵ The public at large, in the context of the traumatic events of September 11 and continuing acts of lawless terrorism around the world, cannot be expected sua sponte to impose due process constraints on the President's efforts to prevent future terrorist attacks.⁶⁶

Further, the prospects of any political restraint are minimized if the President's war power is found to justify indefinite detentions unless Congress affirmatively passes legislation to prohibit them. Political inertia weighs against such legislation. However, if affirmative congressional authorization is deemed necessary (at a minimum) to sanction such detentions, as we believe and the Second Circuit has held, at least a debate on the wisdom and necessity of such measures is assured.

2. The risk of error

If such an extraordinarily lawless system could be confined to actual terrorists -- lawless in their very essence -- at least a certain symmetry would result. But no such limitation can be expected, for the executive branch, of course, like any human institution, is susceptible to error in its detention decisions. The dangers of ethnic profiling are all too apparent in the context of

New York Times Co. v. United States, 403 U.S. 713, 728 (1971).

⁶⁵ Cf. Graham v. Richardson, 403 U.S. 365, 372 (1971):

Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom . . . heightened judicial solicitude is appropriate. (citations omitted).

⁶⁶ In a poll conducted for National Public Radio in November 2001, the respondents were equally divided -- 48% to 48%, with 4% "don't know" -- on whether the government should have the authority to "detain terrorist suspects indefinitely without charging them." NPR/Kaiser/Kennedy School Survey on Civil Liberties, available at www.npr.org/programs/specials/poll/civil_liberties/civil_liberties_static_results_4.html.

terrorism investigations. In recent times, most international terrorists have been Arabs or other Muslims. Striking the balance between security and individual rights is not an abstract proposition in this context. An estimated 1,200 non-citizens, mostly from the Middle East or South Asia, reportedly were secretly detained after 9/11, of whom only four were subsequently indicted for terrorism-related crimes. Human Rights Watch website (hrw.org/un/chr.59/counter-terrorism-bck4.htm (Dec 17, 2003)).⁶⁷ See United States v. Awadallah, 349 F.3d 42, 78 (2d Cir. 2003) (Straub, C.J., concurring) (referring to “the waves of anti-Muslim sentiment that . . . followed September 11”); cf. United States v. Alameh, 341 F.3d 167, 172-74 (2d Cir. 2003) (percentage of Middle Eastern men charged under certain immigration statutes said to increase from 15% before 9/11 to 85% thereafter, though court questioned reliability of these statistics).

We do not believe the country would tolerate today, as did the Court in Korematsu, a wholesale round-up of Arabs or Muslims based on a claim that “there [are] . . . disloyal members of that population,” and on a judgment that “such persons could not readily be isolated and separately dealt with. . . .” Korematsu, 323 U.S. at 218. No one has urged any such wholesale detentions.⁶⁸ But targeted detentions, limited in number, can be based on “some evidence” that later proves to be faulty. See In re Application of United States for Material Witness Warrant, 214 F. Supp. 2d 356, 358-60 (S.D.N.Y. 2002) (recounting filing of material witness warrant

⁶⁷ The government’s secret detentions of these unidentified aliens, most held on immigration charges, have (so far) been upheld by the courts. Center for National Security Studies v. United States Department of Justice, 331 F.3d 918 (D.C. Cir. 2003), cert. denied, No. 03-472 (Jan. 12, 2004). Compare, in the non-immigration context, the comment that “secret arrests” represent a “concept odious to a democratic society.” Morrow v. District of Columbia, 417 F.2d 728, 741-42 (D.C. Cir. 1969).

⁶⁸ However, nationality-based immigration policies have been implemented. See David Stout, Ridge Moves to Tighten Security Ahead of an Iraq War, N.Y. Times, WYSIWYG//12/<http://www.nytimes.com/2003/03/18/politics/18CND-Home.htm> (noting new order by Homeland Security Department to detain all persons seeking political asylum if they arrived from any of 34 countries).

application and criminal charges against Egyptian national following September 11, 2001, based on what proved to be false information provided to government and on an allegedly coerced confession). Indeed, the narrower the scope of court review, the greater the likelihood of such error. The chance of error inevitably is magnified if detainees, as urged by the government, are held incommunicado, with no opportunity to consult an attorney or to rebut the executive's allegations advanced to justify the detention.

3. The long-term and expandable nature of the war on terror

The threat to due process posed by indefinite detentions is all the greater because of the likely prolonged nature of the war on terror, which creates a risk that such extraordinary measures adopted in its context may prove to be permanent features of the constitutional landscape.

In the past, occasional departures in wartime from due process standards have been tolerated in the expectation that, when war ended, the peacetime contours of due process would be resuscitated. Thus, President Lincoln, defending his policy of military arrests of civilians during the Civil War, emphasized the temporary nature of these measures:

I am unable to appreciate the danger . . . that the American people will by means of military arrests during the rebellion lose the right to public discussion, the liberty of speech and the press, the law of evidence, trial by jury and *habeas corpus* throughout the indefinite peaceful future which I trust lies before them, anymore than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthy life.

Edward S. Corwin, Total War and the Constitution 168-69 (1947) (“Corwin”).⁶⁹

Others have found Lincoln’s optimism as to the temporary nature of war measures misplaced:

The Court has had little success in preventing the precedents of war from becoming the precedents of peace. We might even go so far as to say that the court has made a positive contribution to the permanent peacetime weakening of the separation of powers, the principle of non-delegation, the Fifth Amendment, and the necessary and proper clauses applicable limits to governmental power. Rossiter at 129.

Justice Jackson, in his Korematsu dissent, feared that the Court’s ruling in that case would lie “like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” 323 U.S. at 246.

But whatever the merits of this debate in the context of “temporary” wars, the war on terror shows few signs of being temporary. There is certainly little expectation that it will be over anytime in the near term. And its scope is expandable, based on the determinations of the President and/or Congress. It is not limited to al Qaeda, as in the Joint Resolution. It has been said by the President to embrace the former Hussein regime in Iraq, Palestinian terror groups and the Abu Sayyaf Group in the Philippines. Numerous other suspected terrorist organizations

⁶⁹ Similarly, President Roosevelt in World War II, in announcing to Congress that he would impose stringent ceilings on food prices if Congress failed to act, proclaimed:

When the war is won, the powers under which I act automatically revert to the people -- to whom they belong.

Quoted in Edward S. Corwin, The War and the Constitution: President and Congress, 37 *American Political Science Review* 18, 19 (1943).

presumably are within its potential scope: 36 have been designated by the United States. U.S. Dep't of State Press Statement, Oct. 3, 2003.

Accordingly, we must assume a substantial possibility that we will have to live with the war on terror for many years, if not indefinitely. If that is the case, we may not safely await a foreseeable post-crisis period during which the previous contours of due process will be restored. Departures from core due process principles in the context of the war on terror may well be long-lived, not short-term measures easily reversed. This makes all the more important a careful consideration of the relevant constitutional values before due process rights are set aside in obeisance to proclaimed wartime necessity.

4. The potential extension of anti-terrorism measures to other criminal activity

In theory tactics justified in the war against terror, such as indefinite detentions, might be confined to that context. Terrorism is distinguishable, to some significant degree, from other types of criminal activity (see pp. 106-07, below). But a bright line between terrorism and other types of criminal activity will not be easy to maintain. If such tactics are deemed constitutionally acceptable with respect to terrorism, and effective in practice, there will be pressure to employ similar tactics with respect to other types of suspected criminal activity.

The Bush administration, arguing for a broadening of the USA PATRIOT Act, has urged that law enforcement agencies be afforded “the same tools to fight terror that they [already] have to fight other crime,”⁷⁰ but the dynamic will work in the other direction as well. The two rationales for the detentions of suspected terrorists -- to facilitate their interrogation and to

⁷⁰ Remarks of President Bush, Sept. 10, 2003, at FBI Academy, Quantico, Virginia (White House website).

incapacitate them (preventive detention) -- are not limited to terrorism. Compelling arguments for extracting information from detainees surely could be made in the context of investigations of international drug dealing, serial murders or rapes, or even child abuse. Nor can the rationale of preventive detention logically be limited to terrorism. Undoubtedly, any United States Attorney's office could point to many persons of interest believed to a moral certainty by prosecutors to have committed or to be planning to commit serious crimes, but who have not been arrested because the evidence gathered to date is not deemed sufficient to satisfy "probable cause" or to secure a conviction. If such deficiencies of proof do not preclude the detention of suspected terrorists -- if "some evidence" is enough to detain them indefinitely -- pressures may build to use preventive detention in other contexts to lock up other persons suspected of other serious criminal activity, based on "some" evidence falling well short of proof of their guilt.⁷¹

One possible such context is the so-called "war on drugs," which also involves both domestic law enforcement and military efforts abroad, here in aid of governments battling local drug lords, particularly in Colombia and, in the past, in Peru. See, e.g., Thomas Powers, War and its Consequences, N.Y. Review of Books, March 23, 2003, at 19, c. 4 (discussing Dana Priest, The Mission: Waging War and Keeping Peace with America's Military (Norton 2003)). In this context, if the war on terrorism leads to a socially accepted notion that constitutional norms are reserved solely for peacetime, we may see a willingness to accept more extreme and potentially extra-constitutional measures in dealing with suspected drug dealers domestically, particularly if they are linked to foreign groups or governments and if the threat they pose to our social fabric is viewed as sufficiently acute.

⁷¹ Salerno (pp. 16-17, above), opens the door to preventive detentions in the context of pre-trial detentions, but still subject to both a prior probable-cause finding and the speedy trial guarantee of the Sixth Amendment.

Granted, it could be argued that the war powers, however expansively construed, could never justify indefinite detentions in pursuit of some rhetorical “war on drugs” or “war on child abuse.” But if the focus is on due process, the forecast is more worrisome. If due process is deemed not to preclude indefinite detentions in the context of the domestic war on terror, because of the exigencies and urgencies it presents in the sole judgment of the President, there is reason to fear it might not preclude such detentions in the context of other alleged criminal activity.⁷² Our core due process principles should not be subject to this risk.

5. Further extensions of the war power

If the unilateral war power of the President is sufficient to displace due process with respect to the rights of detainees, might it also be held to trump other constitutional rights, such as free speech under the First Amendment? A separation of powers jurisprudence that places in the executive plenary power to determine the means best suited to prosecute the war on terror offers no comforting reassurance on this score.⁷³ To vindicate the use of the war power domestically to justify indefinite detentions may open the door to other executive acts heretofore believed beyond the pale, particularly if the courts accept the administration’s position that the United States should be viewed as a “battlefield” in the war on terror. N.Y.L.J. Nov. 18, 2003, p.

⁷² Concerns of this nature informed Justice Jackson’s dissent in Korematsu. Citing Cardozo’s reference to “the tendency of a principle to expand itself to the limits of its logic” (Nature of the Judicial Process 51), Jackson argued that the Court should not lend its imprimatur to a military decision, reasonable as such but unconstitutional in principle, since the Court’s ruling would have a “generative power of its own,” beyond that of the military order. Korematsu, 323 U.S. at 246.

⁷³ Compare Center for National Security Studies v. United States Dep’t of Justice, 331 F.3d at 932 (D.D.C. 4003) (reversing decision under FOIA requiring disclosure concerning post 9/11 detainees: “the courts must defer to the executive on decisions of national security”), with United States v. Moussaoui, 336 F.3d 279, 282 (4th Cir. 2003) (Wilkins, C.J., concurring in denial of rehearing en banc) (“Siding with the Government in all cases where national security concerns are asserted would entail surrender of the independence of the judicial branch and abandon our sworn commitment to the rule of law”).

1, c. 3 (quoting argument of government counsel to Second Circuit in Padilla appeal, Nov. 17, 2003).

6. The encouragement of repressive regimes abroad

Another negative consequence of indefinite detentions is the encouragement or “cover” they could provide for repressive regimes abroad to oppress their non-terrorist dissidents. If the United States feels justified in departing from the rule of law in combating terrorism at home, notwithstanding our strong tradition of constitutionalism, other countries with no such tradition may see such conduct as justifying crackdowns against their citizens for opposition political activity. We will be in a poor position to complain of arbitrary executive detentions by these regimes, bypassing their judicial systems, if we have engaged in much the same conduct ourselves.

This effect, according to Human Rights Watch, is already occurring:

Over the past two years, numerous governments throughout the world have enacted laws that unduly expand government powers of detention and surveillance. Some governments have pointed to the erosion of civil liberties in the United States after September 11 to deflect criticism of their own rights abuses. www.hrw.org.press (Sept. 30, 2003).⁷⁴

⁷⁴ Examples from the Human Rights Watch website of such statements include:

On December 16, 2001, [Egyptian] President Mubarak asserted that new U.S. policies “prove that we were right from beginning in using all means, including military tribunals There is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual,” Mubarak said.

In comments to a Washington Post columnist in November 2002, Eritrea’s Ambassador to the United States justified his government’s arrest of journalists by claiming that detention without charge was

B. The War Powers Jurisprudence Does Not Support Unilateral Executive Detentions in the United States

The negative consequences of sustaining executive detentions, as just reviewed, argue against construing the Constitution to permit such detentions. We now look again at the few relevant war power case precedents. In our view, they provide no definitive answer to the constitutional question, but surely do not require that the detentions be sustained.

1. The Padilla analysis: based on scant precedent from “total war” contexts

At base, the Padilla district court’s affirmance of the President’s indefinite detention power rests on two cases:

- Quirin, for the proposition that in times of war even United States citizens captured in the United States may be detained as illegal combatants;
- The Prize Cases, for the proposition that the question of whether we are at war is a political question within the President’s unreviewable discretion.

While relevant, neither case can bear the weight assigned to it, and each case was decided in the very different circumstances of the Civil War (The Prize Cases) and World War II (Quirin).

Quirin is cited in Padilla as virtually the only precedent supporting the constitutionality of the indefinite “enemy combatant” detentions. It is a weak reed for it involved no such

consistent with the practices of democratic countries. He cited the roundup of material witnesses and aliens suspected of terrorist activities in the United States as proof.

www.hrw.org/campaigns/september11/opporrtunismwatch.htm (Dec. 17, 2003).

detention.⁷⁵ In passing dictum the Quirin court did observe that the petitioners in that case (including a citizen), seized in the United States as unlawful combatants, were “subject to capture and detention,” like prisoners of war, 317 U.S. at 31. But the issue before the court was not the President’s “wartime detention decisions,” Hamdi II, 296 F.3d at 282, but rather the President’s order that the saboteurs be tried before a military tribunal for war crimes. The constitutionality of that order, supported by congressional authorization as well as a congressional declaration of war, was sustained. Quirin -- “just another of the isolated cases . . . that deal with isolated events and have limited application” (Padilla, 243 F. Supp. 2d at 57) -- does not speak to the constitutionality of domestic detentions of suspected illegal combatants, held indefinitely with no tribunal passing upon the question of guilt or innocence.

Nor is there other case authority supporting such detentions. The cases do support use of military commissions to prosecute illegal combatants (Quirin), or legal combatants who have committed war crimes. In re Yamashita, 327 U.S. 1 (1946); see pp. 121-22, below. Clearly the detention of prisoners of war (legal combatants) is permitted for the duration of a war, subject to the observation of the conditions protective of the POWs in the Third Geneva Convention. But no cases are found addressing the detention without charges of alleged illegal combatants seized in this country.⁷⁶

⁷⁵ In addition, as Judge Mukasey observed, neither Quirin nor any other case addresses the appropriate standard of review with respect to the classification of a particular person as an illegal combatant. Padilla necessarily covered new ground in holding that such classifications are subject to judicial review only on a deferential “some evidence” standard (see pp. 59-60, above).

