UPHOLDING THE RULE OF LAW: A SPECIAL ISSUE OF THE RECORD
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Preface

The September 11th attacks shook our nation in a fundamental way. Announcing that we are in a new kind of war, the Bush Administration began to exercise unprecedented powers and to develop a legal basis for the exercise of those powers. These efforts have raised basic questions regarding the balance of power among the three branches of government, and the balance of interests between preservation of national security and maintaining the rule of law.

From the earliest days after the attacks, this Association began to address these issues, and twelve committees have issued twenty reports on aspects of these questions. Our consistent position has been that while we are in times when heightened security is necessary, this need for security does not justify sacrificing our core constitutional values or treaty obligations, or tilting the balance of power to curtail the law-making role of Congress or the courts’ power of judicial review.

This is the second edition of The Record devoted exclusively to reports addressing the post-September 11th interplay between the rule of law and the exercise of Executive power. The reports focus on:

- constitutional standards applicable to the detention of enemy combatants
- human rights standards applicable to U.S. interrogation of detainees
- the Executive’s right to arrest and deport aliens in secret

In addition to these reports, the Association has filed briefs in two of the three cases just decided by the Supreme Court involving the President’s authority with regard to detainees (the reports were finalized before the decisions were handed down). We are the only domestic bar association to submit briefs in those cases.

The Association continues its extensive efforts to assist 3,000 families and small businesses victimized by the September 11th attacks. We have
collaborated on a publication chronicling efforts of the legal community to serve September 11th victims. The publication, “Public Service in a Time of Crisis”, may be viewed on our website, www.abcny.org. It was written not only to record what was done, but to provide guidance to other bars should calamities befall their communities.

We are indebted to the many Association committee members who have devoted an enormous amount of time to all of these efforts. The media are seeking our assistance with increasing frequency, as they struggle to grasp the significance of the unfolding events relating to the conflicts in Afghanistan and Iraq, and the effect of the “war on terrorism” at home. We will continue to be a voice of concern, of reason and for justice.
Dangerous Doctrine: The Attorney General’s Unfounded Claim of Unlimited Authority to Arrest and Deport Aliens in Secret

The Committee on Immigration and Nationality Law and the Committee on Communications and Media Law

"Domestically, the danger is that in pursuit of security, we end up sacrificing crucial liberties, thereby weakening our common security, not strengthening it—and thereby corroding the vessel of democratic government from within."
—UN Secretary-General Kofi Annan

INTRODUCTION

The September 11, 2001 attacks on the World Trade Center and the Pentagon triggered seismic changes in the American legal landscape, many driven by the Attorney General’s effort to identify and deter future terrorist attacks. All nineteen individuals responsible for the attacks on 9/11 were foreigners. The United States Department of Justice (“DOJ”) moved

1. Sections of this report are drawn from a broader analysis of public access to administrative proceedings completed earlier by the Committee on Communications and Media Law. “If it Walks, Talks, and Squawks . . . First Amendment Right of Access to Administrative Adjudications: A Position Paper” (June 2004).

swiftly to question thousands of immigrants, and in the process arrested and detained hundreds of Muslims for routine visa violations. In a brazen claim of executive branch power, the Attorney General then asserted the authority to deport or remove immigrants completely in secret, denying any right of the public to know what was being done and any power of the court to limit his exercise of authority.

The Attorney General claimed the power to designate any particular alien as being of "special interest," and thereby keep both the fact of the detention and the existence of any formal deportation or removal proceeding completely hidden from the public. While the extraordinary circumstances of 9/11 could well justify a need for extraordinary confidentiality in the investigation of suspected terrorists, the cloak of secrecy was invoked routinely for virtually every Muslim immigrant rounded up for questioning in the aftermath of 9/11. Even more alarming was the Attorney General's claim that he possessed the unilateral right to impose such secrecy over deportation hearings for any reason, or no reason at all. 3

The Attorney General’s claim of such sweeping executive branch power to act in secret is cause for great concern and plainly contradicts the constitutional right of public access—a right to attend, observe and report on government proceedings that is protected by the First Amendment. In the Attorney General’s view, this First Amendment right does not extend to the executive branch at all, but in the Pentagon Papers case more than three decades ago, Justice Black emphasized that the First Amendment applies equally to the Executive, Legislative and Judicial branches: “The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people’s freedom of the press, speech, religion or assembly.” 4 The Attorney General’s approach fundamentally misconstrued the constitutional right of access, which is an integral and established element of the First Amendment. The Attorney General’s position was properly rejected by the United States Courts of Appeals for both the Third and the Sixth Circuits. 5

3. See, e.g. Government’s Brief on Appeal in North Jersey Media Group Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), at 18-38, 2002 WL 32103548, at *15 (arguing that the Constitutional right to public access to governmental proceedings is limited to the 6th Amendment right to a public criminal trial) [hereinafter “Gov. Br. in North Jersey appeal”.]


5. See Detroit Free Press v. Ashcroft, 303 F.3d 681, 696 (6th Cir. 2002) (“we believe that there is a limited First Amendment right of access to certain aspects of the executive and legislative
DANGEROUS DOCTRINE

The secrecy imposed on deportation and removal proceedings raises additional issues for immigrants and immigration law. The unilateral actions taken by DOJ circumvent statutory procedures that Congress created specifically to remove suspected terrorists from the United States, bypassing checks and balances written into the law. Completely secret deportation hearings for immigrants from certain countries effectively deprive immigrants of access to counsel and due process of law in many cases, and increase the likelihood of erroneous removals. None of this can be monitored by the public or the press to protect against abuse.

Given the significant number of “special interest” immigrants that were held in federal detention facilities in New York, and the presence in this city of the nation’s leading news organizations, the Association of the Bar of the City of New York has a particular interest in both the treatment of the “special interest” immigrants and in safeguarding the right of the public and the press to attend deportation proceedings. Closing immigration hearings on a blanket basis, in the manner directed by the Attorney General, threatens to weaken the constitutional protection of access to essential government information, engender abuse, frighten the immigrant community, and ultimately “corrod[e] the vessel of democracy from within.”

I. SECRET PROCEEDINGS:
THE ATTORNEY GENERAL’S RESPONSE TO 9/11

The adverse implications for open government are illuminated by a review of steps taken by the Attorney General and the Department of Justice in September 2001, first in rounding up more than a thousand Muslim immigrants and then by attempting to change the legal rules that would apply to them.

A. The Round-up of Hundreds of Muslims

Soon after the attacks on the World Trade Center and the Pentagon,
the FBI questioned and detained an estimated 1,200 individuals, mostly Muslim men. Detentions were justified by the initiation of immigration proceedings whenever any possible violation existed. Unlike typical immigration detentions, however, aliens arrested by the FBI after 9/11 were detained in secret—no information on an arrest was disclosed—and brought before immigration judges in secret hearings, held completely beyond the view of the public and the press. Even the existence of the proceedings was withheld from public knowledge.

Many immigrants were held for weeks or months before being deported, having been designated by the Attorney General as “special interest” cases, a newly invented term without any basis in law; none was ever accused of any crime related to the 9/11 attacks. Anyone with a possible connection to terrorism instead was held as a material witness or threatened with criminal prosecution. The hundreds of “special interest” deportations conducted in secret involved immigrants with no connection or information at all, who were unlucky enough to have been questioned by the FBI at a time when they had some visa problem. According to a Los Angeles Times report, administration officials acknowledged having used the immigration laws aggressively, “and they are proud of it.”

B. The Unilateral Imposition of Complete Secrecy

The Department of Justice, from the outset, sought to maintain complete control over all information relating to its terrorism investigation, and this included clamping a lid of secrecy around everything related to the immigrants rounded up by the Department. Guidelines previously issued by the Attorney General have long mandated that deportation hearings conducted by the Immigration and Naturalization Service (“INS”) are to be open to the public, in almost all cases. These guidelines reflect

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7. See Center for National Security Studies v. U.S. Dept. of Justice, 331 F.3d 918, 921-22 (D.C. Cir. 2003) (over 700 individuals were detained only on INS charges).
10. Savage, supra note 7.
11. Before the Homeland Security Act was adopted late in 2002, the INS was an agency
the long-standing practice of conducting such proceedings in public. 12 The guidelines do permit any given hearing to be closed “in the public interest,” but the Department of Justice did not want to proceed on a case-by-case basis in closing the deportation hearings of aliens rounded up after 9/11. Therefore, on September 21, 2001, Chief Immigration Judge Michael Creppy of the Executive Office for Immigration Review 13 issued a directive, popularly known as “the Creppy Memo,” ordering immigration judges to follow new procedures whenever the Attorney General of the United States deemed an immigrant to be “of special interest.” 14

Those new procedures, effective immediately, required hearings in all “special interest” cases to be closed completely—even to family members—and even the existence of the proceeding kept secret. There could be no public docket or release of any information, not even to confirm or deny the existence of a proceeding. 15

12. E.g., Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure, Appointed by the Attorney General, at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to Suggest Improvements Therein, S. Doc. No. 77-8, 77th Cong., 1st Sess. at 68 (1941) (noting that administrative hearings are almost invariably public). See also Pechter v. Lyons, 441 F.Supp. 115, 117-18 (S.D.N.Y. 1977) (noting longstanding public policy that trials at which an individual’s “life or liberty” is at stake be open).


15. In ordering the new procedures, the Chief Immigration Judge purported to be acting pursuant to the regulatory authority to close a specific proceeding “in the public interest.” 8 C.F.R § 3.27 (2002).
The Creppy Memo did not explain what standard the Attorney General would use in designating certain cases as “special interest” cases. It was later revealed, however, that “special interest” cases invariably involved persons who were either Muslim or Arab from a selected set of countries, most of which were Middle Eastern.16 “Special interest” immigrants were arrested and tried in secret, while the Government refused to reveal their names or whereabouts, and their family and friends were often unable to locate them. Even when the immigrants had attorneys, the Government in many cases refused to tell the attorneys their clients’ whereabouts.17 Lawyers reported that the “special interest” immigrants were being “denied legal counsel, held indefinitely without charges, suddenly moved to new locations, or kept in prison even after a judge orders release.”18

In an apparently typical case, Malek Zeidan, a Syrian who worked as an ice cream truck driver, was arrested on February 1, 2002.19 He had entered the United States more than a decade ago on a visa, and had stayed well beyond his period of admission. INS came across him accidentally in the course of investigating another case, and held him in detention for about forty (40) days before releasing him.20 Ultimately, he was freed on bail, but his removal hearing remained closed to the public. He had no known connections to terrorists of any kind, was not charged with a crime, and was apparently of so little danger to the safety of Americans that he was not kept in custody. His was labeled a “special interest” case, apparently for the sole reason that he is a Syrian national. When Mr. Zeidan sued to have his hearing opened to the public, DOJ suddenly redesignated his case so that it was no longer of “special interest,” and avoided the legal challenge.21

16. See e.g., Matthew Purdy, Our Towns; Their Right? To Remain Silenced, N.Y. Times, May 1, 2002, at B5 (recounting how an INS trial attorney told an immigration judge that a hearing was “special interest,” and quoting a defense attorney as having said “That’s a long way of saying he’s Arab.”)


18. Audi, supra note 5, at 1A.


20. See id.

Other “special interest” detainees have told similar tales. Mohammed Irshaid, a New York civil engineer, reported being arrested by federal agents, who accused him of being a terrorist, threw him in jail in Passaic, New Jersey, mistreated him badly, and then released him three weeks later, filing a minor immigration charge against him weeks after his release. Syed Jaffri, a Pakistani who had had a dispute with his Bronx landlord, reported being arrested, thrown into solitary confinement, beaten up, verbally abused, never advised of his right to a lawyer, and summarily deported (without his money or papers) to Canada after being held for six months.22

These examples reflect a larger pattern of improper behavior by Government agents in the wake of September 11.23 Besides depriving the public of its constitutional right to know and monitor the conduct of government, the Creppy Memo operated to deprive immigrants of due process and their right to counsel. In deportation hearings aliens have the right to counsel, but, unlike in criminal court proceedings, the government is not obligated to provide immigrants with lawyers. Immigrants must locate, hire, and arrange to pay their own lawyers. Family members often must assist in locating an attorney, particularly if an immigrant is detained or unable to speak English. Even before September 11, this reality meant that many deportation proceedings were conducted with no one representing the immigrant, even though immigration law is often technical and complicated. The new rules imposed after 9/11 made this much worse and effectively prevented pro bono representation of detainees by volunteer attorneys.

Locked up in detention centers with only restricted access to the outside world, with their family and friends unable to obtain any information about when and where their relatives would be called before an administrative law judge, “special interest” immigrants found it uniquely difficult to obtain representation. Without a lawyer, and without access to their families and friends, many “special interest” immigrants were unable to offer a defense to the government’s charges, and were unable or unwilling to appeal adverse rulings. As American Civil Liberties Union attorney Lee Gelernt described it, “special interest” immigrants were “lit-

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erally sitting there all by themselves facing a trained INS prosecutor before a judge, often with language difficulties, while their liberty was at stake." Given the adversarial nature of immigration court proceedings, neither the INS attorney nor the judge can be expected to look out for the interests of the immigrant, and the ability of immigrants to obtain fair hearings often depends on the public's knowledge of their cases—something the Creppy Memo expressly precluded.

II. THE CLAIM OF EXECUTIVE POWER TO ORDER SECRET DEPORTATION PROCEEDINGS

A. The Media's Challenge to Secrecy

The mandates for secret proceedings in cases designated by the Attorney General became the subject of two legal challenges by the press. In Michigan, the Detroit Free Press challenged its exclusion from a deportation hearing involving Rabih Haddad, who had been detained for overstaying his visa. Haddad’s case gained attention because he was co-founder of an Islamic charity, the Global Relief Foundation, which had separately been accused by the Treasury Department of supporting terrorism and had its assets frozen. By the time the Detroit Free Press learned about the government’s efforts to deport Haddad, three secret hearings had already been held.

In the meantime, two local papers in New Jersey, had been trying to obtain information about a large number of aliens who were arrested in that State after 9/11. Unable to learn anything about the status of these aliens, the papers filed a facial challenge to the Creppy Memo requiring all “special interest” proceedings to be secret.

The two press lawsuits filed by ACLU lawyers in Michigan and New Jersey framed the same issue: whether deportation hearings could be completely closed on the unilateral order of the Attorney General, without any review by a judge at any point. The newspapers argued that the blanket sealing of deportation hearings violated the First Amendment right of access to government proceedings, urging that a case by case inquiry was


26. See Global Relief Found., Inc. v. O’Neill, 315 F.3d 748, 754-55 (7th Cir. 2002) (rejecting claim that government lacked authority to freeze the foundation’s assets).