⁷⁶ The absence of case law does not end the inquiry, for “practical construction” -- action on the ground -- may constitute relevant precedent. See Quirin, 317 U.S. at 35-36 (relying on the practice of military authorities recognizing illegal combatants); see also Hyman at 558-59 (bemoaning distorted “case-centered” historical analysis). Justice Frankfurter, in his Youngstown concurrence, would recognize an “executive construction of the Constitution,” (Youngstown, 343 U.S. at 613), citing United

Nor should the power to try illegal combatants before a military commission, sustained on the record before it by Quirin, potentially leading even to the imposition of the death penalty, be viewed as embracing indefinite detentions as a lesser exercise of the war power. A trial before a military commission provides an assessment of guilt or innocence on specific charges, and thereby provides some protection against arbitrary or erroneous executive detentions.

In a sense, to be sure, detention of an individual without charges is more arbitrary than detention on charges to be tried before a tribunal.

Rehnquist at 50. Certainly many detainees might prefer to be merely held rather than promptly tried by a military commission and, if convicted, punished or even executed. But our concern is not honoring the preference of the detainees, but rather respecting the values of the Constitution.

The Prize Cases likewise provide no compelling precedent in the domestic war on terror. They sustained only Lincoln's power as Commander in Chief to respond with appropriate military force, as he judged it, to the indisputable rebellion of the South. The absence of a declared war between two sovereigns did not mean there was in fact no war. A state of war

States v. Midwest Oil Co., 236 U.S. 459 (1915), but only on a showing of "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned" (Youngstown, 343 U.S. at 610-11).

The only apparent candidate for such an "executive construction" with respect to detentions appears to be Lincoln's policy during the Civil War, when military detentions of alleged Confederate sympathizers are said to have been frequent (see pp. 38-40, above).

However, the dramatically different circumstances of the Civil War, an armed rebellion on American soil, minimize the relevance of any such precedents to the domestic war on terror. Further, Lincoln's unique actions hardly meet the Frankfurter test of a "systemic unbroken" practice "long pursued," and in fact were sharply questioned at the time and invalidated in the only two court decisions on point, Merryman and Milligan (see pp. 40-45, above).

plainly existing, the President’s power to prosecute the war through such military measures as he deemed appropriate -- here through a blockade of enemy ports -- was undeniable.

But the military decisionmaking discretion of the President sustained in The Prize Cases should not be taken to constitutionalize indefinite detentions, effected far from any military battlefield, simply because the President proclaims that we are in a “war” and deems the detentions helpful in its prosecution. Surely, at minimum, such a fundamental departure from due process should not be seen as an unreviewable wartime measure, based on the military precedent of Abe Lincoln’s 1861 blockade.

2. A different analysis for a different type of “war”

Given that the result reached by the Padilla district court is not compelled by the few precedents it cites, and that it has troubling implications for due process rights in the United States (see pp. 69-80, above), we look again at the war power precedents, and separation of powers principles. We agree with the Second Circuit’s decision reversing Padilla: those precedents can and should be read in a way that does not grant the President unilateral power to override core due process principles whenever he declares his actions are part of the war on terror.

**a. The differing nature of wars:
“total war” precedents should not
govern the war on terror at home**

As already noted, there is no specific case support for unilateral executive detentions in the United States. The cases supporting an expansive construction of the President’s war power generally, such as The Prize Cases, Korematsu and Quirin, were decided in the very different “total war” circumstances of the Civil War and World War II, which should not control the

balance between due process and the war power in the quite different setting of the domestic war on terror. Further, the President's actions sustained in these cases were supported by congressional authorization, while indefinite detentions are not (see p. 105, below).

The cases involving the President's war power are few in number, and are all but silent in construing the limits or contours of those powers. This post-World War II summary of the case law remains accurate today:

[T]he Court has refused to speak about the powers of the President as commander in chief in any but the most guarded terms. It has been respectful, complimentary, on occasion properly awed, but it has never embarked on one of those expansive flights of dicta into which it has been so often tempted by other great constitutional questions.

* * *

[I]t has fixed neither the outer boundaries nor the inner divisions of the President's martial authority, and has failed completely to draw the line between his powers and those of Congress

Rossiter at 4-5.

It has been equally rare for the courts to balance purported exercises of the war powers against the due process rights of individuals affected by such actions. Generally the courts have viewed the invocation of the war powers as a black-and-white proposition: if the war powers are found properly invoked, a due process analysis attempting to limit the means or methods by which such powers are exercised is seldom to be found.

This all-or-nothing approach reached its zenith in the World War II cases reviewed above. In Quirin and Yamashita, with respect to military commissions, and Hirabayashi and

Korematsu with respect to the Japanese exclusions, once the action was held within the scope of the war powers there was no further consideration by the majority of whether due process might limit the scope or exercise of the powers.

The contrast between this extreme deference to the President's war powers and the due process jurisprudence prevailing in times of peace led one post-World War II commentator to conclude that there are really "two Constitutions — one for peace, the other for war." Rossiter at 129. In times of war, according to this analysis, the courts recognized the futility of any judicial restraint on the President's freedom of action in prosecuting the war:

The government of the United States, in a case of military necessity proclaimed by the President, and a fortiori when Congress has registered agreement, can be just as much a dictatorship, after its own fashion, as any other government on earth. The Supreme Court of the United States will not, and cannot be expected to, get in the way of this power (id. at 54).

Rather, the only realistic curb on the use of the war powers was executive self-discipline:

Most important, the defense of the Constitution rests at bottom exactly where the defense of the nation rests: in the good sense and the good will of the political branches of the national government, which for most martial purposes must mean the President and his military commanders (id. at 131).⁷⁷

⁷⁷ Edward S. Corwin, writing in 1947, came out at about the same place:

The restrictive clauses of the Constitution are not, as to the *citizen at least*, automatically suspended, but the scope of the rights to which they extend is capable of being reduced in face of the urgencies of war, sometimes even to the vanishing point, depending on the demands of the war. Theoretically these will be determined by the President and then Congress, subject to judicial review; actually the Court will not intrude its veto while war is flagrant.

Corwin at 131.

Applying the Rossiter analysis to the war on terrorism would lead to the conclusion that it is both inappropriate and futile for the courts to review now, save perhaps in the most cursory fashion, any decision by the President of how to fight terrorism at home or abroad. Any bold judicial pronouncements applying due process to limit overzealous executive action would come only later, following the example of Milligan, after terrorism is licked.⁷⁸

But this declaration of judicial impotence seems overdrawn, at least, in the context of something less than the “total war” circumstances confronting the courts during the Civil War and World War II. Even in the midst of the actual hostilities of the Korean War, the Supreme

⁷⁸ Milligan, decided the year after the Civil War ended, emphasized, with surprising candor, that the Court was able to address the question before it dispassionately precisely because the war had concluded:

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. 71 U.S. at 109 (italics in original).

As Rossiter observes:

It is one thing for a court to lecture a President when the emergency has passed, quite another to stand up in the middle of the battle and inform him that he is behaving unconstitutionally.

Rossiter at 38.

The hazard in the latter course is illustrated by Justice Taney’s 1861 decision in Merryman, in the early days of the Civil War, ruling Lincoln’s suspension of habeas corpus unconstitutional: the President simply ignored the ruling in his conduct of the war. Hyman at 89.

Court, in Youngstown, rejected President Truman's attempted invocation of his war power to justify his seizure of the steel mills.⁷⁹ See pp. 54-55, above. The court was unanimous that

the President's action could not be justified as an exercise of his military power as Commander in Chief of the armed forces.

Indeed, the case should serve as a particularly valuable precedent in precluding an extensive interpretation of the President's autonomous military powers as a basis for executive control of the internal economy when the country is not in a state of declared war and not threatened with imminent invasion.

Kauper, The Steel Seizure Case: Congress, the President and the Supreme Court, 51 Mich. L. Rev. 141, 175 (1952).

Viewed against the general sweep of the thin war powers jurisprudence, the World War II near "total deference" cases are the exception rather than the rule with respect to exercises of the war power in the United States.⁸⁰ Nor have the decisions by the Supreme Court in Quirin,

⁷⁹ The Court offered no explanation for its conclusion that the President's war power, absent congressional authorization, did not embrace the seizure of domestic industries. The conclusion seemed obvious to the Court, but for reasons it chose not to articulate.

This assertion of judicial power in Youngstown must have surprised Rossiter, who only the year before had written as follows concerning a President's power to seize industries to aid the war effort:

Nor can there be any doubt that under the conditions of modern war the President has a broad constitutional power to seize and operate industrial facilities in which production has been halted, a power which, like his other powers of martial law, is virtually impossible to define or control.

Rossiter at 63.

⁸⁰ At the other extreme, the insistence of Milligan that war and peace make no difference in constitutional terms also finds little echo in the caselaw (or common sense). Milligan's words are clarion: the Constitution "is a law for rulers and people, equally in war and in peace, and covers . . . all classes of men at all times, and under all circumstances." Milligan, 71 U.S. at 120-121. But no case has adopted Milligan's view that it is constitutionally impossible even for Congress and even in emergency circumstances to adopt wartime measures that limit individual rights in a way not limited in peacetime. Due process is not so rigid:

Hirabayashi and Korematsu -- which exhibited the greatest deference to the executive as crisis manager -- well stood the test of time. The Japanese exclusion cases are almost universally condemned. Quirin also has been called into serious question (see pp. 113-14, below). Another reason not to follow blindly the lead of the World War II precedents is the emergence, in the years since World War II, of a jurisprudence far more vigorous in recognizing and protecting individual rights from excessive governmental action. Katyal & Tribe, 111 Yale L.J. at 1303-04.⁸¹ We trust that today neither the executive nor the courts would countenance the wholesale ethnic-based military orders upheld in Korematsu and Hirabayashi. See generally, E. Muller, 12/7 and 9/11: War, Liberties, and the Lessons of History, 104 W. Va. L. Rev. 1 (2002) (favorably comparing the Bush administration's policies toward Arab Americans after 9/11 with the Roosevelt administration's actions against ethnic Japanese during World War II).

Short of the most pressing emergency circumstances (see pp. 103-04, below), there should be room to balance civil liberties and national security, i.e., to analyze whether the necessities of national security truly require limiting or abandoning core due process principles. But to achieve such a balance, the courts must go beyond the "yes" or "no" question of whether a

Early constitutional absolutism is replaced by constitutional relativity; it all depends -- a result that has been definitely aided in the case of substantive rights by the modern conception of due process of law as 'reasonable law' -- that is to say, what the Supreme Court finds to be reasonable in the circumstances.

Corwin at 80.

⁸¹ Louis Henkin, writing in 1972, pointed out the transformation in the role of the Constitution, as applied by the Supreme Court, with respect to individual rights. While "there was hardly a case during more than a hundred years [after adoption of the Constitution] in which the courts invalidated federal action on the ground that it violated an individual's constitutional rights" -- Dred Scott (recognizing the property rights of the slave owner) being the only such pre-Civil War case -- more recently for the courts "the Constitution has become primarily a bulwark for the individual against government excess." Louis Henkin, Foreign Affairs and the Constitution 251-52 (1972).

state of war exists. The courts recognize the President's power to commit the nation's military forces to combat, though the power to declare war (and finance it) remains with Congress. But this Commander-in-Chief power should not be construed to carry with it the inherent authority to depart from due process at home. Wars and armed conflicts are of too varying kinds, and the war on terror specifically is too multi-faceted, to equate the power to activate the Armed Forces, or even to declare war, with a power to override fundamental individual rights and liberties.

The Padilla district court decision appears to treat the "war on terror" as no different from the Civil War or World War II, in terms of a separation of powers analysis, thus compelling judicial deference to the President's actions as Commander in Chief in pursuit of that war, wherever prosecuted, with the courts without power to "review the level of force selected." Padilla, 533 F. Supp. 2d at 589, quoting Campbell v. Clinton, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring).⁸² To the contrary, wars or armed conflicts are of different kinds, particularly as they concern the exercise of the President's war power in this country. One size does not fit all. World War II should not be equated, with respect to the scope of the President's war power at home, with our military invasion of Grenada (or Iraq). World War II, a war declared by Congress, was a "total war" fought for national survival, with extensive domestic impacts. It involved a general mobilization of domestic industry for the war effort, a draft, rationing, etc. Grenada, of course, was not even a blip on the domestic screen. The war on terror is no such minor matter, but neither does it, by its nature, involve the military in domestic affairs to the extent required in World War II or, even more so, the Civil War fought on American soil.

⁸² In Campbell, a group of Congressmen challenged President Clinton's authority to direct American armed forces to participate in the NATO military campaign in Yugoslavia, in the absence of a congressional declaration of war or authorization under the War Powers Resolution (50 U.S.C. § 1541 et

As the nature of a war changes, so too should the permissible scope of the President's war power at home and its balance with due process. Youngstown shows that at a minimum. While the power to wage war is "the power to wage war successfully," what may be necessary for success in the context of one war may be gratuitous in another -- or at least not so necessary as to sacrifice our core due process principles.

The relevant question, then, is not whether the war on terror is truly a "war," but rather what kind of war it is. Does it exhibit the conditions that, in past conflicts, have justified expansive interpretations of the war power? The war on terror, in fact, has many different aspects involving widely differing circumstances, ranging from the military campaign in Afghanistan to domestic law enforcement efforts to root out "sleeper cells." To use the Afghanistan campaign to justify limits on due process at home -- on the ground that the "war on terror" embraces both venues -- is dangerous and unnecessary business in the context of due process. The words of Justice Jackson, concurring in Youngstown, are salient here:

. . . [N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his master over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

343 U.S. at 642.⁸³

seq.). The court held the plaintiffs lacked standing and Judge Silberman, concurring, also added that "what constitutes a war" was a non-justifiable political question.

⁸³ Admittedly, the Korean War, which Justice Jackson addressed, did not involve attacks on American soil. Nor is the labor-management context of Youngstown closely analogous to Padilla, involving seizure of a suspected terrorist as he entered this country. But, on the other side, Truman's

Any analysis of the balance between the war power and due process should distinguish between the two principal theaters of the war on terror, domestic and foreign. The rule of law speaks very differently to these two venues, as do the justifications typically advanced in support of an expansive reading of presidential power in wartime.

b. The war on terror abroad: broad Presidential discretion, and maximum judicial deference

The courts are most deferential to exercises of the war power when the President is acting in a military context, as Commander in Chief, or as the architect of foreign policy, and especially “in time of war and of grave public danger.” See, e.g., Quirin, 317 U.S. at 25 (detention and trial of saboteurs ordered by President in the exercise of his powers as Commander in Chief should not “be set aside by the courts without the clear conviction that they are in conflict with the Constitution or the laws of Congress constitutionally enacted”). Such judicial deference, strongest when Congress has specifically authorized the challenged action, appears to follow from the courts’ acceptance of two related notions. First, that military and foreign affairs are seen as areas in which the President is constitutionally vested with unique authority and possesses presumed expertise. See, e.g., Chicago & Southern Air Lines v. Waterman Steamship Co., 333 U.S. 103, 111 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). Second, the courts view themselves as particularly ill-equipped to make decisions in these areas, because they require policy judgments not within the judges’ special knowledge and because decisions often must be made rapidly and in a manner that court processes are not designed to accommodate. See pp. 35-38, above (discussing Martin v. Mott and Luther v. Borden). In addition, judicial deference is also heightened by the fact that the President and

action in Youngstown affected only property rights, while the indefinite detentions violate core due process values.

Congress are the “political” branches, and thus charged with making life-and-death decisions in times of crisis. As the one unelected branch, the judiciary is properly reluctant at such times to take positions that either potentially threaten, or may be seen as threatening, national survival.

The Fourth Circuit in Hamdi articulated the reasons for this deference in the context of overseas conflicts in these words:

Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution’s allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them.

Hamdi III, 316 F.3d at 463. The very notion of a court attempting to adjudicate facts that may be concealed by the fog of foreign wars suggests caution. Hence we see the courts reluctant to become involved in cases that may call upon them to decide factual and policy-laden questions that are either not susceptible of direct proof by competent evidence, or that may require, for proper illumination, substantial disruption of military or other national security activities by the executive branch.

These justifications for extreme judicial deference speak most strongly to the overseas and military aspects of the war on terror. The military campaigns in Afghanistan and Iraq squarely implicate the President’s powers as Commander in Chief. Their international aspects speak to the President’s primacy in foreign affairs. The need for speedy executive action in response to terrorist-inspired crises abroad is self-evident. The need broadly to gather

information (often not of evidentiary quality) from a wide variety of sources, including foreign intelligence services, is one that only the executive can meet.

For these reasons, an expansive view of the President's powers to pursue the war on terror abroad is justified. Further, the exercise of such powers abroad rarely will implicate due process concerns in view of the traditionally limited role of due process outside the country. The Hamdi decision, in these respects, was an easier one than Padilla.⁸⁴

c. The war on terror at home: due process still applies

But when the focus is shifted to the detention of alleged enemy combatants seized in this country, such as in Padilla and now al-Marri, the case for deference to the President's unilateral war power becomes problematic. In this context, the President's foreign affairs primacy is of lesser moment. Nor is the President's role as a military commander dominant, for the domestic war on terror seems closer to a law enforcement effort than to a military campaign.⁸⁵ Most

⁸⁴ As Hamdi illustrates, a citizen has the right to pursue habeas relief in the domestic courts even when detained abroad. But given the scope of the President's war power abroad, a citizen seized abroad as an illegal combatant in a military setting may well be denied substantive relief, as Hamdi also illustrates, at least in the short term when such relief might interfere with an ongoing military campaign.

By this we do not mean to minimize the issues in Hamdi, which also implicates due process concerns. The justification for the incommunicado, long-term interrogation and detention of a foot soldier in the Taliban armed forces, if that is all Hamdi was, seems hard to square with the Third Geneva Convention, or to justify on the basis of any apparent need. As to what Hamdi was, the facts concerning his combatant status may not be as indisputable as the court concluded. See Hamdi v. Rumsfeld, 337 F.3d 335, 357-64 (4th Cir. 2003) (Luttig, J. dissenting from denial of rehearing en banc, arguing that circumstances of Hamdi's seizure were neither conceded in fact nor "susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel" (id. at 357)).

⁸⁵ Congress, in the Posse Comitatus Act, 18 U.S.C. § 1385, passed in 1878 in reaction to the use of the armed forces to support reconstruction in the south, precluded the use of the armed forces "to execute the laws," except "in cases and under circumstances expressly authorized by the Constitution or act of Congress. . . ."

In passing the Homeland Security Act in 2002, Congress reaffirmed "the continued importance" of the Posse Comitatus Act, 6 U.S.C. § 466(b). However, it also affirmed that the Act did not bar the

suspected terrorists detained in this country in fact have been prosecuted through the criminal justice system.⁸⁶ Nor does the war on terror at home, as a general matter, involve an emergency requiring action so hasty as to preclude the use of judicial processes, though particular crises may occur that do so temporarily (as in the immediate aftermath of 9/11). Speed surely is not the essence of the indefinite detentions, which are expressly intended to be long-term.

There is a vital line to be drawn between the exercise of the President's war power at home versus abroad. In the words of an FBI agent engaged in anti-terrorism investigations:

Inside the borders of the United States, there is the rule of law. We had U.S. citizens. I was not just going to go up and scoop them off the street. N.Y. Times, The First Home-Front Battle in the War on Terror, Oct. 16, 2003, E8, c.3, 8 (quoting special agent Peter Ahearn on why he had not acted to seize the "Lackawanna Six" in the absence of sufficient evidence for an arrest).

A protest might be raised to the distinction of the war on terror abroad from the war on terror at home on the ground that it is all one war waged by the same enemy: an international conspiracy that respects no national boundaries. But while the war may be one, due process operates (generally) only at home, not abroad. The constitutional calculus is different, and it must be if the war on terror is not to swallow domestic liberties whole.

The contrary view of an undifferentiated global war on terror, with America viewed as part of the "battlefield," would hold all civil liberties hostage to the Commander in Chief's

President's use of the armed forces when required "to respond promptly in time of war, insurrection or other serious emergency" (6 U.S.C. § 466(a)(4)).

⁸⁶ According to the Department of Justice's website, as of January 30, 2004, 284 suspected terrorists have been charged in United States courts, with 149 convicted. (www.lifeandliberty.gov/subs/a_terr.htm).

unilateral military judgment as to the “level of force” required to combat al Qaeda or other terrorists. With the President possessed of unreviewable powers to determine (i) when we are “at war,” (ii) the dimensions of the “battlefield,” and (iii) the “level of force” to be used, the elements of a “constitutional dictatorship,” in Rossiter’s phrase,⁸⁷ would be in place. The courts must abandon their role as protectors of core due process rights if they take Quirin and The Prize Cases to justify such an extreme result.

The Second Circuit did not. In reversing Padilla it drew a clear distinction between exercises of the war power abroad and at home. Again turning to Justice Jackson’s concurrence in Youngstown, it cited his articulation (343 U.S. at 644) of the “Constitution’s policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.” Padilla Cir., slip op. at 28; see pp. 105-06 n.93, below. The separation of powers as enforced by the courts, in sum, requires congressional authorization for Presidential action at home, as distinguished from his action abroad, which the courts generally will not scrutinize. Cf. United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) (any restrictions on actions by American armed forces abroad “must be imposed by the political branches through diplomatic understanding, treaty, or legislation,” and not by the courts).

3. The claimed necessity for indefinite detentions

The exigencies of the war on terror at home surely warrant some deference by the courts to the executive’s anti-terror initiatives, and the “flexible” nature of due process permits it (see p. 19, above). Such measures as heightened screening of luggage at airports and the use of police checkpoints during terrorism alerts are two examples of reasonable restrictions of liberty that

⁸⁷ See generally Clinton Rossiter, Constitutional Dictatorship (1948) (arguing that such is necessary in times of great national peril, such as total war).

should cause little pause. But the question of necessity cannot be left entirely in the hands of the executive branch, given its institutional need to place primary emphasis on national security. Political realities almost compel the President, by virtue of his role, to tilt the balance between national security and the due process rights of suspected terrorists strongly in favor of national security. He may be held responsible by the voters if he fails to prevent another terrorist attack, but likely not for any violation of due process in the course of seeking to prevent such an attack.

Chief Justice Rehnquist, writing in his private capacity as historian, sees the need for “more careful” judicial review of exercises of the war powers based on claims of necessity:

It is all too easy to slide from a case of genuine military necessity, where the power sought to be exercised is at least debatable, to one where the threat is not critical and the power either dubious or non-existent.

* * *

It is neither reasonable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government’s claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.

Rehnquist at 224-25.

The courts, to be sure, are not ideally positioned to judge the military necessity of particular exercises of a President’s claimed war power. But they are familiar with and responsible for enforcing due process principles. When a President’s actions so sharply depart from core due process principles as do indefinite detentions, a heavy burden is fairly placed on the executive to justify the necessity of such unilaterally adopted measures.

With these observations in mind, we turn to the two bases on which the executive has claimed a necessity to employ indefinite detentions: to incapacitate suspected terrorists, and to interrogate them.

a. Incapacitation: achieved well by the criminal justice system

The first rationale is simply incapacitation: detaining a suspected terrorist prevents him from committing further acts of terrorism.⁸⁸ But so, too, does a successful criminal prosecution followed by a sentence commensurate with the crime. Accordingly, indefinite detentions could be justified on this rationale only if we lack confidence in the ability of the Justice Department, juries and judges to prosecute, convict and sentence terrorists. No such lack of confidence is warranted in light of the record of Article III courts in handling terrorist cases to date (see pp. 128-29, below).

Are there an appreciable number of cases in which there exists “some evidence” that a suspect is a terrorist, but not enough to convict him of terrorism “beyond a reasonable doubt”? We have not heard of such an argument being seriously advanced. If there is any basis for it, it should be presented to Congress for it to consider whether legislation permitting indefinite detentions under some circumstances is justified.

b. Intelligence gathering: prosecutions need not short circuit the process

The more serious alleged need for indefinite, incommunicado detentions is to facilitate intelligence-gathering interrogation designed to extract information helpful in preventing future

⁸⁸ Having exhausted its interrogation of Hamdi, the Department of Defense explains his continued detention as “not criminal in nature but . . . permitted under the law of war to prevent an enemy combatant from continuing to fight against the United States” (Press Release, Dec. 2, 2003).

terrorist attacks. It is with respect to this alleged need that the question of how to balance due process and security is most acutely posed, in the context of executive detentions.

It seems apparent, if press reports can be believed, that interrogations of al Qaeda leaders and some lower level operatives have yielded some valuable information concerning ongoing terrorist plots. The professed purpose of these enemy combatant detentions is indeed to extract information, rather than to impose a penalty for past conduct. To require prompt trials of the detainees on charges, the government urges, will defeat this purpose: a criminal proceeding, with its requirement that the defendant have access to counsel and to information in the possession of the government that is pertinent to his defense, may interfere with the continuity of debriefing of terrorist suspects, including both the defendant and others.

The premise for this point is summarized in a declaration submitted by the government on its re-argument motion in Padilla. In that declaration, an official from the Defense Intelligence Agency (“DIA”) summarized the technique of debriefing favored by the DIA in this context. As quoted by Chief Judge Mukasey, the government represented:

DIA’s approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or even years, after the interrogation process began.

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example -- even if only for a limited duration or for a specific purpose -- can

undo months of work and may permanently shut down the interrogation process. Therefore, it is critical to minimize external influences on the interrogation process.

Padilla, 243 F. Supp. 2d at 49.

The interference posited by the government could come in two ways. First, once criminal charges are filed the interrogation process could come to an immediate halt since the defendant must be warned of his rights to silence and to counsel.⁸⁹ Second, the defendant might seek and obtain court authorization to contact other detainees who may be undergoing such interrogation, and such contacts could imperil the gathering of information even from individuals who are being held abroad, outside of the criminal justice system.

Although these concerns are not fanciful, there are at least some potential avenues for dealing with them. First, in many instances, the government might most effectively obtain information from a detainee by pursuing criminal charges, having counsel assigned and then allowing the attorney to seek to persuade his client to cooperate in exchange for leniency. See Padilla, 243 F. Supp. 2d at 51-53 (suggesting the same scenario). In fact, the Department of Justice touts its success at obtaining information from accused terrorists in precisely this manner:

⁸⁹ Here is one forceful expression of this concern:

The prime source of intelligence [concerning anticipated terrorist attacks] will be captured combatants; and lawyers, alas, will inevitably turn off that flow of time critical information.

* * *

Any lawyer worth his salt will deliver standard form advice to a client: Keep your mouth shut. Don't talk. Not in court and not in military interviews.

Ruth Wedgwood, Lawyers at War, Wall St. J., Feb. 18, 2003.

- **[W]e are gathering information by leveraging criminal charges and long prison sentences.** When individuals realize that they face a long prison term, they often try to cut their prison time by pleading guilty and cooperating with the government. Since September 11, we have obtained criminal plea agreements from more than 15 individuals, who must, and will continue to, cooperate with the government in its terrorist investigations.
- These individuals have provided critical intelligence about al Qaeda and other terrorist groups, safehouses, training camps, recruitment, and tactics in the U.S., and the operations of those terrorists who mean to do American citizens harm.
- One individual has given us intelligence on weapons stored here in the United States.
- Another cooperator has identified locations in the U.S. being scouted or cased for potential attacks by al Qaeda.

(Dept. of Justice Website, Jan. 30, 2004: www.lifeandliberty.gov/subs/a_terr.htm) (emphasis in original).

Second, since there is little doubt that after arrest accused terrorists will be subject to pre-trial preventive detention (see pp. 16-17, above), while they are so detained the government could possibly subject them to an intelligence-gathering process, and yet protect its ability to prosecute, by having the interrogation conducted by someone who is involved solely in intelligence-gathering and will be walled off from any participants in any subsequent criminal proceeding. See, e.g., Padilla, 243 F. Supp. 2d at 51 (citing cases).⁹⁰ The privilege against self-incrimination is an evidentiary one: a “fundamental trial right,” the violation of which “occurs only at trial.” United States v. Verdugo-Urquidoz, 494 U.S. at 264. It is not offended by questioning if the fruits are not used at trial. Therefore, so long as the interrogation is isolated

⁹⁰ The case also might be held in a state of suspense -- with appropriate Speedy Trial Act findings -- while intelligence officials pursue their inquiries.

from the criminal proceeding, with no information elicited from the suspect introduced at trial against the suspect or made available to the prosecuting attorneys, due process and the right to assistance of counsel may be flexible enough to permit some interrogation of suspected terrorists. The precise extent to which such interrogations might be permitted is not a question we need answer for the purpose of this discussion, except to note that such interrogation is not necessarily precluded if due process, as we urge, is construed to prevent indefinite and incommunicado detentions in service of the domestic war on terror.

The danger of interference with other ongoing interrogations is not entirely speculative, as illustrated by the case of Zacarias Moussaoui, the accused “twentieth hijacker”. Moussaoui has successfully sought from the trial court some form of access to Ramzi Bin Al-Shibh, an allegedly high-level al Qaeda operative recently seized in Pakistan and now being held and interrogated overseas. The government’s refusal to permit such access has resulted in the dismissal of portions of the indictment and the preclusion of the death penalty, a ruling now on appeal. United States v. Moussaoui, No. CR 01-455-A, E.D. Va., Oct. 2, 2003, appeal pending, No. 03-4792 (4th Cir.).

We do not know the eventual fate of the Moussaoui prosecution, but it appears to present quite a unique circumstance: a charge of conspiracy to commit a specific act (the 9/11 attacks), supported by (it would appear) scant evidence, and with the defendant able credibly to identify another suspect in a position to refute the charge. There are likely to be very few similar cases, in part because the argument for the necessity of access to another detainee will not appeal to most courts. Moreover, even if some access is deemed necessary, the less intrusive approach may involve either providing defense counsel with some of the fruits of the other suspect’s interrogation or, still more likely, having the trial judge review those fruits and, if they are

helpful to the defendant, grant relief comparable to what is authorized by the Classified Information Procedures Act, 18 U.S.C. App. 3, § 1 et seq., as a substitute for production of classified information (see pp. 138-39, below).

While we recognize that the above measures fall short of the unlimited opportunity for interrogation desired by the executive, they accommodate the proclaimed need to some degree. If due process is to be bent further, perhaps to the breaking point, we submit that statutory authority is required at a minimum based on a showing of compelling necessity found persuasive by Congress.

4. Emergencies

While we conclude that indefinite detentions in this country should not be held within the executive's war power, absolutism is not necessary or prudent in this context. Due process is not unyielding in the face of dire emergency. It can accommodate transient, short-term departures from its normal strictures in truly emergency situations, requiring immediate action to protect the nation's security that only the executive is capable of initiating. Temporary detentions by the executive in such emergency circumstances might pass due process muster in "the particular situation" presented. Morrissey v. Brewer, 408 U.S. at 481.

The Second Circuit appears to disagree, holding that "the Constitution lodges these [emergency] powers with Congress, not the President," again relying on the Jackson concurrence in Youngstown. Padilla Cir., slip op. at 30-31.⁹¹ We do not agree with this total negation of a

⁹¹ Justice Jackson cautions about permitting the President "of his own volition," to "invest himself with undefined emergency powers." "[E]mergency powers are consistent with free government only when their control is lodged elsewhere than the Executive who exercises them." Youngstown, 343 U.S. at 651.

President's ability to act swiftly in a dire emergency at home under his war power given the possibility -- not so remote in light of 9/11 -- of an unpredictable circumstance in which awaiting congressional action would be folly and reliance on criminal procedures futile.

But to say that the domestic war on terror presents such circumstances of emergency necessity in general -- throughout its indeterminate duration and wherever prosecuted -- would be not only contrary to fact but deeply threatening to our core due process values. The courts cannot abdicate meaningful review of Presidential claims of emergency circumstances and remain true to their role as protectors of constitutional liberties.