27. See North Jersey Media Group, Inc. v. Ashcroft, 308 F. 3d 198, 203-04 (3d Cir. 2002).
required to close specific deportation hearings. The newspapers also challenged the Attorney General’s blanket approach to secrecy as ineffective in advancing security interests, because it barred the public from attending hearings before immigration judges, but left detainees free to disclose information to anyone they desired. Detainees actually connected to terrorist organizations were free to pass on information; only the public and press were kept in the dark.

B. The Overreaching Claim of Executive Power to Order Secrecy

The stated purpose for closing the deportation hearings was to avoid the possibility that potentially sensitive information would be disclosed to terrorists. Experts for the Department of Justice claimed that a blanket approach to secrecy was required because even routine information that appeared innocuous in isolation might prove valuable to terrorists as part of a broader “mosaic” of facts. For example, the Department was concerned that any details of how or why a “special interest” alien was detained “would allow the terrorist organizations to discern patterns and methods of investigation,” and might reveal “what patterns of entry” to this country were most likely to succeed.28

Rather than simply claiming that these national security concerns justified secrecy in the cases designated by the Attorney General, the government took a far more extreme position to defend the actions by DOJ. The Government moved to dismiss the papers’ claims for access by asserting that no constitutional right of access exists anywhere outside of Article III courts, suggesting that the right may even sweep no further than criminal proceedings.29 This argument misstated both the constitutional source of the right of access and the Supreme Court’s stated rationale in declaring the qualified right to be enforceable by the press and public.

The scope of the First Amendment right of access was defined by the Supreme Court in Richmond Newspapers, Inc. v. Virginia,30 an appeal challenging the sealing of a whole criminal trial conducted in Virginia entirely in secret, under a statute that gave the judge discretion to do so. This secrecy was impermissible, Chief Justice Burger explained, because:

[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if

28. Id. at 203 (quoting from the appellant’s papers).
access to observe the trial could, as it was here, be foreclosed arbitrarily.31

The Court found a qualified right of public access to be implicit in the guarantees of free speech and press, just as the right of association, right of privacy, right to travel and the right to be presumed innocent are implicit in other provisions of the Bill of Rights.32

The Richmond Newspapers case “unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.”33 The First Amendment right of access is an affirmative individual right, enforceable by any member of the public or the press against abuse and over-reaching by those in power.34

DOJ sought to severely limit this Constitutional right, by theorizing that it does not extend to the “political branches” because Articles I and II of the Constitution supposedly contain their own specific “access” requirements (an unusual characterization of the President’s obligation to report on “the State of the Union” and Congress’ obligation to publish a “regular Statement and Account” of all public monies).35 Given these express “access” obligations, DOJ contended, the Constitution must be read to foreclose other access obligations and “leave[ ] to the democratic processes” the regulation of the political branches.36 This novel contention ignored that the Supreme Court located the right of public access in the First Amendment, which applies equally to all branches of government, and did so precisely because the access right is a necessary tool in the hands of voters if those “democratic processes” are to function effectively.

31. Id. 576-77 (plurality opinion by Burger, C.J.).
32. See id. at 577 (plurality opinion) (“the right of access to places traditionally open to the public . . . may be seen as assured by the amalgam of the First Amendment guarantees of speech and press” and as related to “the right of assembly”); id. at 585 (Brennan, J., concurring) (“the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures such a public right of access to trial proceedings.”); id. at 583 (Stevens, J., concurring) (stating that “an arbitrary interference with access to important information” abridges the First Amendment).
33. Id. (Stevens, J., concurring).
36. Id. at 22.
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As the Court put it in Globe Newspaper Co. v. Superior Court, the First Amendment right of access to criminal trials is based upon,

the common understanding that a 'major purpose of that Amendment was to protect the free discussion of governmental affairs'. By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

The DOJ's whole-cloth argument continued that the right of access supposedly had been found to exist in the judicial branch alone because the absence of any express “access” provision in Article III combined with the Sixth Amendment guarantee of a “public trial” together supported the inference of a right of access to judicial proceedings. The Richmond Newspapers holding, however, had nothing to do with “access” obligations—missing or present—in Articles I through III. And, the Supreme Court just one year before Richmond Newspapers specifically rejected the notion that the Sixth Amendment creates any public right of access at all, finding the “public trial” guarantee to be an individual right extended only to criminal defendants.

In short, DOJ was entirely off-base in claiming that administrative proceedings should not even be subject to evaluation under Richmond Newspapers. It argued that the Founders would never have contemplated any public access to the operations of administrative agencies. In point of fact, “[t]he Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state.”

38. Id. at 604 (citation omitted). See also, Richmond Newspapers, Inc., 448 U.S. at 587 (Brennan, J., concurring) (“But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government.”); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 517 (1984) (Stevens, J., concurring) (stating that the right of access furthers the “core purpose” of assuring free communication about the functioning of government, quoting Richmond Newspapers, Inc., 448 U.S. at 575 (plurality opinion) [herinafter, “Press-Enterprise I”].
40. Gannett Co. v. DePasquale, 443 U.S. 368 (1979); see Press-Enterprise I, 464 U.S. at 516 (Stevens, J., concurring) (stating that the right of public access to criminal trials is not founded upon “the public trial provision” of the Sixth Amendment); United States v. Criden, 675 F.2d 550 (3d Cir. 1982) (public has no rights of access under the Sixth Amendment).
As the Supreme Court has explained, “formalized administrative adjudications were all but unheard of in the late 18th century and early 19th century.”

The Court has also explained that the “vast expansion” of administrative regulation through which the Government now operates is possible under our system only by adherence to certain “basic principles,” and these include an obligation for quasi-judicial administrative proceedings generally to be “fair and open.” The Court long ago described a “fair and open” administrative hearing as:

essential alike to the legal validity of administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an “inexorable safeguard.”

This rationale has propelled the “prevailing” rule that administrative hearings are typically open, “if not by statutory mandate, then by regulation or practice.”

The DOJ finally argued that INS deportation proceedings should be exempt from the First Amendment right of access, even if it applies to some executive branch proceedings, because the “power to expel or exclude aliens” is a sovereign power belonging to Congress, characterizing the Creppy Memo as a “bona fide immigration regulation.” Yet, Congress also has broad power over the military but, under a Richmond Newspapers analysis, the right of access has been held to attach to court martial proceedings. Congress, under Article II, Section 8, has power over “the subject of Bankruptcies,” yet access rights attach to bankruptcy pro-

43. Id.
44. Morgan v. United States, 304 U.S. 1, 14 (1938).
45. (Id. citation omitted, emphasis added.)
47. Gov. Br. in North Jersey appeal, supra note 2, at 48.
48. Id. at 18.
ceedings, including creditors’ meetings.\(^50\) And, even accepting that Congress’ plenary power over immigration is exceptionally broad, it is not exempt from constitutional constraints.\(^51\) In the case of deportations, this means “the Government must respect the procedural safeguards of due process” in exercising its right to remove aliens.\(^52\)

C. The Legal Framework That Was Available to Impose Necessary Secrecy

The DOJ’s effort to create for the Executive branch a wholesale exemption from the First Amendment right of access is particularly problematic because it could readily have defended the need for secrecy after 9/11, without making this frontal assault on the right of access. DOJ had available grounds to defend much of the secrecy it imposed, without advancing the extreme position that no right of access exists at all within the Executive branch. First, DOJ could more narrowly argue (and did successfully in the Third Circuit) that the right of access does not apply to deportation proceedings, in specific, because public access to such proceedings provides no structural benefit to the operation of government. In defining the scope of the right of access, the Supreme Court has said it only attaches to those government proceedings where there has been a tradition of openness that provides “structural” benefits to the operation of that proceeding.\(^53\) This analysis requires a consideration of whether there exists a “tradition” of public access to a type of proceeding that carries “the favorable judgment of experience,” and “whether public access plays a significant positive role in the functioning of the particular process in question.”\(^54\)

Second, DOJ could argue (and did as an alternative position) that “special interest” deportation proceedings properly could be closed because the right of access is a qualified right that must give way to legitimate national security concerns. Whether the qualified right of access may be restricted in a given instance is resolved by a consideration of four


\(^{51}\) Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (Congress’ plenary power over immigration “is subject to important constitutional limitations”); Yamataya v. Fisher, 189 U.S. 86, 99-100 (1903) (Congressional immigration authority is limited by the due process clause of the 5th Amendment).