C. The Necessity of Congressional Authorization

1. A clear if not loud message: Congress counts

The question of the extent to which due process should yield to the demands of the war on terror is not an easy one. But when the President's actions at home so clearly conflict with core due process principles, we do not believe that the President's war-making power alone should be held sufficient to sustain those actions under the Constitution. Rather, we believe that congressional authorization is essential for any indefinite domestic detentions conceivably to pass constitutional muster, given that they depart so sharply from core due process principles. Striking the balance between national security and due process rights cannot and should not depend on the courts' naked review of unilateral executive actions, not supported by the other political branch.

One fairly consistent theme that runs through the relatively sparse relevant case law is that the courts are more willing to approve the President's actions in the United States pursuant to his war powers when there has been specific congressional authorization for those actions.

See, e.g., Martin v. Mott, 25 U.S. 19 (1827) (President’s activation of state militias authorized by 1795 statute); Luther v. Borden, 48 U.S. 1, 42-43 (1849) (citing same statute); Quirin, 317 U.S. 1 (1942) (use of military commissions to try unlawful combatants seized in U.S.); Hirabayashi v. United States, 320 U.S. 81 (1944), and Korematsu v. United States, 323 U.S. 214 (1944) (congressional authorization found for the curfew and relocation orders imposed by the executive branch on Japanese resident aliens and citizens).⁹²

In contrast, several important cases have struck down executive action in the United States as beyond the President’s war power, in the absence of specific congressional authorization. See Milligan, 71 U.S. 2 (no congressional authorization for use of military commissions in areas in which civil courts were functioning; four concurring justices in Milligan would have affirmed the challenged military commissions had they been authorized by Congress -- see p. 44 above); Youngstown, 343 U.S. 579 (no congressional authorization for seizure of steel mills). The absence of congressional authorization, in fact, is the principal basis of the Second Circuit’s invalidation of citizen detentions in its Padilla decision.⁹³

⁹² Hirabayashi is said to be:

perhaps the most clear-cut case on record of the Court’s tendency to insist that unusual military actions be grounded, whenever possible, on the combined powers of President and Congress, which when merged are called simply the war powers of the United States.

Rossiter at 47.

⁹³ The Second Circuit’s opinion relies principally on the Constitution’s allocation of certain specific powers to Congress, not the President: Article I, § 8, cl. 10 (power to define offenses against the laws of nations), Article I, § 9, cl. 2 (suspension of habeas corpus), and the Third Amendment (quartering of soldiers in houses in time of war without owner’s consent, permitted only as “prescribed by law”). Padilla Cir., slip op. at 31-32.

In our view this analysis is somewhat conclusory. Enemy combatant detentions inescapably require the courts to balance the interests of national security with due process rights. The Constitution’s

It is true that the presence or absence of congressional authorization has not been the central focus of the above-cited Supreme Court decisions. The clearest expression of the importance of congressional action is probably Justice Jackson's concurring opinion in Youngstown, heavily relied upon the Second Circuit's Padilla opinion, in which he urged that the presumption in favor of the constitutionality of presidential action is strongest when the action is supported by specific congressional authorization (see p. 55, above). There is compelling wisdom in this observation. It is consistent with a sensitive application of the separation of powers doctrine for the courts to show greater deference to action authorized by both of the political branches of government, rather than to action taken by the executive alone.

The sharp departure from due process inherent in indefinite detentions should require, at minimum, affirmative congressional authorization after consideration of the difficult relevant policy considerations. There is, we recognize, a rational basis for some special treatment of terrorist activities under the law, for terrorism, to some degree, can be distinguished from other types of criminal activity. International terrorism represents an organized and violent conspiracy directed against the United States, as distinguished from other criminal activity, which is typically more private and limited in its objectives. As September 11 demonstrated, terrorism

allocation of specific powers to Congress may help inform this balancing task, but it does not avoid it. The balancing required should place heavy weight on the due process values at stake. The Second Circuit's opinion does not expressly recognize those constitutional values as having independent force, entitled to protection by the courts (at least presumptively) even in times of war. It makes only passing reference to the "individual liberty rights" implicated by the detentions, in distinguishing the property interests at stake in The Prize Cases (Padilla Cir., slip op. at 36), and pays an unexplained tribute to the "guarantees of the Fourth and Fifth Amendments to the Constitution." Id. at 47.

We also would not be as absolutist as the Second Circuit's separation of powers analysis. We believe that the President has some war power to act domestically in emergency circumstances (see pp. 103-04, above). On the other hand, congressional action authorizing indefinite detentions would not obviate the need for the courts to address due process concerns, as the Second Circuit's opinion may assume (see p. 108 n.95, below).

can cause a uniquely grave impact on the national sense of well-being as well as terrible loss of life. The demonstrated willingness of religious fanatics to engage in suicidal attacks places their actions beyond the normal variety of criminal conduct, and beyond the likely deterrent capacity of any threat of punishment by our criminal justice system.

In criminal prosecutions, the requirement that the government prove guilt beyond a reasonable doubt is “designed to exclude as nearly as possible the likelihood of an erroneous judgment,” and thereby “our society imposes almost the entire risk of error upon itself.” Addington v. Texas, 441 U.S. 418, 424-25 (1979). With respect to terrorism, when the consequence of error may be not just the acquittal of a defendant but the perpetration of further terrorist acts, the graver risk of error may argue against reading the Constitution to impose the “entire risk of error” on society. Cf. Kennedy v. Mendoza-Martinez, 372 U.S. 141, 160 (1963) (the Constitution “is not a suicide pact”; case involved compulsory military service).

Congress is in a position to weigh the interests of due process and national security in this context. It “can see the problem whole,” not limited to the President’s necessary emphasis on national security or by the courts’ necessary focus on individual cases. Katyal & Tribe, 111 Yale L.J. at 1275. Specifically, it can explore through hearings and debate the extent to which indefinite detentions are necessary to facilitate the interrogations of terrorists, and the degree to which such interrogations are essential in preventing future terrorist attacks. It can consider ways in which such interrogations can be facilitated without wholesale departure from the rule of law and due process.⁹⁴

⁹⁴ Compare the op ed comment by Prof. Viet Dinh, a former assistant attorney general: “After two years of unofficial criticism . . . it is time for Congress to contribute its voice -- either to affirm the

There are, it is important to note, constitutional limitations on what Congress itself can authorize in the war on terror. See Humanitarian Law Project v. Ashcroft, No. CV 03-6107 (C.D. Cal. Jan. 22, 2004) (invalidating section of USA Patriot Act as unconditionally vague); cf., e.g., Reid v. Covert, 354 U.S. 1 (1957) (ruling unconstitutional, as violative of Article III and the Fifth and Sixth Amendments, the congressionally-authorized use of courts marshal to try dependents of military personnel abroad on capital charges). To the extent legislation abrogates core due process principles in authorizing enemy combatant detentions, its constitutionality cannot be assumed.⁹⁵ But no question: the judgment of both political branches as to the necessity of enemy combatant detentions, and their appropriate extent and limitations, would carry a stronger presumption of constitutionality than does unilateral executive action.

If legislation in this area is deemed desirable, it could and should address the circumstances (if any) warranting detentions without charges, and the appropriate role of the courts in reviewing such detentions.⁹⁶ Among the many relevant questions:

president's authority or suggest refinements to administration policy." Justice for All, Wall St. J., Dec. 15, 2003, at A14.

⁹⁵ In this context we are troubled by this Second Circuit's dictum in its Padilla decision, quoting the discredited Hirabayashi:

To be sure, when Congress and the President act together in the conduct of war, "it is not for any court to sit in review of the wisdom of their action and substitute its judgment for theirs." Hirabayashi v. United States, 320 U.S. 81, 93 (1943).

Padilla Cir., slip op. at 28.

Again, we say it depends on what kind of "war" and just what measures are taken in its pursuit. Surely the Second Circuit would not hesitate to "sit in review," during the "war" on terror, of a congressionally authorized curfew directed solely at all Arabs and Muslims, similar to the Japanese curfew upheld in Hirabayashi itself.

⁹⁶ Other suggested approaches may include the creation of specialized so-called "terrorism courts" that would be empowered to try individuals charged with specified terrorism-related offenses while

- What type of activity is sufficient to warrant detention (as distinguished from a trial on criminal charges), e.g., should only direct involvement in a violent terrorist plot be sufficient or should providing logistical support for a terrorist organization also be sufficient, as the administration seems to believe (see p. 70 above)?
- What standard of proof concerning the detainee's activities must the government meet in court to justify the detention (e.g., "some evidence," probable cause, clear and convincing evidence)?
- What type of hearing should the courts conduct to test the government's justification (a full adversary proceeding or something less rigorous)?
- Is the detainee to be afforded the right to counsel by statute, as is the case in proceedings under the Alien Terrorist Removal Act, 8 U.S.C. § 1534(c)(1)?
- For what purposes can the detention be continued (e.g., preventive detention, ongoing interrogation), and what standard of proof applies to such a showing by the government?
- For how long can the detention be continued before additional justification must be presented by the government in court?
- Are the rules for detention to be different for citizens and non-citizens?⁹⁷

There is a risk that the Second Circuit's opinion in Padilla, relying as it does on a statute prohibiting the detention (only) of citizens, and deciding as it must only the case before it, involving a citizen, might encourage arbitrary distinctions between citizens and non-citizens. Any such bright line distinctions are to be avoided. They would violate the equal protection and due process rights of aliens (see pp. 29-30, above), and encourage additional discrimination against Arabs and Muslims.

offering core due-process protections. See, e.g., Powers, Due Process for Terrorists? The Case for a Federal Terrorism Court, The Weekly Standard, Vol. 9, Issue 17 (Jan. 12, 2004). We take no position on any such proposals, but strongly urge that any dilution of long-accepted due process procedures be rejected without, at a minimum, a clear and considered congressional imprimatur.

⁹⁷ Compare the reported recent remarks by Judge Michael Chertoff, former head of the Justice Department's Criminal Division, suggesting that "we need to debate a long-term sustainable architecture for the process of determining when, why and for how long someone may be detained as an enemy

Nor would such distinctions make sense. Padilla and Hamdi, both citizens, probably have less attachment to this country than millions of Arab-Americans who have lived here for many years. Any detentions, if at all justified outside the criminal justice system, should be based on individualized considerations, and not ethnic stereotyping or arbitrary citizen vs. non-citizen categories.

2. Congress has not authorized indefinite detentions

a. The Joint Resolution does not

We agree with the Second Circuit that the Joint Resolution of September 18, 2001, does not constitute authorization for indefinite enemy combatant detentions in the United States. The Joint Resolution broadly authorizes the President to use “all necessary and appropriate force” against terrorist organizations (and their members) responsible for the September 11 attacks. By its title it speaks expressly of “Military Force” and “the use of the United States Armed Forces,” and its text specifies that it constitutes authorization, under sections 5(b) and 8(a)(1) of the War Powers Resolution, 50 U.S.C. § 1544(b), 1547(a)(1), for the use of the United States Armed Forces. This generally worded enactment, speaking most directly (and perhaps exclusively) to military action abroad, should not be sufficient to suspend or abridge basic due process rights of individuals detained in the United States.⁹⁸ Specific congressional legislation addressing the enemy combatant context, and invoking Congress’ own war powers, properly would elicit

combatant, and what judicial review should be available.” R. Schmitt, Patriot Act Author Has Concerns, L.A. Times, Nov. 3, 2003 (www.informationclearinghouse.info/articles5325.htm).

⁹⁸ The Joint Resolution would appear to authorize at least Hamdi’s initial detention in Afghanistan, which was closely related to the engagement of the Armed Forces pursuant to the Joint Resolution against the Taliban, because of its sheltering of al Qaeda.

greater judicial deference, though not an abdication of the courts' role to pass on the constitutionality of legislation.

b. The USA PATRIOT Act does not, and by implication restricts detentions

Legislation more specific than the Joint Resolution is found in the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), but it does not support detentions of an extended or indefinite nature, and its detention provisions do not apply at all to U.S. citizens. The statute authorizes only the detention for up to seven days of an alien “the Attorney General has reasonable grounds to believe” is engaged in activity that “endangers the national security,” following which the Attorney General must either commence removal proceedings or release the detainee. Title IV, §§ 411-12, codified at 8 U.S.C. § 1226A(a)(3) and (5) (2001).

Further, “[i]f an alien is finally determined not to be removable”, then the detention “shall terminate.” 8 U.S.C. § 1226a(a)(2). If the alien is found to be removable, but cannot be removed, then but only then is the Attorney General authorized to detain such an individual for successive six-month periods until the alien either is removed or is no longer a threat to “the national security of the United States or the safety of the community or any person.” *Id.* § 1226a(a)(6).

Thus the PATRIOT Act authorizes continuing detentions of aliens only if a) they are adjudged to be removable, pursuant to proceedings which must be commenced within 7 days of detention; b) they cannot be removed; c) and they pose a threat to national security.⁹⁹ The

⁹⁹ Such a continuing detention, of course, would require confronting the due process question posed by indefinite detentions, a question the *Zadvydas* Court avoided by narrowly construing the statute before it (see pp. 15-16, above).

designation of an individual as an “enemy combatant” is not a substitute for a final order of removal. Therefore, it cannot be said that Congress authorized such indefinite detentions in the PATRIOT Act.

c. 18 U.S.C. § 4001(a) prohibits detentions not within the war power

The Second Circuit held that the detention of citizens as enemy combatants is prohibited (since not authorized by the Joint Resolution) by 18 U.S.C. § 4001(a), which provides:

No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

This statute was passed in 1971 to preclude any detentions analogous to the widely condemned removals of Japanese citizens in World War II upheld in the Korematsu case. In our view, this generally worded statute, enacted in a context far removed from terrorism, should not be construed to abrogate any long-standing war power of the President.¹⁰⁰ But, as argued above, such power does not include indefinite detentions in the United States, and to that extent the statute does have force.

¹⁰⁰ The Second Circuit views 18 U.S.C. § 4001(a) as casting in doubt the continuing “usefulness” of Quirin (Padilla Cir., slip op. at 34), and it did unearth a few references in the congressional debates on 18 U.S.C. 4001(a) that focused specifically on the possible impact of the proposed statute in precluding executive detentions of suspected spies and saboteurs in wartime (id. at 39).

Since we do not view Quirin as a detention case (see pp. 81-82, above), we do not view the statute as relevant to Quirin. If, as Quirin held, trial by military commission has been authorized by Congress, it follows that a detention in service of such a trial has congressional sanction.

V. Military Commissions: Their Use in the War on Terror Should be Minimized

If we are correct in arguing that accused terrorists seized in the United States and citizens seized abroad must be tried (or released),¹⁰¹ the question of the trial tribunal becomes ripe.

The President's Military Order issued on November 13, 2001 (the "PMO"),¹⁰² authorized the trial by military commission of non-citizens -- whether seized at home or abroad -- accused of being members of al Qaeda or committing or aiding terrorist acts (see pp. 123-25, below). In July 2003 six detained "enemy combatants" were designated as subject to the PMO, but no commissions have yet been scheduled.

As a matter of constitutional law, we believe the President's war power alone would be insufficient to override the Sixth Amendment right of suspects seized in this country to a "speedy and public trial before an impartial jury." But, unlike with respect to indefinite detentions, there is express congressional authorization for the use of military commissions to try offenses violating the law of war: the same statute on which the Quirin court relied.

Quirin, although it has been questioned,¹⁰³ stands as precedent authorizing the use of military commissions to try violations of the law of war, even by a United States citizen seized in the United States. It is true that the statute on which Quirin relied, Article 15 of the Articles of

¹⁰¹ A caveat is in order with respect to the seizure of citizens abroad in a theater of armed military conflict, the facts presented in Hamdi (see p. 94 n.84, above).

¹⁰² Military Order regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (November 13, 2001).

¹⁰³ Quirin's analysis, predicated on no directly supportive legal authority, has come into considerable question since its issuance, including by some of the participating justices. See, e.g., David J. Danelski, The Saboteurs Case, J. Sup. Ct. Hist. 61, 72-80 (1996); Michael R. Belknap, The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case, 89 Mili. L. Rev. 59, 81-90 (1980); Katyal & Tribe, 111 Yale L.J. at 1282-83, 1290-91.