\(^{54}\) Id.
specific factors laid down by the Supreme Court in Richmond Newspapers and its progeny:

1. whether an open proceeding is substantially likely to prejudice another transcendent value;\(^{55}\)
2. if so, whether any alternative exists to avoid that prejudice without limiting public access;\(^{56}\)
3. if not, whether the limitation of access is narrowed (in scope and time) to the minimum necessary;\(^{57}\) and,
4. whether the limitation of access effectively avoids the prejudice it is intended to address.\(^{58}\)

This four-part test requires only that a particularized showing be made to justify any denial of access on a case-by-case basis.\(^{59}\)

In the two court challenges to the DOJ’s imposition of total secrecy on the “special interest” deportation proceedings, both the Sixth Circuit and the Third Circuit rejected the Attorney General’s breathtaking claim that the Executive branch was not bound by the First Amendment right of access. The Sixth Circuit, in Detroit Free Press v. Ashcroft,\(^ {60}\) faced an appeal of the district court’s preliminary injunction striking down the closure of the “special interest” hearing of Rabih Haddad. Finding that DOJ’s actions violated the First Amendment right of access, the opinion strongly endorsed the importance of openness as a check upon the abuse of governmental power:

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56. Press-Enterprise II, 478 U.S. at 14; Publicker, 733 F.2d at 1070.
57. Press-Enterprise I, 464 U.S. at 510; United States v. Antar, 38 F.3d 1348, 1363 (3d Cir. 1994) (stating that the court must ensure “that the limitation imposed is the least restrictive means possible.”).
58. Globe Newspaper, 457 U.S. at 610; In re Charlotte Observer, 882 F.2d 850, 855 (4th Cir. 1989) (“Where closure is wholly inefficacious to prevent a perceived harm, that alone suffices to make it constitutionally impermissible.”). The “effectiveness” factor flows from the proposition that First Amendment rights will not be abridged for an idle purpose. See Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976) (rejecting a prior restraint in part because it might not have fulfilled its intended goal); Smith v. Daily Mail Pub’g Co., 443 U.S. 97, 105 (1979 (“[e]ven assuming a state interest of the highest order, [the statute] does not accomplish its stated purpose.”).
60. 303 F.3d 681 (6th Cir. 2002).
Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them “special interest” cases. The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment “did not trust any government to separate the true from the false for us.” [Citation omitted] They protected the people against secret government.

The court examined both the tradition of openness in deportation proceedings and the structural benefit of open deportation hearings. The court rejected the government’s insistence that there must be a historical tradition dating back to the time “when our organic laws were adopted” before a First Amendment right could be found. It noted that Press-Enterprise II and several circuit courts’ holdings’ “relied exclusively on post-Bill of Rights history,” and found that deportation proceedings had for the most part been conducted openly since the enactment of the first immigration statute in 1882. The court said it “should look to proceedings that are similar in form and substance” and found that deportation hearings “walk, talk and squawk’ very much like a judicial proceeding” and are comparable to a statutory criminal sentencing statute authorizing removal.

The Court of Appeals had little difficulty concluding that access would play “a significant positive role” in deportation proceedings—noting that “the press and the public serve as perhaps the only check on abusive government practices.” The court noted that additional benefits of public proceedings included improved government performance, a “cathartic”

61. Id. at 683.
62. Id. at 700 (quoting Richmond Newspapers, 448 U.S. at 569).
63. Id.
64. Id. at 701.
65. Id. (citing 8 U.S.C.A. § 1228(c) (2002)).
66. Id. at 703-04.
67. Id. at 704-05.
effect on the community, the “perception of integrity and fairness,” and a more informed public. The Government, according to the Court of Appeals, had not identified “one persuasive reason why openness would play a negative role in the process.” 68 Thus, the Sixth Circuit found the right of access to attach to deportation proceedings.

Taking up the question of whether the qualified access right was overcome on the facts presented by the government, the court concluded it was not. Although the government had demonstrated a compelling interest in preventing the disclosure of information that might impede its ongoing anti-terrorism investigation, its blanket ban on access to all “special interest” hearings failed to satisfy two other requirements mandated by the First Amendment: that the closure order be narrowly tailored and that it be based on individualized “specific findings on the record so that a reviewing court can determine whether closure was proper and whether less restrictive alternatives exist.” 69 The opinion characterized open deportation proceedings as a vital demonstration of democratic values “that Americans should not discard in these troubling times.” 70

The Third Circuit decided North Jersey Media Group v. Ashcroft 71 six weeks later and also rejected the contention that the First Amendment right of access has no application to the Executive branch. In applying the two-prong test for determining whether the right of access attached specifically to deportation hearings, however, Chief Judge Becker took a strict view of the “tradition” requirement. Disagreeing with the Sixth Circuit, the Third Circuit majority noted that Congress had never explicitly guaranteed public access to deportation hearings, and viewed the “rebuttable presumption of openness” created by 1964 INS regulations to be too recent and too qualified to establish the type of “unbroken, uncontradicted history” of openness present in Richmond Newspapers. 72 Although Judge Becker considered a “1000-year history” unnecessary, he rejected the position that a court could rely solely on the “structural benefits” of open hearings in a given context, so long as there was no history of closed proceedings 73—an approach taken in previous Third Circuit cases involving modern criminal procedures. 74 Judge

68. Id. at 705.
69. Id. at 707.
70. Id. at 711.
72. Id. at 212.
73. Id. at 213.
74. See e.g., United States v. Criden, 675 F.2d 550, 555-57 (3d Cir.1982).
Becker concluded that a demonstration of a history of openness was required in order to “preserve administrative flexibility and avoid constitution-alizing ambiguous, and potentially unconsidered, executive decisions.”

With regard to the structural benefits prong of the test, the Third Circuit first noted that it “does not do much work” because no case had yet found an access request that satisfied the “experience” test, but failed the “logic” test. It then read the Press-Enterprise II formulation of “whether public access plays a significant positive role in the functioning of the particular process in question” to require an examination of the “flip side” of that inquiry: “the extent to which openness impairs the public good.” Judge Becker criticized the lower court for not fully crediting the declaration of the FBI’s Counterterrorism Chief outlining how disclosure of seemingly minor and innocuous information about a deportation proceeding could be valuable to a person within a terrorist network, and could thwart the government’s efforts to investigate and prevent future acts of violence. In a confusing conclusion, however, the Court seemed to limit its analysis to “special interest” deportation hearings only. “On balance,” stated Judge Becker, “we are unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.”

In a vigorous dissent, Judge Sirica found that the two-step analysis for the existence of the First Amendment right was plainly satisfied. He found an adequate historical record of open proceedings, and relied on cases applying the Supreme Court precedents to civil trials as equally applicable given the similar procedures used at deportation hearings.

The Supreme Court denied certiorari in the Third Circuit case, and

75. North Jersey Media Group, Inc., 308 F.3d at 216.
76. Id. at 217.
77. Id. Judge Becker recognized that considering evidence of how open deportation hearings could threaten national security as part of the threshold inquiry into the existence of a presumptive access right created an “evidentiary overlap” with the “compelling government interest” analysis that is taken up to decide whether a proceeding could be closed, but felt that “the inquiries are not redundant because it is possible for openness to serve a positive role under a balanced logic prong even though the government has a compelling interest in closure. This would simply require that the policy rationales supporting openness be even more compelling than those supporting closure.” Id. at 217 n. 13.
78. Id. at 218-19.
79. Id. at 220. (emphasis added).
80. Id. at 222-25 (Sirica, J., dissenting).
none was sought by the government from the Sixth Circuit ruling, so the split decision over the validity of the Creppy Memo stands for now. Both courts, however, squarely rejected the dangerous doctrine advanced by the Attorney General—that the Executive branch is exempt from any constitutional right of access. This extreme position is unsupportable in law or logic, and was properly rejected by the courts.

III. SHORTCOMINGS OF THE THIRD CIRCUIT
APPROACH TO SECRET DEPORTATION HEARINGS

Departing from the approach of the Sixth Circuit, the Third Circuit accepted a blanket closure of “special interest” immigration hearings. As noted, the Third Circuit rejected application of the right of access to deportation proceedings largely because it found a lack of evidence establishing a long history of open proceedings. The Third Circuit approach is seriously flawed. Press Enterprise II establishes that it is not necessary to demonstrate a historical practice pre-dating our country’s founding to find a constitutional right of access to a government proceeding.

Indeed, few aspects of modern criminal prosecutions can boast a pedigree of public access dating back to the Founders and beyond, yet lower courts have widely found a right of access to phases of criminal proceedings that have no specific historical counterpart—such as plea hearings, pretrial suppression hearings, and motions for judicial disqualification. Some courts have cited a consistent modern practice of openness as sufficient under the Press Enterprise II analysis, while others have concluded that the “favorable judgment of history” is not necessary where the structural benefits of openness are irrefutable. For example, in Seattle Times Co. v.

83. Id.
84. See 478 U.S. 1, 7-9; 478 U.S. at 21 (Stevens, J., dissenting) (“a common law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted”).
86. See, e.g., United States v. Cojab, 996 F.2d 1404, 1407 (2d Cir. 1993) (pretrial hearing); United States v. Criden, 675 F.2d 550, 555 (3d Cir. 1982) (“societal interests” rather than historical analysis should determine First Amendment right of access to suppression hearing);
United States District Court, the Ninth Circuit reasoned that introduction of new procedures that did not exist at common law by the Bail Reform Act of 1984, rendered “the historical tradition surrounding bail proceedings ... much less significant.” As the Fifth Circuit similarly noted, First Amendment access rights “should not be foreclosed because these proceedings lack the history of openness relied on by the Richmond Newspapers court.”

The Third Circuit also went off the tracks with its analysis of the “structural benefits” inherent in the recognition of a qualified right of access to deportation hearings. This analysis is intended to focus on whether access plays a positive role in the functioning of the proceeding itself. Because a deportation hearing is conducted in the form of a trial, the value of openness to the “very process” itself is the same as in a judicial trial, and supports the existence of a constitutional right of access.

Immigration hearings are presided over by hearing officers, who are not judges but who are “neutral,” and have authority to make binding decisions. The Department of Justice has declined the extension of immigration proceedings to ALJs, perhaps because Supreme Court decisions permit it and DOJ can keep its hearing officers in closer check than ALJs. See Paul R. Verkuil, Reflections Upon the Federal Administrative Judiciary, 39 U.C.L.A. L. Rev. 1341, 1358-1360 (1992).
decisions, subject only to limited review. In fact, for most of the century, the hearing officers were INS employees, but that structure was routinely criticized and, in 1983, the arrangement ended. Although the hearing officer may take an active role in questioning a witness—as Federal Rule of Evidence 614 permits a judge to do during a civil trial—in practice, they rarely do so.

Just like Article III judicial proceedings, immigration proceedings are adversarial. Over time, the INS has developed a specialized staff of attorneys who are responsible for the prosecutorial functions of a removal or departure hearing, and these attorneys generally present the case to the hearing officer. An alien has a right to counsel in removal proceedings under the Fifth Amendment’s due process clause, and the INS must also give the alien a list of attorneys in the area.

Although the formal rules of evidence do not apply, INS regulations take care to ensure that only reliable evidence will be considered. Unauthenticated documents, hearsay, and other information that are not inherently trustworthy can be considered only after the hearing officer finds the specific evidence to be probative and reliable. The different burdens of proof and levels of proof required track the structure of civil cases in Article III courts.
The decisions made in immigration proceedings have a significant impact on the individual subject, usually far more than a civil lawsuit seeking only financial compensation. As a consequence, to ensure fairness and conformance with constitutional due process requirements, immigration proceedings, although conducted under the auspices of the executive branch’s administrative apparatus, act and look very much like judicial proceedings.100 In such a proceeding, the First Amendment right plainly exists. If a proceeding “walks, talks and squawks very much like a lawsuit...[i]t’s placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication.”101

The Third Circuit not only misperceived the nature of the “structural benefits” analysis, it found that the standard was not satisfied because in a narrow category of deportation hearings—“special interest” cases involving national security—the public interest may be threatened by open hearings. This concern, however, does not address the value of openness of deportation hearings in general, but only the need to restrict openness in specific types of cases; and the question remains whether the Attorney General should have the unreviewable power of closure. This analysis should more appropriately have been applied to decide whether a particular pro-
ceeding should be closed, after concluding, as did the Sixth Circuit, that a qualified right of access to deportation hearings indeed exists. In this regard, the Sixth Circuit’s conclusions about the value of access to deportation proceedings rests on much more solid constitutional ground than the Third Circuit’s logically flawed approach.

The Third Circuit ridiculed the Sixth Circuit’s statement that “democracies die behind closed doors,” pointing out that the Constitutional Convention of 1787 was held behind closed doors, and that “is where democracy was born.” The Third Circuit’s ridicule is inappropriate. The Constitutional Convention did not make determinations behind closed doors as to whether a particular individual should lose his life or liberty. In fact, making such decisions behind closed doors would have been anathema to the Founders, who would have called it a “Star Chamber,” and who wrote the right to a speedy and public trial into the Bill of Rights. The Third Circuit judges, in questioning “how they could possibly rule against the government when national security and human lives were at stake,” seem to have overlooked that the lives of immigrants and the cohesion of immigrant families are at stake in immigration court hearings.

There are of course legitimate national security concerns that can come into play in deportation or removal hearings, and those concerns may well require closure of particular hearings. There is no logical reason, however, to conclude that there is no right of access to any deportation hearing, or even to sanction secret proceedings in an entire class of cases, upon the unsupported allegation that “national security” is implicated because an alien is from a particular country. Under traditional First Amendment principles, the Government should be required to make a case-by-case showing of why a particular hearing must be closed, and denied the power to close categories of hearing unilaterally.