War, was general. It merely confirmed, without defining, the pre-existing jurisdiction of military commissions to try “offenders or offenses that by statute or by the law of war may be tried by military commissions” It was arguably inadequate to support the result reached in Quirin, for there was little precedent for the use of military commissions outside occupied territories or theaters of active combat, or in any area where the civilian courts were functioning. However, Congress reenacted Article 15 in 1950 as part of the Uniform Code of Military Justice. 10 U.S.C. § 821.¹⁰⁴ That congressional action, with knowledge of the Quirin precedent, can fairly be read as endorsing Quirin’s view that Congress has authorized the use of military commissions in the United States to prosecute violations of the law of war.¹⁰⁵

Thus, given Quirin, we do not say “never” with respect to the use of military commissions to prosecute alleged violators of the law of war seized in the United States. We note, however, that whether acts of terrorism by non-state actors violate the law of war is far from clear. Neither customary international law nor any treaties to which the United States is a party recognize a state of war or “armed conflict,” thereby implicating the law of war, in the absence of any organized armed forces. An international terrorist conspiracy, though subject to criminal prosecution, is not easily viewed as governed by the law of war. See generally, Congressional Research Service, Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions, CRS 10-17 (Dec. 11, 2001); Nat’l Inst. of Military

¹⁰⁴ Article of War 15, as now codified as Article 21 at 10 U.S.C. § 821, states:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by the law of war may be tried by military commissions, provost courts, or other military tribunals.

¹⁰⁵ For a tightly reasoned contrary view, see Katyal & Tribe, 111 Yale L.J. at 1286-90.

Justice, Annotated Guide, Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism 9-10 (2002) (“NIMJ Guide”). For a thorough discussion of this and related issues concerning the use of military commissions in the war on terror, see Association of the Bar of the City of New York, Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws be Silent? A Report on The President’s Military Order of November 13, 2001 Regarding “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” (“City Bar Report”).

But assuming that, to some extent, the use of military commissions to try suspected terrorists would be constitutional, we urge that they be sparingly used, given the competence and advantages of the federal court forum.

As a practical matter, the federal courts have proven their ability effectively to try terrorists, aided by the enactment in 1980 of the Classified Information Procedures Act, 18 U.S.C. App. 3, § 1 et seq. (“CIPA”), which protects national security information in the context of such trials (see pp. 136-45, below).

As a policy matter, trials in Article III courts serve the national interest by providing a public determination of guilt or innocence by an impartial jury overseen by an independent judge. The far greater likely acceptance of the fairness of such trials more than compensates for any marginal increase in the protection of classified information, or any higher likelihood of convictions, that may be available in military commissions controlled by the executive branch (see pp. 126-52, below).

A. Military Justice System (Courts Martial)

Since September 11th, both courts-martial and military commissions have been proposed as venues for trying terrorists. These proposals often conflate two very different mechanisms. Each system has a unique function, constitutional foundation and relationship with what this report has labeled “core values”. See NIMJ Guide 78-80. While in general the federal judiciary has had minimal contact with and oversight of these forms of military justice, civilian and military judicial structures have interacted in important ways.

1. Constitutional and statutory basis

The United States Constitution empowered the Congress to create a military justice system, including a courts-martial system. This congressional power springs from Article I, section 8, clause 1 (to “provide for the common defense”) and clause 11 (“To make Rules for the Government and Regulation of the land and naval Forces.”). Statutory authority for courts-martial derives from the Articles of War, initially adopted by the Second Continental Congress in 1775 (NIMJ Guide 78), its numerous amendments,¹⁰⁶ and the Uniform Code of Military Justice (“UCMJ”), enacted by Congress in 1950, which in part codifies the Articles of War. 10 U.S.C. §§ 801-950.

The UCMJ amended the Articles of War to create the system of military courts-martial in existence today.¹⁰⁷ It authorizes the President (and the Secretary of Defense) to convene courts-martial (Article 22(a)(1)(2)) and to compel, insofar as the President considers “practicable,” the

¹⁰⁶ E.g., Articles of War, 15 H.R. Doc. No. 81-491 (1949); S. Rep. No. 81-486 (1949). See generally *Loving v. United States*, 517 U.S. 748, 752-53 (1996).

¹⁰⁷ These reforms were made in response to allegations that courts-martial held during World War II (up to 2 million) were arbitrary and lacked independence. Cox Commission, *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice 2* (May 2001) (“Cox Commission”).

enforcement of civilian standards of criminal procedure.¹⁰⁸ The Supreme Court has upheld the constitutionality of this delegation of power.¹⁰⁹

Both the Articles of War and the UCMJ reflect the initial conception of the military justice system as primarily a system for disciplining soldiers, and only secondarily a venue for trying non-military personnel.¹¹⁰ But the UCMJ contains provisions that give courts-martials jurisdiction over non-servicemen in narrow circumstances.¹¹¹ Most notably, the UCMJ provides that courts-martial have jurisdiction, concurrent with military tribunals and commissions (Article 21), “to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war” (Article 18), and also jurisdiction over prisoners of war (Article 2(a)(9)). In practice, however, these functions have generally been fulfilled by special military commissions (see pp. 120-23, below).

¹⁰⁸ Article 36(a), UCMJ, provides that procedures, including “modes of proof,” for courts-martial, as well as military commissions

may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Courts-martial procedure is governed by the detailed and comprehensive Manual for Courts-Martial (2002 ed.)

¹⁰⁹ Loving v. United States, 517 U.S. 748, 770 (1996) (the Supreme Court interpreted Article 36 as “indicative of congressional intent to delegate [the authority to proscribe aggravating circumstances in capital cases] to the President . . .”)

¹¹⁰ The courts-martial system has jurisdiction over, *inter alia*, active duty members of the armed forces or those working with the armed forces, persons accompanying an armed force in the field during times of war, certain retired servicemen, certain areas under the control of the armed forces “subject to any treaty or agreement”, volunteers and those under reserve duty. UCMJ Art. 2.

¹¹¹ Courts-martials under the Articles of War also applied “in time of war” to “all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States. . . .” Articles of War, Spies, Sec. 2. 2 Stat. 359-372 (1806).

2. Protection of core values and judicial oversight

The Due Process Clause is applicable to legislation dealing with military affairs, though the courts afford great deference to Congress given its “plenary control” over the military under the Constitution (Art. I, § 8). Weiss v. United States, 510 U.S. 163, 176-77 (1994), quoting Chappell v. Wallace, 462 U.S. 296, 301 (1983).

The UCMJ contains many provisions recognizing rights also enforced in civilian courts:

By enacting the Uniform Code of Military Justice in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system. Weiss, 510 U.S. at 174.

Thus the UCMJ includes a prohibition on compulsory self-incrimination (Article 31), and a right to be represented by civilian counsel or military counsel of one’s own selection (Article 38), and imposes a burden of proof on the United States to establish guilt beyond a reasonable doubt (Article 51). The UCMJ also establishes an appeals court of five civilian judges, the United States Court of Appeals for the Armed Forces, which is located within, but independent of, the Department of Defense (Articles 59-76).¹¹²

The most widely criticized weakness of the courts-martial system has been its lack of independence from the military command structure. Courts-martial judges have significantly less independence than civilian judges since their selection, as well as many pre-trial procedural decisions, are made by commanding officers, who often also have initiated the prosecutions.¹¹³

¹¹² Formerly the United States Military Court of Appeals. See <http://www.armfor.uscourts.gov>.

¹¹³ See generally Cox Commission. An informative website on this topic is Citizens Against Military Injustice, <http://www.militaryinjustice.org>.

In general, the military justice system has not been the subject of significant judicial oversight. Most procedural issues and appeals have been dealt with by the Court of Appeals for the Armed Forces. However, the federal courts have intervened to adjudicate the overlapping or conflicting jurisdictions of the courts-martial and civilian courts in the context of habeas petitions.¹¹⁴ A series of post-World War II cases¹¹⁵ ruled that courts-martial jurisdiction could not be extended to non-military personnel, including discharged soldiers,¹¹⁵ civilian employees of the military overseas (for capital offenses),¹¹⁶ and civilian dependents of overseas military personnel.¹¹⁷ With respect to members of the Armed Forces, in 1987 the Supreme Court overruled its 1969 decision that had limited the jurisdiction of courts-martial to crimes committed by military personnel that had a relationship to their military service (a “service connection”).¹¹⁸

The federal courts have heard habeas petitions from courts-martial rulings and on occasion intervened in the procedural area of courts-martials. For instance, in Loving v. United States, 517 U.S. 748 (1996), the Supreme Court held that Supreme Court jurisprudence on the

¹¹⁴ Petitions for certiorari are also possible from the Court of Appeals for the Armed Forces to the Supreme Court. UCMJ Article 67 (a), and 28 U.S.C. § 1259.

¹¹⁵ United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

¹¹⁶ McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).

¹¹⁷ Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960) (wife of soldier charged with his murder).

¹¹⁸ In O’Callahan v. Parker, 396 U.S. 258 (1969), the Court had ruled that the rape of a civilian woman in an off-base hotel room by an active duty soldier was outside of the jurisdiction of a court-martial. The Court’s opinion rejected, largely on due process grounds, the courts-martial system as an appropriate venue for trying either civilians or military personnel charged with non-military related criminal acts. In 1987 the Court overruled O’Callahan, and a subsequent case, Relford v. Commandant, 401 U.S. 355 (1971), and reinstated the former rule which based jurisdiction solely upon the military or civilian status of the accused. Solario v. United States, 483 U.S. 435, 447 (1987).

death penalty applied to the military court system. At the same time, the Court endorsed the power of the President to circumscribe courts-martial procedural rules (a power delegated to him under the UCMJ).

In summary, while the traditional role of the military justice system has been to discipline soldiers and other individuals working for or under the control of the military, it could nonetheless be used as a tool for prosecuting terrorists for offenses violating the “law of war”, under the jurisdiction accorded by Article 18. While the courts-martial’s lack of independence presents a risk of manipulation by military commanders, the UCMJ and the Manual for Courts-Martial offer significant protection to core values.

B. Special military commissions

1. Constitutional and statutory basis

Military commissions, as Quirin observed, have a long history of use both in this country and elsewhere in the world. See Quirin, 317 U.S. at 35-36. They have been the historic and traditional venue for the trial of war crimes. See Wedgwood, 96 Am. J. Int’l L. at 332.¹¹⁹

The historical precedent for the use in the United States of special military tribunals (hereinafter “military commissions”), extends back to the Revolutionary War trial of Major John Andre.¹²⁰ While the Constitution makes no mention of military commissions, Presidential authority to establish them is traceable to the Commander in Chief war power clause of Article

¹¹⁹ See also Shadow Enemies at 136-141 (discussing the use of military commissions in the Revolutionary War, the Mexican-American War, the Civil War and other conflicts); Maj. Michael O. Lacey, Military Commissions: A Historical Survey, Army Law. 41, 41-47 (March 2002) (“Lacey”); NIMJ Guide 4-5.

II, section 2. During the occupation of parts of Mexico during the Mexican American War, military commissions were set up to try civilian offenses committed in the occupied territory, and “councils of war” were set up to try violations of the law of war.¹²¹ During the Civil War, the use of military commissions flourished, with over 4000 trials covering both violation of the laws of war and ordinary crimes.¹²² President Lincoln declared a state of martial law throughout the country in 1862, and set up tribunals to try both military personnel and civilians.

During World War II, as most notably upheld in Quirin, military commissions were once again put into place to try spies and enemy combatants both on American soil and abroad, in Germany, Japan and other countries occupied by the Allies. The year after World War II ended, the Court again upheld the use of a military commission in In re Yamashita, 327 U.S. 1 (1946). Japanese General Tomoyuki Yamashita, though captured as a lawful combatant, was accused of committing war crimes: failure to take steps to prevent the commission of atrocities by Japanese troops under his command during the U.S. Army’s retaking of the Philippines. 327 U.S. at 16. The Court affirmed the authority of military commissions to try offenses against the law of war, even after active hostilities had ceased.¹²³ It further held, based on congressional grants of power

¹²⁰ Maj. Timothy C. MacDonnell, Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts, Army Law. 19 (March 2002) (“MacDonnell”).

¹²¹ Quirin at 13 n.10; MacDonnell at 28.

¹²² Quirin at 13 n.10. Military commissions were used during the Civil War to try Confederate soldiers who had shed their uniforms in attempts to take over civilian ships or commit acts of sabotage, as well as to try spies. Id., 317 U.S. at 31-32, n.9, n.10.

¹²³ Like Quirin, Yamashita upheld the right of habeas corpus to test the authority of the military commission to proceed. “[Congress] has not withdrawn, and the Executive branch of the government could not, unless there was a suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the Commission as may be made by habeas corpus.” 327 U.S. at 9.

in the Articles of War and the Espionage Act of 1917, that proceedings before military tribunals were free from review by the Supreme Court, save only inquiry as to whether the trial was within the authority of the military power.

In Madsen v. Kinsella, 343 U.S. 341 (1952), the Supreme Court surveyed the history of military commissions as follows:

Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adopted in each instance to the need that called it forth. . . .

Id. at 348 (footnotes and citation omitted).

In Madsen, the wife of an American officer stationed in occupied Germany was tried by the United States Court of the Allied High Commission for Germany for murdering her husband and was convicted. The Supreme Court upheld the High Commission Court's authority, stating that the establishment of a military tribunal in an occupied country after the cessation of hostilities was within the President's authority, absent any attempt to limit that authority by Congress:

In absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do so sometimes survives cessation of hostilities. The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by

force of arms. The policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate.

Id. at 348-49 (emphasis added).

The UCMJ, the Constitution, and federal jurisprudence limit the subject matter jurisdiction of military tribunals to violations of the law of war, with the narrow exception, as affirmed by Madsen, of the temporary use of tribunals to try civilian offenses during military occupation by United States forces abroad. See American Bar Association Task Force on Terrorism and the Law, Report and Recommendations on Military Commissions, 2002-MAR Army Law 8, 12-13 (2002); City Bar Report at 10-14.¹²⁴ If, then, the President seeks to prosecute suspected terrorists before military commissions, one necessary role for the federal courts will be to review whether the actions charged constitute violations of the law of war, a question not free from doubt in the context of stateless terrorism (see pp. 114-15, above).

2. **The enemy combatant commission orders**

Language in the Manual for Courts-Martial suggests that, barring other regulations set forth by the President or Congress, the UCMJ governs military commissions.¹²⁵ However, the Bush administration chose to promulgate specific procedures to govern the trial of any suspected terrorists, initially in the PMO issued November 13, 2001, and, later, in Military Commission

¹²⁴ Duncan v. Kahanamoku, 327 U.S. 308 (1946), reaffirmed this limiting principle in construing the legislation that authorized the declaration of “martial law” in Hawaii during World War II. The Court emphatically rejected the argument that Congress had authorized the military to arrest civilians in Hawaii and try them before military commissions, not for violations of the law of war but rather for civilian offenses. The Court’s conclusion that the statutory use of the term “martial law” did not permit the military to supplant otherwise available civilian courts in trying civilian offenses was said to rest on the bedrock of constitutional case law and practice since the Revolutionary War. See id. at 319-24 (citing inter alia, Milligan and emphasizing that “[c]ourts and their procedural safeguards are indispensable to our system of government.” Id. at 322).

¹²⁵ Manual for Courts-Martial, Preamble paragraph 2(b) (2); see generally NIMJ Guide 77-80.

Order No. 1 issued on March 21, 2002, by the Department of Defense (the “DOD Order”). See generally NIMJ Guide (comprehensive analysis of the DOD Order).

The PMO presented an array of potential due process issues.¹²⁶ This is foreshadowed in Section 1(f) of the PMO, stating “it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” The PMO provided for preventive arrest,¹²⁷ seemingly indefinite detention,¹²⁸ suspension of the exclusionary rule,¹²⁹ and exclusive jurisdiction, the latter provision perhaps intended to prohibit habeas corpus relief.¹³⁰ Under the PMO, a detainee could be convicted, and even sentenced to death, on secret evidence (§ 4(c)(4)), and on a vote of only two-thirds of the members of the commission (§ 4(c)(6) and (7)); conviction could be premised on evidence well short of proof beyond a reasonable doubt; the decision was to be rendered, not by a jury of the detainee’s peers, but by military officers subject to executive

¹²⁶ City Bar Report at 18.

¹²⁷ Section 2(c) provides that “any individual subject to this order . . . shall . . . forthwith be placed under the control of the Secretary of Defense.”

¹²⁸ Section 3 provides that “[a]ny individual subject to this order shall be - (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States.”

¹²⁹ Section 4(c)(3): permits the “admission of such evidence as would . . . have probative value to a reasonable person.”

¹³⁰ Section 7(b) provides, with respect to “any individual subject to this order,” that

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

The Supreme Court has in the past heard habeas petitions and reviewed the jurisdiction and authority of a military commission despite similarly limiting language. See p. 45 n.38 above; Quirin, 317 U.S. at 23-25.

command; and the trials could be closed to the public (§ 4(c)(4)). In the opinion of this Association, the framework set forth in the PMO was inconsistent with the procedural protections of the UCMJ, thereby violating the requirement of UCMJ Article 36 that procedural changes made by the President “not be contrary or inconsistent with this chapter [the UCMJ].” City Bar Report at 18.

The March 2002 DOD Order responded to numerous complaints about the lack of protection of core values in the PMO. For instance, the DOD Order articulates a presumption of innocence, a right to counsel, a right to cross-examine witnesses, and a right not to testify during trial with no adverse inference to be drawn. § 5 (“Procedures Accorded the Accused”). It also establishes a procedure for limited appeals to a review panel appointed by the “Appointing Authority” (§ 6H(4) and (5)), defined as “the Secretary of Defense or a designee.” § 2.

However, the DOD Order does little to answer concerns that the commission structure lacks independence, fails to provide some very basic protections for ‘core values’, and falls substantially short of the procedural safeguards embodied in the UCMJ. For instance, the Order gives the President, the Secretary of Defense or their designee control over the appointment of tribunal members (§ 4A) and members of the review panel (§ 6H(4)), and the authority to review the rulings of the review panel (§ 6H(5) and (6)). The DOD Order’s guarantee of a right to civilian counsel is conditioned on such counsel being approved by the government, and their employment at no government expense. (§ 4(C)(3)). The DOD Order allows for public hearings (§ 5O), but also empowers the Appointing Authority to close those hearings for security reasons and to exclude the accused and civilian defense counsel from closed hearings in certain circumstances. § 6B(3). It further authorizes the government to withhold information

“concerning . . . national security interests” (§ 6D(5)), or “state secrets.” § 9.¹³¹ It does not supersede (see § 7B) the terms of the PMO providing for preventive arrest, indefinite detention, suspension of the exclusionary rule and exclusive jurisdiction § 6(b). See pp. 124-25, above.

Thus from the standpoint of due process values, the DOD Order, while a significant improvement from the PMO, still stops considerably short of the procedural protections available in Article III courts, or even those available in courts-martial under the UCMJ. See NIMJ Guide 80-83.

VI. The Advantages and Disadvantages of the Federal Court Forum

Our review of legal and historical precedent suggests that the government, consistent with the Constitution, may have the authority to try suspected terrorists for violations of the law of war, in the United States or elsewhere, before military commissions. We turn to the question of whether such an approach, to the extent constitutional, is desirable public policy, and, if so, in what circumstances.¹³²

The principal articulated argument for avoiding the civilian courts is that both procedural and substantive legal requirements applicable in these courts pose significant practical problems for the war on terrorism. In substance, the proponents of alternative remedies suggest that the civilian courts are not equipped to handle cases of this sort without endangering either national

¹³¹ The term “state secrets” is not well-defined in the law, even in the privilege context. See NIMJ Guide 87.

¹³² Another alternative alluded to by commentators is the possibility of referring at least some terrorism detainees to an international tribunal. See, e.g., Harold Hongju Koh, “The Case Against Military Commissions”, 96 Am. J. Int’l L. 337, 339 n.30 (2002). Since our government has forcefully opposed the creation of a permanent international criminal court and has offered no indication that it sees a special multi-national court to be an appropriate means of dealing with suspects detained by the United States, we focus on American-controlled methods of handling such detainees.

security or the participants in the proceeding. See, e.g., Ruth Wedgwood, *After September 11*, 36 New Eng. L. Rev. 725, 728 (2002); Wedgwood, 96 Am. J. Int'l L. at 330-32 (2002). This argument rests on explicit or implicit assumptions about how the civilian legal system works and what its limitations may be in dealing with the prosecution of terrorists. To test these assumptions, we look to the courts' experience in dealing with similar types of cases, and also assess the procedures available to the courts under current law to protect national security and other vital interests in the context of terrorism prosecutions.

A. The Feasibility of Criminal Prosecutions of Terrorists in Article III Courts

As an initial matter, we note that the criminal justice system today clearly has the statutory authority to deal with acts of terrorism. This has not always been the case. During the Civil War, one reason for the frequent resort to military commissions was that few if any criminal statutes reached the actions of Confederate sympathizers and activists. See, e.g., Hyman at 65-75. Prosecutors lacked any legal basis for charging many such suspects with serious and provable criminal violations. Absent clear proof of violent activity, the only available legal theory was treason, and that charge carries with it a very difficult, constitutionally mandated burden of proof.¹³³ See Hyman at 94-95. See generally *United States v. Rahman*, 189 F.3d 88, 111-12 (2d Cir. 1999).

¹³³ Article III, section 3, of the Constitution provides:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court

In contrast, the current federal criminal code is well stocked with provisions criminalizing a significant array of activities that are said to bear the hallmark of terrorist intent. As recent prosecutions illustrate, the potential legal charges are many and varied.

For example, the defendants in the Rahman prosecution faced charges of seditious conspiracy, 18 U.S.C. § 2384; illegal use of explosives to destroy property, 18 U.S.C. § 844(i); conspiracy to kill foreign officials, 18 U.S.C. §§ 1416-17; and the use of violence or other criminal acts to assist a racketeering organization, 18 U.S.C. § 1959. See Rahman, 189 F.3d at 126. In the embassy bombing case, the defendants were charged, inter alia, with possession of firearms in a federal facility, 18 U.S.C. § 930; dealing in, possessing or distributing explosives without a license, 18 U.S.C. § 842; murder within the territorial jurisdiction of the United States, 18 U.S.C. § 1111; destruction of national-defense materials, premises or utilities, 18 U.S.C. § 2155(b); the killing of a United States official or employee in the course of his official functions, 18 U.S.C. § 1114; maiming within the territorial jurisdiction of the United States, 18 U.S.C. § 114; malicious destruction of government property, 18 U.S.C. § 844(f)(1); and use of explosives against United States nationals, 18 U.S.C. §§ 844(n) & 2332(b). See, e.g., United States v. Bin Laden, 92 F. Supp. 2d 189, 192, 198, 201-04 (S.D.N.Y. 2000); United States v. Bin Laden, 160 F. Supp. 2d 670, 672 n.1 (S.D.N.Y. 2001). Other recent prosecutions have featured charges of fraud in connection with the possession or use of identification documents, visas and passports, 18 U.S.C. §§ 1546(a), 1028(a)(6), see United States v. Koubriti, 199 F. Supp. 2d 656, 658 (E.D. Mich. 2002), and providing material support and resources to a registered terrorist

organization, 18 U.S.C. § 2339B. See United States v. Sattar, No. 02 CR 395, 2002 WL 1836755 *1 (S.D.N.Y. Aug. 12, 2002).¹³⁴

The federal courts have had significant experience trying terrorists, with a high rate of convictions.¹³⁵ Since criminal prosecutions in Article III federal courts are a readily available option for proceeding against accused terrorists, we turn to the question of whether such prosecutions are preferable to the use of military commissions. We start with the evident benefits of such an approach, and then address the principal articulated drawbacks.

B. The Benefits of Using Article III Courts to Deal with Terrorism Offenses

The considerations militating in favor of using the federal courts to deal with criminal conduct that involves terrorist aims or methods are easy to cite and compelling in their simplicity.

¹³⁴ The court in Sattar later held that 18 U.S.C. § 2339B was unconstitutionally vague as applied to the specific allegations of the indictment that defendants had “provided” telecommunications equipment (through use of a telephone) and personnel (by their own conduct) to a terrorist organization. See United States v. Sattar, 272 F. Supp. 2d 348, 356-61 (S.D.N.Y. 2003). The government has since filed a superseding indictment charging the defendants with an alternative violation involving the provision of assistance to a terrorist organization.

¹³⁵ In the 1990s the federal courts heard numerous high profile cases involving international terrorists, including the trial of members of the Provisional IRA, the Abu Nidal Organization, the Nestor Paz Zamora Commission (CPNZ), the Japanese Red Army, and Cuban National Movement, and the prosecutions arising out of the 1993 attack on the World Trade Center and the 1998 bombing of the American embassies in Kenya and Tanzania. For a detailed discussion and statistical analysis of the prosecution of international and domestic terrorists in federal courts during the 1980s and 1990s, see Brent L. Smith et al., The Prosecution and Punishment of International Terrorists in Federal Courts: 1980-1998, *Criminology & Public Policy* 311-38 (July 2002) (accounting for 427 defendants charged with terrorists crimes from 1980 to 1998) of those tried from 1988 to 1998, the conviction rate exceeded 80%).

Since September 11, 2001, 284 suspected terrorists have been charged in the federal courts and 149 convicted to date. See p. 95 n.86, above.

1. Justice

As we have noted earlier in this report, our Constitution -- as interpreted by the Supreme Court -- embodies a set of requirements that evolve from the twin concepts that the government may not seize an individual and hold him against his will absent evidence of criminal conduct or some other constitutionally cognizable basis for detention (the substantive due-process principle) and that any such detainee is entitled to certain procedural protections to ensure that his loss of liberty is justified by governing legal rules (the procedural due-process principle). In substance, any person seized by the government is presumed to be entitled to be restored to freedom, and the government must persuade a neutral decision-maker that the detainee is permissibly deprived of his liberty for whatever length of time and under whatever circumstances may be involved.

The rules that ordinarily apply to enforce this principle in the context of criminal prosecutions include a host of requirements to ensure both a tolerable level of reliability to the process and respect for the dignity and presumptive autonomy of the individual (see pp. 25-27, above). Each of the procedural protections offered by the Constitution adds a quantum of assurance of both fairness to the detainee and reliability in the result of the process. Collectively, they reflect our society's understanding of what is required to ensure that individuals are not held by the government without basis and that the factual and legal validity of the asserted bases for detention are reliably judged. They are recognized by our society as necessary to protect a detainee's liberty interest when he is faced with the prospect of prolonged detention because of alleged misconduct.

It seems self-evident that the same protections should presumptively extend to those individuals whom the government has seized and proposes to detain for an extended, and perhaps indefinite, period of time because they are suspected of having engaged in conduct

intended to further terrorist aims, thus violating applicable criminal laws. Such a presumption serves the precise goals of honoring the substantive and procedural due-process principles to which we have adverted.

Many of the protections afforded in the civilian criminal process are denied in the context of military commissions, even under the DOD Order, as discussed above (see pp. 123-26, above). To the extent such protections are denied, so too is justice as our society traditionally defines it under the Constitution.¹³⁶

In short, the demand for a just result is a persuasive reason for resorting to the Article III forum in which the full panoply of rights are available to a detainee, unless there are compelling reasons for depriving him of some of those protections. These considerations justify a presumption in favor of resorting to the civilian courts.

2. **Appearance of fairness**

As we have suggested, the protections for the detainee that are recognized by the Supreme Court in the context of criminal proceedings form the basis of a regime acknowledged by our society as necessary to ensure fair procedure and a reliable result in determining criminal liability. In view of this societal consensus, these protections provide not merely the substance of fairness to the detainee -- both a fair process and, hopefully, a just result -- but also the appearance of fairness. In short, they lend legitimacy both to the process and to its outcome.

¹³⁶ This observation applies to both citizens and non-citizens. Indeed, due process concerns presumptively give even aliens illegally in the country access to the courts to review removal orders. See, e.g., Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003) (applying INS v. St. Cyr, 533 U.S. 289); see also Plyler v. Doe, 457 U.S. 202, 210 (1982).

The significance of this consideration extends beyond the boundaries of our society. Just as the use of indefinite detentions may encourage repression abroad (see p. 80, above), so too may any prominent resort to military commissions. Our leaders have not been shy in trumpeting the civic virtues of our constitutional system to other nations, including those with little, if any, tradition of respect for individual autonomy and limitation on government authority. Necessarily, the manner in which our government actually conducts itself in dealing with perceived misconduct both by citizens and by foreigners -- including acts that may be considered threats to our civil peace and security -- offers the world a strong indicator as to whether our system of self-governance actually adheres to the high standards that we profess to honor.

3. Maintaining the health of the Bill of Rights generally

For many of the reasons cited above with respect to indefinite detentions, the unnecessary by-passing of the criminal justice system in dealing with accused terrorists would create the risk of weakening our observance of core due process principles in other areas protected by the Bill of Rights (see pp. 77-80, above). By the same token, if we can adhere to pre-existing rigorous norms of procedural fairness even in a time of fear and potentially serious threats to our national security, we reinforce the strength of those shared values in all contexts. In short, we diminish the temptation to cut corners in connection with both procedural and substantive requirements of regularity and fairness in all circumstances. If -- despite the severity of the threat -- we avoid ad hoc solutions designed to achieve an easy result in terms of the government's ability to ensure security, we will inevitably reinforce adherence to those norms in the face of other, and hopefully less extreme, circumstances.

4. **Public participation in the process**

In summarizing the various protections offered by the civilian criminal justice system, we have mentioned, among others, the right to a trial by a jury of the defendant's peers and the right to a public trial. These guarantees are deemed to offer some affirmative assurance as to the fairness of the process to the detainee, but they also serve another function, which benefits society as a whole.

The openness of the process gives the public itself the assurance that this aspect of governance is carried out in a manner consistent not only with constitutional norms, but with society's expectations. As the Supreme Court has recently noted, "[t]ransparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." Smith v. Doe, 528 U.S. 84, 99 (2003). Thus, the guarantee of a public trial is not merely a benefit to the defendant, but also a benefit to the public at large. Indeed, the courts have recognized that the principle of public access to the proceedings of the courts has a basis in the First Amendment (see p. 26 n.20, above).

Apart from the benefits of such access for purposes of public observation and monitoring, the direct participation of the community in the process, as jurors or potential jurors, offers further assurance that the government, when exercising its most coercive function, operates only with the consent and at the behest of the public. In effect, the executive branch is held to account for its actions in a very direct and public fashion. Moreover, when a verdict is rendered by a jury of citizens chosen from the community, it most consistently reflects the voice and judgment of that community, not only on the alleged actions of the defendant, but also on the conduct of the government.

Resort to the civilian courts ensures such participation to a far greater degree than other proposed means of handling detainees. The guarantee of a public trial in the civilian courts is not absolute, but the court is required to minimize any closure to the narrowest possible scope consistent with any compelling need for closed proceedings. See, e.g., Waller v. Georgia, 467 U.S. 39, 48 (1984); Ayala v. Speckard, 131 F.3d 62, 68-69 (2d Cir. 1997) (en banc), cert. denied, 524 U.S. 958 (1998). Moreover, the right to a jury trial on criminal charges filed in federal court remains inviolate, and thus ensures direct public participation in the process.