IV. CLOSED HEARINGS CIRCUMVENT THE LAW, VIOLATE DUE PROCESS AND ARE BAD PUBLIC POLICY

A. Closed Hearings Defeat the Purpose of the Alien Terrorist Removal Court

DOJ’s policy of blanket closure of certain “special interest” immigra-

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103. Id.
tion cases does an end-run around the existing statutory mechanism for deporting immigrants suspected of terrorist connections. In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act,\textsuperscript{105} Congress enacted a statutory scheme to remove from the United States those persons suspected of being terrorists. Congress created a new court to hear these terrorist removal cases—the Alien Terrorist Removal Court.\textsuperscript{106} Through these new procedures and this new court, Congress expanded the government’s power to conduct deportation hearings with the use of secret evidence to target suspected terrorists.\textsuperscript{107} The Alien Terrorist Removal Court, composed of five (5) United States district court judges appointed by the Chief Justice of the U.S. Supreme Court, is the proper court to be used to deport suspected terrorists.\textsuperscript{108} The Court’s rules create special protections for the rights of those brought within its jurisdiction.\textsuperscript{109} To date, however, INS has chosen not to use this new court.\textsuperscript{110}

Prior to 9/11, the INS\textsuperscript{111} ignored this court, choosing instead to try persons suspected of being terrorists or linked to terrorists in regular deportation or removal proceedings.\textsuperscript{112} At these proceedings, INS chose to introduce “secret evidence,” which INS refused to show judges, aliens or their counsel. Often, when this “secret evidence” was later revealed, it

\textsuperscript{104} The following sections concerning issues of immigration law and policy are authored solely by the Committee on Immigration and Nationality Law.
\textsuperscript{106} 8 U.S.C §§1531-1537 (2004).
\textsuperscript{107} Id. The use of secret evidence against foreigners suspected of being a danger to national security is not new, but dates back at least fifty (50) years to World War II. See Knauff v. Shaughnessy, 338 U.S. 537 (1950) (discussing the use of secret evidence against aliens during World War II).
\textsuperscript{110} See, generally, Martin Schwartz, Niels Frenzen, & Mayra L. Calo, Recent Developments on the INS’s Use of Secret Evidence Against Aliens, 2 IMMIGRATION & NATIONALITY LAW HANDBOOK 300-11 (2001 ed.).
\textsuperscript{111} The Immigration and Naturalization Service (INS), formerly an agency of the Department of Justice, has since been divided up, on March 1, 2003, with the creation of the Department of Homeland Security. The immigration prosecutorial functions are now with US Immigration and Customs Enforcement (USICE) while the Immigration Court and Board of Immigration Appeals remain with the Department of Justice.
\textsuperscript{112} Id. at 309 (“In recent years the INS has used secret evidence, with a few exceptions, primarily against Arabs and Muslims.”).
proved to be so faulty as to cause the agency to become something of a laughingstock in the intelligence community.\textsuperscript{113} In the post-September 11 world, DOJ has again attempted to disregard Congress's statutory scheme for deporting terrorists, instead invoking its regulatory powers to create secret proceedings for deporting immigrants. This end-run around existing statutes should not be allowed.

\textbf{B. Closing Hearings Deprives Immigrants of Due Process}

While immigration court proceedings are administrative, they implicate the most serious of interests—life and liberty.\textsuperscript{114} An immigrant may face death in his native country, should he be deported. Certainly, at a minimum, he has a liberty interest. Under the venerable Matthews v. Eldridge test,\textsuperscript{115} blanket closure of hearings is an unconstitutional violation of procedural due process because it serves to deprive immigrants of notice of the charges against them and a meaningful opportunity to be heard.

Mathews v. Eldridge requires that when the Government seeks to deprive persons of their life, liberty, or property, the Government must consider three distinct factors when determining how the deprivation may be carried out: first, the Government must consider the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\textsuperscript{116} In the case of immigration detainees, the private interest in preventing an improper deportation can be a matter of life and death. When secret hearings are held and an immigrant is deprived of the presence of her family, her witnesses, and her lawyer, there is a grave risk of an error; the value of additional procedural safeguards is great, and is also likely to save the Government time and money (for example, the involvement of a lawyer may clarify the facts

\textsuperscript{113} See, e.g., Andrew Cockburn, The Radicalization of James Woolsey, N. Y. Times, July 23, 2000 (describing how former CIA Director James Woolsey defended Iraqis whom INS attempted using "secret evidence") ("Finally free to read what the government had fought to conceal, he was astonished to discover that the case against his clients was, as he put it, 'a joke.'").

\textsuperscript{114} "[Deportation] may result also in loss of both property and life; or of all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

\textsuperscript{115} 424 U.S. 319 (1976).

\textsuperscript{116} Id.
more quickly). Third, while the Government’s interest in deporting immigrants is often significant, there is little fiscal or administrative burden in requiring individual, case-by-case analysis of whether a hearing should be closed. Thus, the Mathews v. Eldridge test argues against the blanket hearing closure policy used by the DOJ after September 11.

It has become increasingly obvious, however, that the Government has paid scant attention, to the procedural due process rights of immigrants in the post-September 11 world. The media have reported that “the handling of Muslims arrested on immigration charges after September 11 has been fraught with delay and sloppy bookkeeping and that due process [has been] shortchanged . . .” Immigrants have been held for months without being charged. At least one detainee has died while in custody, apparently as a result of the stress of being detained. “[D]etainees the government suspects least end up being held longest since they are low on the list of priorities. In the meantime, reputations are ruined, jobs are lost, families are kept apart, and lives are turned upside down.” While being held in detention, a number of detainees were abused. The Office of the Inspector General of the Department of Justice issued a supplementary report at the end of 2003, after an in-depth investigation, concluding that “officers slammed detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished them by keeping them restrained for long periods of time.” Furthermore, it has become clear in recent months that immigration judges have been intimidated by the Attorney General, who has publicly commented on their decisions in an unprecedented and arguably unethical fashion. Attorney General Ashcroft has fired members of the Board of

118. Id.
119. Somini Sengupta, Ill-Fated Path to America, Jail & Death, N.Y. Times, Nov. 5, 2001 (describing how a Pakistani detainee died of a heart attack after being inexplicably held in US jail after he agreed to depart the United States).
120. Audi, supra note 5.
123. For example, the Attorney General has issued a press release applauding the decision of an immigration judge to deny asylum to one particular Muslim male who was the subject of a “special interest” hearing. See Press Release, Department of Justice, Statement of Barbara
Immigration Appeals with whose decisions he does not agree.\textsuperscript{124} This biased behavior by the Attorney General threatens to further undermine the due process rights of immigrants.

Finally, the closed hearings policy has operated to deprive immigrants of witnesses needed for their cases, and has likely resulted in erroneous removals and deportations.

C. Closing Hearings Deprives Immigrants of Their Right to Counsel

Blanket closure of immigration hearings also deprives immigrants of their right to counsel, and is part of a disturbing Justice Department trend to hinder the right to counsel in general.\textsuperscript{125} “There’s been a concerted effort to cut defense lawyers out of the process, to make it impossible for people accused of terrorism offenses to mount an effective defense.”\textsuperscript{126}

As mentioned above, in an immigration court proceeding, if an alien wants a lawyer, she must find and pay for one herself, often while incarcerated and perhaps even unable to use a telephone. Even if the alien has an attorney, INS may ship the alien thousands of miles away from his attorney, without even notifying the attorney.\textsuperscript{127} The alien is responsible for providing evidence to rebut the INS’s claims, although such evidence

\textsuperscript{124} See, e.g., Ricardo Alonso-Zaldivar & Jonathan Peterson, The Nation: S on Immigration Board Asked to Leave; Critics Call It a ‘Purge,’ LOS ANGELES TIMES, Mar. 12, 2003, at 16 (quoting a Senate aide who said “This sends a signal to the remaining [members] that if you don’t toe the line, you could be in jeopardy”); Lisa Getter & Jonathan Peterson, The Nation: Speedier Rate of Deportation Rulings Assailed, LOS ANGELES TIMES, Jan. 5, 2003, at 1 (describing Attorney General John Ashcroft’s plan to clear administrative backlog with summary denials of appeals).