In a period when the government may seek, presumably for legitimate reasons, to exert its coercive authority to the greatest extent that may be consistent with constitutional limitations, the participation of the public, both as observer and as fact-finder, will serve to legitimize defensible applications of government powers. In this respect, it bears emphasis that the trust presumably desired by the executive branch must be earned, and that a failure to shine a light on government processes is conducive to abuse. See generally NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (describing policy underlying Freedom of Information Act). See also Jane Mayer, Annals of Justice: Lost in the Jihad, The New Yorker, 50, 57-59 (March 10, 2003) (recounting circumstances in which John Walker Lindh was allowed to plead to lesser charges); Al-Najjar v. Reno, 97 F. Supp. 2d 1329, 1352-61 (S.D. Fla. 2000) (rejecting INS detention order against suspected terrorist sympathizer, which was based on ex parte and hearsay evidence), vac. as moot, 273 F.3d 1330 (11th Cir. 2001).

Viewed in this context, a decision to use the civilian courts brings with it the evident advantage that public participation is assured. In contrast, military commissions lack equivalent protections, and are in fact designed to exclude them. For the reasons noted, such a choice

would bring with it a serious cost in terms of both the regularity of the process and public acceptance of its legitimacy.

C. Possible Drawbacks to the Use of Article III Courts

Having taken account of the advantages to be derived by a consistent adherence to the processes of the civilian courts in dealing with terrorism detainees, we address those points principally made in favor of military commissions, and offer, if not a rebuttal, at least a context in which to assess them.

The principal difficulties cited by critics of the use of the civilian judicial process include i) the danger of detainees obtaining access to classified or otherwise sensitive information, ii) possible leakage of such information to the public through its compelled disclosure at a public trial or through intentional or inadvertent revelation by defense counsel, iii) the stringency of the standards for admission of relevant evidence, iv) the threat of physical harm to the civilian participants in the trial (including, presumably, jurors, judges and prosecutors), v) juror intimidation by fear of terrorist retaliation, and vi) the administrative and fiscal burden of these types of cases on the judicial system. We address each of these issues in turn.

1. Detainees' demand for access to sensitive information and the conduct of the trial

The defendant in a criminal proceeding is constitutionally entitled to see potentially exculpatory information, Brady v. Maryland, 373 U.S. 83, 84-87 (1963), and is also permitted, as a matter of discovery, to see a variety of other information pertinent to the prosecutor's case, including statements by witnesses. See 18 U.S.C § 3500; Fed. R. Crim. P. 16. In the trial of an accused terrorist, even good-faith requests by defense counsel for such information might pose the hazard that a defendant will obtain access to sensitive information that, if revealed to others

in a position to act on it, could cause serious harm to national security. Moreover, there may be circumstances in which a defendant exercises his right to discovery for purposes antithetical to its governing purpose, which is the assurance of a fair trial. Thus, the defendant may seek sensitive and arguably relevant data precisely because it may be helpful to those of his conspirators who are still at liberty. In other circumstances, he may seek the most sensitive information arguably available in order to place the government on the horns of a dilemma, in which it must choose between (1) risking the dangerous disclosure of secret information (either to the defendant or at trial or both) as the price of prosecution and (2) foregoing prosecution.

Obviously these dangers would be entirely avoided by subjecting the detainee to a court process in which he is not entitled to disclosure of information by the prosecutor, in which evidence deemed necessary for proof of guilt can be disclosed ex parte by the government to a reliable set of military judges, and to which the public, including the press, has no access.

The concern with disclosure of sensitive information to a defendant accused of threatening national security is not a new phenomenon. Indeed, from the earliest espionage cases, it appears that the government has been compelled to address the question of how to obtain convictions consistent with legal requirements while protecting national security.¹³⁷ Ultimately

¹³⁷ In 1949, at a time of much public concern about the threat posed by the Soviet Union, Attorney General J. Howard McGrath, in his annual report to the United States Judicial Conference, addressed this very question of “protecting against the disclosure of information during espionage trials or other trials involving the national security, which in the interest of national security should be kept secret.” Report of the Proceedings of the Annual Meeting of the Judicial Conference of the United States, Report of the Attorney General at 34 (Sept. 22, 1949). The Attorney General indicated that, as a general matter, a series of decisions by the Second Circuit had adequately addressed the issue in upholding the practice of trial courts in declining to admit confidential government documents at trial unless the defendant demonstrated that they were “directly material to his defense.” United States v. Andolschek, 142 F.2d 503, 506-07 (2d Cir. 1944); United States v. Cohen, 145 F.2d 82, 92 (2d Cir. 1944); United States v. Krulewich, 145 F.2d 76, 78-79 (2d Cir. 1944); United States v. Ebeling, 146 F.2d 254, 256-57 (2d Cir. 1945).

in 1980 Congress addressed concerns about the potential for abuse of classified information by defendants in criminal prosecutions by enacting the CIPA. See generally Timothy J. Shea, CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials, 27 Am. Crim. L. Rev. 657 (1990). The CIPA is designed to ensure a fair trial while at the same time minimizing the risk that a defendant can disclose classified information, whether as part of an effort to present a defense at trial or as a tactic to preclude his prosecution (euphemistically referred to as “greymail”), or even as part of an effort to assist enemies of the country. See, e.g. United States v. Pappas, 94 F.3d 795, 799 (2d Cir. 1996) (quoting United States v. Wilson, 571 F. Supp. 1422, 1426 (S.D.N.Y. 1983)). The pertinent provisions impose a series of procedural requirements on a defendant who proposes to use classified information in his defense and authorize several forms of remediation by the court to harmonize the conflicting legitimate interests of the defendant and the government.¹³⁸

The statute addresses three circumstances in which the question of disclosure of classified information may arise. First, the defendant may seek production of such information from the government and may propose to use it at trial. Second, the defendant may already be in

As Mr. McGrath explained these decisions, the court is to exclude and “seal” any confidential document not “directly material” to the defense, and he suggested that even the sensitive evidence admitted at trial would be shown only to the attorneys, the jurors and the judge (and apparently not to the defendant), an arrangement that he appeared to view as satisfactory. As for appeals, he suggested that any such documents would be filed under seal with the appellate court.

Mr. McGrath did note a practical problem involving cases in which the information needed for trial of the charges was so sensitive “that it cannot be disclosed even to the court, the attorneys or the jury.” Id. at 35. He advised that because of this problem, “[i]n many cases of this type the Department [of Justice] has been compelled to refrain from prosecuting, and known violators of the law remain at large.” Id.

¹³⁸ The statute also requires the Attorney General to issue guidelines specifying what factors the Department of Justice is to consider in determining whether to pursue a prosecution in which classified information may be disclosed. CIPA, 18 U.S.C. App. 3, §12

possession of classified data, and may wish to use it at trial. Third, the government may find it necessary to use such information as evidence.

To deal with any of these circumstances, the government may demand a pre-trial conference to consider matters related to the use of classified information in the case. These issues include discovery, the defendant's obligation to provide notice of his intent to use such information at trial, and the conducting of hearings to determine whether and in what circumstances classified information must be produced to the defendant or may be used at trial. See Shea, 27 Am. Crim. L. Rev. at 662-64.

With respect to discovery, the CIPA entitles the government, on an ex parte submission, to seek an order excusing it from disclosing classified information to the defense. See, e.g., United States v. Rezaq, 156 F.R.D. 514, 525-26, vac. in part, 899 F. Supp. 697 (D.D.C. 1995). The statute gives the court three options in ruling on the government's request: first, to conclude that the classified information is not sufficiently relevant to require its disclosure (e.g., United States v. Fowler, 932 F.2d 306, 310 (4th Cir. 1991)); second, even if some disclosure is deemed necessary, to authorize the government to substitute for the classified information either a summary of it or "a statement admitting relevant facts that the classified information would tend to prove" (CIPA § 4; see, e.g., United States v. Rezaq, 134 F.3d 1121, 1142 (D.C. Cir.)); or third, to conclude that the latter substitutes are not adequate to protect the defendant's interests (see, e.g., United States v. Fernandez, 913 F.2d 148, 150 (4th Cir. 1990)), in which event the court has

broad discretion to enter a protective order conditioning the discovery required on compliance with terms that ensure against improper use of the sensitive information. CIPA § 3.¹³⁹

The CIPA further provides that if the defendant wishes to use classified information at trial or intends to cause it to be disclosed (presumably by questioning government witnesses), he must notify the prosecutor and the court at least thirty days before trial and identify the information in question. CIPA, § 5(a). See, e.g., United States v. Wilson, 750 F.2d 7, 8 (2d Cir. 1984), cert. denied, 479 U.S. 839 (1985). In response, the government may request an in camera hearing on “the use, relevance, or admissibility of classified information” (§ 6(a)), and, in support of a motion to limit or exclude classified information at trial, may submit an affidavit by the Attorney General, to be reviewed in camera and ex parte if the government requests,¹⁴⁰ “certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information.” § 6(c).

In deciding whether to permit the use of classified information at trial, the courts have generally held that CIPA does not change the law on privilege or admissibility, but requires the trial judge to apply a balancing test, weighing the relevance and probative weight of the

¹³⁹ Under this provision, the courts have imposed a variety of conditions, including prohibiting public revelation of the information, requiring that the disclosure of sensitive information be limited to defense counsel only and not to the defendant, and compelling the defense attorney to undergo a formal security clearance by the government as a condition for receiving such information. See, e.g., United States v. Pappas, 94 F.3d at 795, 799-800 (2d Cir. 1996); United States v. Moussaoui, No. 01-455-A, 2002 WL 1987964, *1 (E.D. Va. Aug. 23, 2002); United States v. Bin Laden, No. S (7), 98 CR, 2001 WL 66393, *2 (S.D.N.Y. Jan. 25, 2001); United States v. Bin Laden, 58 F. Supp. 2d 113, 116-17 (S.D.N.Y. 2000).

¹⁴⁰ See, e.g., United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998).

information, the public interest in its non-disclosure,¹⁴¹ and the adequacy of a summary or statement in lieu of its use. See, e.g., United States v. Smith, 780 F.2d 1102, 1107 (4th Cir. 1985); United States v. Yunis, 924 F.2d 1086, 1095 (D.C. Cir. 1991) (citing United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988)). See also United States v. Rahman, 870 F. Supp. 47, 50-51 (S.D.N.Y. 1994). But see United States v. Baptista-Rodriguez, 17 F.3d 1354, 1164 (11th Cir. 1994).

If the court authorizes the disclosure at trial, the government may request that instead the court permit a summary or statement admitting relevant facts to be substituted, and the court must grant the motion if the summary or statement will provide the defendant “with substantially the same ability to make his defense as would disclosure of the specific classified information.” § 6(c)(1);¹⁴² see, e.g., Rezaq, 134 F.3d at 142-43. If the court denies the government’s substitution motion, the Attorney General can still block the disclosure by filing an affidavit objecting to it. CIPA, § 6(e)(1). The resulting limitation on the defense, however, requires that the court dismiss the indictment,¹⁴³ unless it concludes “that the interests of justice would not be

¹⁴¹ That public interest is embodied in a number of recognized privileges, including the state secret, informant and various law-enforcement privileges, and in applying the CIPA the courts have plainly been sensitive to the policy considerations undergirding them. See generally Shea, 27 Am. Crim. L. Rev. at 693-96 (citing cases).

¹⁴² If the court rules against the government on the disclosure question, the prosecutor may obtain interlocutory appellate review. § 7(a). But cf. United States v. Moussaoui, 336 F.3d 279, 280-32 (4th Cir. 2003) (Wilkins, C.J., concurring in denial of en banc review) (appellate jurisdiction attaches only after district court imposes sanctions on government). The procedures on appeal are expedited, and appropriate security measures must be taken to avoid disclosure of the classified information while the issue is under appeal. §§ 7(a), 9(b).

¹⁴³ See, e.g., Fernandez, 913 F.2d at 151, 162-65 (affirming dismissal of indictment).

served by dismissal” (id.), in which event the court has broad discretion in designing an appropriate remedy.¹⁴⁴

The statute also deals with trial procedure. See, e.g., United States v. O’Hara, 301 F.3d 563, 567 (7th Cir.). It authorizes the court to minimize the use of classified materials at trial by admitting only selected parts of a document or by requiring the deletion of classified portions “unless the whole ought in fairness to be considered.” CIPA, § 8(b). The government may object to any question or line of inquiry by the defense on the ground it will lead to the unauthorized disclosure of classified information, in response to which objection the court must ensure against such unauthorized disclosure, such as by requiring an explanation by the defense as to the nature of the information it seeks to elicit. § 8(c).

The CIPA also requires the Chief Justice, in consultation with specified executive branch agencies, to issue procedural rules to protect against the unauthorized disclosure of classified information through the courts. § 9(a). Those rules, issued in 1981 by then-Chief Justice Burger, require, inter alia, the appointment of a court security officer to supervise security measures, the identification of secure quarters within the courthouse in which proceedings concerning classified information are to take place, and security investigations and clearances for any court personnel who may have access to such information. Security Procedures Published

¹⁴⁴ The statute mentions, as some alternatives, the dismissal of specific counts of the indictment, entering findings against the government on issues pertaining to which the classified information is relevant, and either striking or precluding pertinent portions of the testimony of specific witnesses. § 6(e)(2). See, e.g., United States v. Moussaoui, 282 F. Supp. 2d 480, 482-87 (E.D. Va. 2003).

By the Chief Justice of the United States for the Protection of Classified Information, ¶¶ 3-4 (“Security Procedures”), reprinted following 18 U.S.C.A. App. 3, § 9 (West 2000).¹⁴⁵

The requirements imposed by CIPA and the rules of the Chief Justice have been repeatedly upheld as constitutional. See, e.g., Wilson, 750 F.2d at 9 (upholding requirement that defendant notify government of his intention to use classified information); United States v. Lee, 90 F. Supp. 2d 1324, 1326-28 (D.N.M. 2000); United States v. Poindexter, 725 F. Supp. 13, 31-35 (D.D.C. 1989) (same); United States v. Collins, 603 F. Supp. 301, 303-06 (S.D. Fla. 1985) (upholding provisions authorizing court to substitute admission or summary for original document); United States v. Wilson, 571 F. Supp. 1422, 1426-27 (S.D.N.Y. 1983) (definitions not void for vagueness); United States v. Joliff, 548 F. Supp. 229, 231-32 (D. Md. 1981) (upholding discovery limitations); United States v. Smith, 899 F.2d 564, 569-70 (6th Cir.), cert. denied, 498 U.S. 848, reh. denied, 498 U.S. 848 (1990) (upholding rules of Chief Justice). The provisions of CIPA have been consistently applied by the federal courts in a variety of prosecutions, including cases involving charges of terrorism. E.g., Rezaq, 134 F.3d at 1142-43 (upholding substitution order in aircraft piracy case); Bin Laden, 58 F. Supp. 2d at 115-17, 121-23 (requiring security clearances for defense counsel and imposing stringent rules for handling classified materials in terrorism case); Rahman, 870 F. Supp. at 52 (authorizing summary of

¹⁴⁵ The rules also authorize the government to investigate the background, or “trustworthiness”, of any individuals “associated with the defense”, and to provide such information to the court to consider in framing a protective order under section 3 of CIPA. Id. at § 5. The rules also refer to the jurors, stating that security checks of them are not require[d], but advising that the trial judge should honor any government request for a post-trial instruction cautioning the jurors not to reveal the contents of any classified documents shown to them during the trial. § 6. The rules go on to require specific procedures for the storage and transmittal of such documents within the court, establishment of operating routines in handling sensitive materials, coordination with Justice Department security personnel, and procedures for disposal of the materials after the completion of court proceedings. §§ 7, 8, 9, 11 & 13.

pertinent part of classified document in terrorism prosecution). See also United States v. Bin Laden, 2001 WL 66393, * 2-4 (S.D.N.Y. Jan. 25, 2001).

Based on this body of experience, we are aware of no indication that the statute, reasonably interpreted by federal judges, is inadequate to the task of protecting national security interests while affording defendants a fair trial. Indeed, the recent experience of the Southern District of New York in hosting a series of trials involving al Qaeda defendants suggests that available procedures can minimize the dangers of either public disclosure or defendant misuse of classified information.