\textsuperscript{125} For example, the Justice Department has altered prison regulations to allow the government to eavesdrop on attorney-client conversations. See, e.g., Jim Edwards, No Secrets, MIAMI DAILY BUS. REV., Aug. 29, 2002 at A9 (discussing “a lengthening line of laws, regulations and other measures that constrain attorneys representing those swept up in the [terrorism] probe”).

\textsuperscript{126} Dan Christensen, Secrets Within, MIAMI DAILY BUS. REV., Mar. 12, 2003.

\textsuperscript{127} Audi supra note 5. (“When you’re locked up in Tucson and transferred five times in three weeks and you’re not given a phone, your right to counsel is rendered meaningless.”).
might be in a faraway country, or come from US Government employees whom the INS will not produce to testify. Although rules officially exist to ensure procedural fairness, in reality, translations are frequently bad, shaky evidence is commonly admitted, and jaded immigration judges and INS attorneys with little knowledge of the complicated politics of other nations can, without the guidance of counsel, make critical mistakes such as confuse one political group with another. Immigration law itself, in the words of the INS, is a “mystery and a mastery of obfuscation,” and few immigrants can be expected to understand it or to appreciate their eligibility for relief. Access to counsel in immigration court is often the only chance an immigrant has to obtain justice—and perhaps prevent his own death.

Following the September 11 attacks, the Government has in many cases had a pattern and practice of denying “special interest” immigrants their right to counsel. When giving immigrants lists of lawyers who can supposedly help with their cases, government officials have provided lists with bad phone numbers. Lawyers have been told that they cannot accompany clients to interviews with the INS.

Blanket closure of hearings deprives immigrants of access to counsel. When an immigrant is locked up, unable to contact his family, he often cannot obtain an attorney. If his family is unable to determine when and where his hearing will be, they cannot hire an attorney to be there to represent him. The Government will not provide him a free attorney. Because the Government itself is represented by an experienced attorney, and immigration court proceedings are adversarial, immigrants who are unrepresented by counsel are at a grave disadvantage.

D. Closing Hearings Can Injure Rather Than Protect National Security

The closure of hearings can actually hurt national security. The po-

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128. Metro: In Brief, WASH. POST, Apr. 24, 2001, at B1 (quoting INS spokeswoman Karen Kraushaar as stating, “Immigration is a mystery and a mastery of obfuscation, and the lawyers who can figure it out are worth their weight in gold”).

129. BRILL, supra note 21, at 147 (recounting the story of a high-level Department of Justice meeting in which “someone in the room remarked that the government should not try too hard to make sure [aliens] could contact lawyers”).

130. Id. (“Under INS rules, they were entitled to call a lawyer from jail, but the lists the INS provided of available lawyers invariably had phone numbers that were not in service”).

131. Mark Bixler, Right to Counsel Denied, Immigration Lawyers Say, ATLANTA J.-CONST., Mar. 12, 2003, at 2E (recounting story of Iranian national whose lawyer was told that he could not accompany him to an INS interview).
potential danger to national security posed by closed hearings is illustrated by the case of the Iraqi Six, a story that illustrates the grave consequences of unquestioning deference to Government requests for closed hearings.

In 1996, Saddam Hussein’s troops rolled into Northern Iraq, attacking Kurdish allies of the United States. Kurdish opponents of the Iraqi regime were slaughtered. Belatedly, the US military evacuated some six thousand Iraqis and Kurds who had been associated with the Iraqi National Congress, taking the evacuees to Guam by military airlift. Among the evacuees were six men who would later earn the appellation “the Iraqi Six.” Like their Kurdish and Iraqi compatriots, these men were interviewed on Guam by FBI agents, and later allowed to come to California. Once in California, they filed for political asylum, citing a well-founded fear of persecution by Saddam Hussein. After they filed for asylum, however, the US Immigration & Naturalization Service moved to deport them, claiming that classified evidence proved that the men were national security risks. INS said that secret evidence revealed that the men should be deported back to Iraq. INS refused to disclose the classified evidence to the men, or to their lawyers, despite the fact that one of their lawyers, R. James Woolsey, was the former Director of the Central Intelligence Agency.

If sent back to Iraq, the Iraqi Six faced certain death at the hands of Saddam Hussein. At the time of the hearings of the Iraqi Six, immigration hearings such as theirs were not closed. Although INS refused to allow the men or their lawyers to see the evidence in their cases, the hearings themselves were open. What happened during those hearings gives us a glimpse of what INS might do when no one—the press or the public—is there to watch. During the hearings of the Iraqi Six, the public learned that FBI agents with no prior experience dealing with Iraqi or Kurdish issues had interviewed the men after having had only a single 45-minute classified briefing on the situation in Iraq; translation problems caused the FBI to make critical mistakes in taking statements from the men; and FBI and INS agents collected allegations from other Iraqis, and then failed to investigate to see if the allegations were actually true. Government agents called these collections of allegations “evidence,” classified them, refused to show them to the Iraqi Six or their lawyers, and used them as grounds for the “national security risk” charge. In addition, FBI and INS agents made appalling errors in interpreting evidence in the case, including confusing thallium (rat poison) with valium (a common sedative), an error which caused them to determine that one of the men was a recreational drug user when instead he was a victim of poisoning by Iraqi intelligence agents. In another egregious error, an FBI interviewer thought
that one man was lying because he described a trip to Baghdad in which he stayed with relatives who were Kurds. The FBI agent believed that no Kurds lived in Baghdad, although a quarter of Iraq’s Kurds live there. The FBI agent was also unaware that Kurdish groups had engaged in negotiations with Saddam Hussein’s regime. FBI agents mixed up family names with ethnic groups, and then said one man was lying because he failed to list his ethnic group as one of his names. INS failed to call as witnesses some key government employees—including at least one retired CIA agent—who could have cleared the men and testified how the men had helped the CIA. FBI and INS personnel had little understanding of the situation in Northern Iraq and the various struggles of the Kurdish people, and were thus unable to appreciate or evaluate the testimony they were hearing.

Media coverage of the deportation hearings of the Iraqi Six played a significant role in stopping their deportation and exposing these INS and FBI blunders. Under intense pressure, the Justice Department eventually declassified the evidence against the men. Once revealed publicly, the evidence proved to be shaky, unreliable, and in some cases, laughable. After having spent years in jail fighting deportation to Iraq, the men were eventually released. Today, these men are alive and well, and have helped the United States with the conflict in Iraq.

Were hearings like this held today, the men would no doubt be classified as “special interest” cases. The hearings would be closed to family, friends, and the press. Today, the press would not be allowed to expose the blunders of the FBI and the shaky nature of the INS’s evidence. Under today’s secret hearings, men like this would have no chance—they would have been sent back to their country long ago and might well be dead today.