We particularly note that periodic review of classified information was required in the recent prosecution of defendants in the embassy bombing case in the Southern District of New York. The district court ordered that all defense counsel be subjected to security checks; directed that to the extent that the defense required access to classified information, the documents were to be shown only to counsel and not to the defendants; conducted in camera reviews and ex parte hearings, as necessary; and determined on an item-by-item basis whether disclosure of classified data was required. E.g., Bin Laden, 58 F. Supp. 2d at 115-17, 121-23; Bin Laden, 2001 WL 66393, *4-7. Further, a number of testifying witnesses possessed highly sensitive information (including not only law-enforcement agents, but also one or more formerly highly placed members of al Qaeda who were cooperating with the government), and the district court supervised the questioning to avoid disclosing any such information not clearly necessary for the defense. We have no reason to believe at this point that this manner of proceeding was inadequate either to safeguard sensitive information or to ensure a fair trial for all of the defendants.

In reaching these conclusions, we recognize that the CIPA does not remove all risks in the prosecution of terrorists. The statute itself creates the possibility that an indictment charging an alleged terrorist suspect with heinous crimes could be dismissed if the court ordered disclosure of sensitive information and the government declined. The Moussouai case demonstrates, in analogous circumstances, the potential of such an outcome.¹⁴⁶

Nonetheless, the CIPA gives the courts broad discretion to find other alternatives that, in most if not all circumstances, should give adequate assurance to the government that its interest in protecting the public will not be significantly threatened by the need to disclose classified information as a condition for prosecuting the detainee. We are confident that, given the importance of permitting such prosecutions to go forward, the courts will continue to make every effort to design procedures that would provide reasonable assurance that the legitimate concerns of the government are met.

Finally, we view the CIPA and other governing law as likely to be adequate to deal with the concern that if classified information must be used at trial, it will filter out to terrorist groups or others who could make use of it to harm this country. The potential sources of such disclosure presumably are members of the public and the press who attend the trial, and the jurors.¹⁴⁷ But

¹⁴⁶ Strictly speaking, the Moussouai issue does not concern the required disclosure of classified information, but rather the asserted interest of the government in unhampered access to terrorist sources of intelligence (see p. 102, above).

¹⁴⁷ The portrayal of defense counsel as a potential threat to national security presents a minimal risk, at best. As Chief Judge Mukasey observed, in rejecting the government's objection to provision of counsel to an alleged al Qaeda supporter and activist, when counsel are known to the court as reliable officers of the court and there is no reason to suspect that they would violate stringent and specific requirements concerning the non-disclosure of sensitive information, the risks to national security are minimal or non-existent, and a detainee's access to counsel should therefore be accommodated. Padilla, 233 F. Supp. 2d at 599-605.

the long-recognized authority of the court to protect sensitive information even at trial suggests that this concern does not pose an irreparable problem.

As noted, the Supreme Court has explicitly recognized that an otherwise public trial may be closed for as long as necessary to avoid disclosure of information that could cause public injury. This principle has most commonly been applied to protect the identity of undercover agents in narcotics prosecutions. Brown v. Artuz, 283 F.3d 492, 498-500 (2d Cir. 2002); Bowden v. Keane, 237 F.3d 125, 127 (2d Cir. 2001). Nonetheless, it plainly would extend to portions of a terrorism or other criminal trial in which sensitive information must be disclosed or national security concerns are present. E.g., Abu-Jamal v. Horn, 2001 WL 1609690, *87-90 (E.D. Pa. Dec. 18, 2001); United States v. Poindexter, 732 F. Supp. 165, 167-69 (D.D.C. 1990); see generally Noble, The Independent Counsel Versus the Attorney General in a Classified Information Procedures Act - Independent Counsel Statute Case, 33 B.C.L. Rev. 539, 585-90 (1992).

Similarly, although the jurors could be exposed to such information if it was received in evidence, there are precautions available to minimize the risk that they will disclose what they have seen. First, as noted, the CIPA allows the court to mask classified data through the substitution of summaries or findings, so that actual disclosure of highly sensitive information to the jury is unlikely. Second, the voir dire process is likely to weed out individuals who might

We recognize that a member of the bar who represented one defendant in United States v. Rahman, 189 F.3d 88 (2d Cir. 1999), stands charged with having assisted her now-convicted client in communicating to his followers a statement encouraging the commission of terrorist acts overseas. See United States v. Sattar, 2002 WL 1836755, *1 (S.D.N.Y. Aug. 12, 2002). Whatever the merits of this charge, it does not suggest that this attorney had access to classified information during the trial, or that she improperly disclosed any such information during or after the trial, or, of course, that any actual wrongdoing by this attorney exemplifies the behavior of the criminal defense bar.

pose a possible risk of disclosing very sensitive information. Third, although the rules promulgated by the Chief Justice specify that security clearances for jurors are not required, neither the statute nor the rules preclude a thorough background check of potential jurors, up to and including an inquiry at the level of a security investigation. Between these forms of assurance and the court's authority to instruct the jurors that they are not to make any such disclosure, on pain of potential criminal prosecution, again we view the cited danger as in the realm of fairly remote speculation.¹⁴⁸

2. Stringency of evidentiary rules

Another criticism of the use of civilian courts is the suggestion that the rules of evidence applicable in federal court are too stringent to permit proper proof of guilt when dealing with an organization as shadowy and difficult to track as al Qaeda. In general terms, the stated concern is that information that may be quite compelling may be found inadmissible in a civilian court because of the restrictions on hearsay, authentication requirements (for example, how to establish chain of custody for objects found on a foreign battlefield) and the possible effect of the exclusionary rule for illegal searches. Since a military commission may be empowered to consider such evidence, albeit with the discretion to discount its weight if there are serious questions about its reliability, proponents of that approach suggest that the commission will be a better tool for dealing with the threat of organizations that are based overseas and have far-flung and very secretive means of operating. See, e.g., Wedgwood, 96 Am. J. Int'l L. at 330-31.

¹⁴⁸ It is also worth observing that the danger of some outsider pressuring a former juror to disclose the substance of secret evidence is remote in view of the ability of the court to require an anonymous jury. See, e.g., United States v. Aulicino, 44 F.3d 1102, 1116-17 (2d Cir. 1995); United States v. Thai, 29 F.3d 785, 800-01 (2d Cir. 1994).

We do not doubt that lowering these evidentiary barriers would make successful prosecution of suspects somewhat easier. To the extent that some of the cited rules are designed to ensure reliability, however, we question whether sacrificing that goal is necessarily desirable.

In any event, we believe that the concern that the Federal Rules of Evidence will prevent successful prosecutions in cases in which the government has persuasive evidence of guilt is overstated. For example, the rules governing authentication give the trial court significant discretion, and if the evidence in question is probably what it purports to be, then the court is likely to treat chain-of-custody issues with some flexibility. *See, e.g., United States v. Tropeano*, 252 F.3d 653, 660 (2d Cir. 2001); *United States v. Bin Laden*, 2001 WL 276714, *1-2 (S.D.N.Y. March 20, 2001).

As for the hearsay rule, apart from the numerous specific exceptions found in Fed. R. Civ. P. 803 and 804, the catch-all provisions of Rule 807 allow for admission of a statement that would otherwise be barred if the statement “is offered as evidence of a material fact” and “is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts” and, finally, if “the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.” This provision also gives the court ample latitude, and if the statement in question is deemed to bear indicia of reliability and it is relevant to a material issue, it will presumably be admitted.¹⁴⁹

¹⁴⁹ Prof. Wedgwood’s hypothetical example of reliable evidence that would be inadmissible in a civilian court is a statement by Bin Laden’s mother to someone else that her son had called her just before September 11, 2001, and warned her that “a major event was imminent”. Wedgwood, 96 Am. J. Int’l L. at 331. It is not self-evident that, if confronted with the question, a court would bar the mother’s interlocutor from testifying to the statement under the provisions of Rule 807.

With regard to the possibility of Fourth or Fifth Amendment suppression due to irregularities in evidence-gathering overseas, the courts have recognized that information-gathering in foreign countries may not permit all of the formalities that pertain to police searches or investigations here. For example, in the embassy bombing case, the defendants sought to suppress statements that they had made to law enforcement agents in Kenya because they were not supplied with lawyers at the time and were informed that none were available there but that they could receive help if they confessed. The court denied suppression. In doing so, it held that the American agents had undertaken reasonable measures in view of all of the circumstances when questioning the defendants, and that in general terms a defendant being interrogated in Kenya by Kenyan law enforcement agents is not entitled to the same protections as would apply if he were in the United States or being questioned overseas under the supervision of American agents. United States v. Bin Laden, 132 F. Supp. 2d 168, 185-89 (S.D.N.Y. 2001). Similarly, when defendants sought to suppress the fruits of electronic surveillance and searches of a residence undertaken overseas, the court held that foreign intelligence surveillance is not governed by a warrant requirement, and it denied the motion, holding that both the electronic surveillance and the residential searches had been reasonable. United States v. Bin Laden, 126 F. Supp. 2d 264, 277 (S.D.N.Y. 2001); United States v. Bin Laden, 160 F. Supp. 2d 670, 678-79 (S.D.N.Y. 2001).

In short, although the federal rules of evidence may make proof somewhat more difficult in some circumstances, they are unlikely to pose a serious obstacle to the successful prosecution of a strong case. This is evident from the convictions secured in the various World Trade Center and related prosecutions, e.g., United States v. Salameh, 152 F.3d 88 (2d Cir. 1998); United States v. Youssef, 327 F.3d 56 (2d Cir. 2003); United States v. Rahman, 189 F.3d 88 (2d Cir.

1999); the embassy bombing case, *see, e.g., United States v. Bin Laden*, 2001 WL 1160604 (S.D.N.Y. Oct. 2, 2001); *United States v. Bin Laden*, 156 F. Supp. 2d 359, 361 (S.D.N.Y. 2001); and other terrorism cases in which defendants have ultimately pled to serious charges despite possible difficulties of proof. *See, e.g., United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002); *Another Man in Buffalo Case Pleads Guilty to Qaeda Link*, N.Y. Times, March 25, 2003, at D7, c. 5.

3. Possible harm to trial participants

Another concern voiced by proponents of alternatives other than civilian court trials is the danger of retaliation against the participants in such a trial. *E.g., Wedgwood*, 96 Am. J. Int'l L. at 331. The implied assumption is that military prosecutors and judges are more used to taking physical risks and can more readily be protected.

We understand that the judges who have presided at terrorism trials have been offered continued security protection after the completion of the trials, and that some have accepted. Theoretically the same danger might be found in cases involving other types of charges of organized mayhem, including gang cases, organized-crime cases and drug prosecutions. Indeed, the few incidents of actual violence directed at federal judges have taken place in a variety of settings. These include the murder of a judge in the Southern District of New York following an unfavorable decision in a civil case brought by the daughter of the assailant; the bombing death of a federal appellate judge in Georgia; and the shooting of a judge in Texas at the behest of a convicted drug dealer. *See Zagel & Winkler, The Independence of Judges*, 46 Mercer L. Rev. 775, 830-31 (1995).

As for risks to jurors or prosecutors, this concern seems quite speculative. The use of anonymous juries seems adequate to shield jurors. We know of no evidence that prosecutors are significantly more at risk in handling terrorism cases than in pursuing drug, gang or organized crime cases. In fact, the general animus of terrorist groups toward American society generally may make it less likely, than with other criminal suspects, that their confederates would seek vengeance against specific federal actors.

In sum, the danger posed by participation in a terrorist trial is not a compelling argument for denying this class of detainees the same procedural protections as have been afforded to all criminal defendants under the Constitution.

4. Juror intimidation

A related potential area of concern is based on the perception that trial participants may face threats of retaliation from terrorist groups. Regardless of whether that is a realistic possibility, it might be argued that the perception of such a threat exposes jurors -- who have no training or perspective to deal with the fear -- to subtle pressures to alter their analysis of the evidence.

It is certainly conceivable that some potential jurors may be fearful of serving and, if left on the jury, might tailor their verdict to some degree to accommodate that fear. This is a concern in other types of case as well, however, particularly in prosecutions of organized-crime figures and possibly some other cases involving violence-prone defendants who belonged to criminal organizations. See, e.g., United States v. Ruggiero, 928 F.2d 1289, 1300-02 (2d Cir. 1991). In those cases, the problem is dealt with in two ways: first, by careful and searching voir dire, with ample opportunity for both sides to exercise peremptory challenges and with heightened

sensitivity by the court to challenges for cause, and, second, by the availability of anonymity for jurors.

We recognize that this may not be a perfect solution. A recent article that was based on interviews with a number of jurors who had participated in the embassy-bombing trial suggested that at least one may have been partly influenced by a personal concern for safety in assessing the death-penalty question, although apparently not the issue of guilt. See Weiser, *A Jury Torn and Fearful in 2001 Terrorism Trial*, N.Y. Times, Jan. 5, 2003 at 1 (reprinted at <http://www.why-war.com/news/2003/01/05/ajuryfor.html>). Nonetheless, perfection is obviously not a tenable standard on which to base the decision as to how we are to treat detainees in the current circumstances, since none of the other proposed solutions even approach that lofty criterion.

In truth, we are left with a variety of quite imperfect approaches, but the highly subjective concern with the mental processes of jurors seems a very weak reed on which to rest a serious deviation from accepted standards of procedural fairness.

5. Administrative and fiscal burdens

A further concern that has been voiced at the use of the civilian courts is related to the security issues. Simply stated, the argument, as we understand it, is that the procedures for ensuring that the national security is adequately protected and that the participants are secure will prove too cumbersome and delay resolution of the charges. See, e.g., Byard Q. Clemmons, The Case for Military Tribunals, 49 *The Federal Lawyer* 27, 31 & nn.51-52 (2002). This concern is that the financial and administrative headaches of managing a Rube Goldberg set of procedures will put an excessive strain on the courts.

We view this concern as entirely unpersuasive. First, compared to the wealth of other legal proceedings handled by the federal courts -- some of them of great length and complexity -- terrorism trials are a minor drain on the courts' resources. Second, the considerations going to the fairness of our treatment of detainees and the legitimacy for which our society should properly strive in its handling of proceedings involving charges of serious crimes plainly outweigh dollar-and-cents calculations. If the war on terrorism is of sufficient moment, our country is capable of paying for it. Third, the speed with which verdicts are rendered is not a determinant of the fairness of the result nor should it dictate the availability of fundamental due process protections to a defendant.

D. On Balance: Maximize Use of the Federal Court Forum

The case for using the federal courts as the preferred forum for the trial of terrorism cases is in our view compelling. Conceivably there may be exceptional circumstances from time to time that would warrant proceeding before a military commission. But as a general matter, the powerful benefits derived from the transparency and perceived fairness of federal court trials will strongly militate in favor of that venue.

We note that with the recent capture of Saddam Hussein, the Administration has been careful to emphasize the importance of a transparent and open trial proceeding that will give the world confidence that justice has been served at the end of the process. These same considerations are what impels us to recommend the use of the federal courts to try domestic terrorism cases.

VII. Conclusion

While to date only three enemy combatants are known to have been detained in the United States, the importance of the issues discussed in this report extend well beyond those three individuals. It must be expected that there will be further terrorist attacks against the United States, and also further suspected terrorists apprehended before they have been able to put their plans into effect. The precedents set with respect to the three existing cases will influence the treatment of such later cases, and more generally the degree to which our country preserves its due process values while it maintains its homeland security.

The issues are not easy ones, and the dearth of case law and practical experience truly on point is striking. But the fundamental due process principles that form the rule of our law under the Constitution are not obscure. In our view, those basic principles cannot be set aside and avoided, in the context of terrorism, without doing likely permanent damage to the constitutional values we honor in all other circumstances.

The Constitution is not a “suicide pact”, as a Supreme Court Justice once famously declared. But neither is it a mere compact of convenience, to be enforced only in times of civic tranquility. It should take far more than the monstrous brutality of a handful of terrorists to drive us to abandon our core constitutional values. We can effectively combat terrorism in the United States without jettisoning the core due process principles that form the essence of the rule of law underlying our system of government.

Insistence on the rule of law will not undermine our national security. Abandoning the rule of law will threaten our national identity.

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⁺ Abstained from consideration of this report.