Ironically, in cases like those of the Iraqi Six, media coverage also helps protect the national security of the United States. National security is harmed when shaky evidence is used to deport people who could help our country. National security is harmed even more if foreign governments or organizations know they can manipulate the INS into deporting a foreign government’s enemies through secret tribunals. National security is further harmed by the United States developing a reputation, with both its own immigrant community and the world at large, of treating minorities (and typically Islamic minorities) unfairly through secret proceedings. The case of the Iraqi Six should be an example to us of one of the dangers of secret immigration hearings. While such hearings may speed the removal of aliens, they may also cover up abuses and mistakes, and lead ultimately to tragic results. As one writer recently noted, “the
idea that openness can be more effective than secrecy in reducing risks has received too little attention.” 132

E. Closing Hearings Fosters Misconduct and Misinformation

Closed hearings are particularly pernicious because they presume the government will act professionally and accountably in the absence of any public scrutiny. Unfortunately, the historical record does not reflect that the Department is always professional and accountable when it operates without oversight. The Federal Bureau of Investigation and the Immigration & Naturalization Service, the two agencies most often involved in “special interest” immigration hearings, are particularly noteworthy for their poor record of respect for due process.

Throughout its history, but particularly during the 1950s and 1960s—a time when the nation was highly concerned about its security—the Federal Bureau of Investigation used illegal means to obtain information;133 the FBI also used this information for political purposes unrelated to any national security threat.134 Secrecy immunized the FBI’s operations from public scrutiny. In repeatedly breaking the law and covering up its behavior, the FBI used the same rationale offered today by Attorney General Ashcroft to justify the current blanket closures of immigration court hearings. In the 1950s and 1960s, those excuses proved to be fictitious:

The FBI’s interest in secrecy and in minimizing the attorney general’s oversight role was not predicated on national security considerations or even the possibility that leaks might compromise legitimate security interests. [A] culture of lawlessness . . . shaped FBI policies . . . [S]ecrecy encouraged FBI officials to act independently, even insubordinately.135

This same danger is apparent today, as the FBI attempts to deal with the threat posed by al Qaeda terrorists. Although the Attorney General has argued that his Department is trustworthy even in the absence of any

133. See Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 755, at Book III 355 (1976) (“Before 1966, the FBI conducted over two hundred ‘black bag jobs.’ These warrantless surreptitious entries were carried out for intelligence purposes”).
134. See, e.g., G. GORDON LIDDY, WILL at 133 (1998) (describing how FBI Director J. Edgar Hoover had extensive files on various Washington politicians, which he used for political leverage).
public scrutiny, there are indications that such confidence is misplaced. In 2002, the public learned that the FBI and Justice Department had systematically misled the judges of the nation’s Foreign Intelligence Surveillance Court, providing misinformation to support ex parte requests for wiretaps and surveillance of terrorism suspects in about 75 cases. More recently, the public learned that the Department of Justice had misreported the number of terrorism-related convictions it had obtained, and may have exaggerated the number of terrorists present in the United States. Finally, the Department of Justice’s own Inspector General has documented serious abuses of immigrants that took place in connection with the post-September 11 mass arrests of Muslim men.

Along with the FBI, the INS—the other key agency involved in immigration detainee cases—has not been a shining light in federal law enforcement circles, either. Its inefficiency and ineptitude have become so notorious as to be a cliché. At least one lawmaker has called it the “agency from hell.” For years, news reports have told of corruption, mismanagement, and an agency culture that tramples on people’s rights and tolerates racism and abuse. There is no reason to think that the agency has

137. U.S. Gen. Accounting Office, Justice Department: Better Management Oversight & Internal Controls Needed to Ensure Accuracy of Terrorism-Related Statistics, GAO-03-266 (Jan. 2003) (reporting that almost half of the convictions deemed “terrorism-related” by the Department of Justice were determined by GAO investigators to have been wrongly classified as such).
138. Patrick Howe, FBI Agent Questions FBI’s Terrorism Readiness if Iraq Attacked, ASSOCIATED PRESS, Mar. 6, 2003 (citing an agent’s letter to FBI Director Robert Mueller in which she questions the evidence linking al Qaeda to Iraq and the truthfulness of a FBI statement claiming that there are 5,000 terrorists in the country).
141. Walth & Christensen, supra note 139, at A01 (quoting Zoe Lofgren, D-Calif.).
142. See, e.g., Kim Christensen et al., Unchecked Power of the INS Shatters American Dream, OREGONIAN, Dec. 10, 2000, at A01 (noting that “one in seven of the agency’s 32,000 employees was the subject of an internal investigation in 1999”).
suddenly been reformed post-September 11 such that it can be trusted to act properly in the absence of public scrutiny. Although the agency has now been absorbed into the new Department of Homeland Security, the employees remain largely the same.\footnote{143}

In connection with immigration detainees, the Department of Justice has repeatedly misled the public as to the reasons for its blanket policy. Attorney General Ashcroft himself first claimed that blanket closure of hearings was necessary because the “special interest” immigrants affected belonged to al Qaeda.\footnote{144} Later, Justice Department officials privately admitted that none of the immigration detainees were actually al Qaeda members. These errors in DOJ’s reporting were ultimately revealed by the news media.\footnote{145} Perhaps not surprisingly, the DOJ has since sought even more opportunity to hide its operations from the media and the public.\footnote{146}

When DOJ “does not have sufficient management oversight and internal controls in place ... to ensure the accuracy and reliability of its terrorism-related conviction statistics,”\footnote{147} it is highly unlikely that it has sufficient management oversight and internal controls over the designation of “special interest” administrative immigration cases, given that criminal cases have a much higher profile at the Department. Given the due process interests at stake in immigration court hearings, mismanagement and inefficiency should not be tolerated. There is no reason to think that mismanagement and inefficiency will disappear without public scrutiny.

\section*{F. Closing Hearings Alarms the Immigrant Community}

The immigrant community has been terrified by the DOJ’s new policies, including blanket closure of immigration hearings. Immigrants are leaving the United States, apparently from fear of this policy and others

\footnotetext[143]{See, e.g., Philip Shenon, Threats and Responses: Domestic Security; Ridge Discovers Size of Home Security Task, N.Y. Times, Mar. 3, at A1.}
\footnotetext[144]{Terrorist Attack Investigation: Ashcroft Details Tally of Detainees, Other Developments, FACTS ON FILE WORLD NEWS DIG., Nov. 27, 2001, at 932A1.}
\footnotetext[145]{An article in the Philadelphia Inquirer first raised allegations that the DOJ was improp- erly reporting information about terrorism-related convictions. See Mark Fazlollah & Peter Nicholas, U.S. Overstates Arrests in Terrorism: For Years, Officials Said, Cases That Should Not Have Been in that Category Were Included to Support Budget Requests, PHILADELPHIA INQUIRER, Dec. 16, 2001, at A01. This article triggered the GAO investigation that confirmed the inaccurate reports.}
\footnotetext[146]{Christensen, supra note 125, at A1 (reporting how the DOJ is apparently sealing all records relating to a civil lawsuit filed against the warden of a federal correctional institution by a since-released Muslim inmate).}
\footnotetext[147]{U.S. GEN. ACCOUNTING OFFICE, supra note 136.}
DANGEROUS DOCTRINE

like it. 148 Ironically, this fear lessens the likelihood that immigrants will come forward to help the Government win the war on terrorism. “By rounding up young Muslim men for questioning, or holding them indefinitely on minor immigration charges, the Justice Department may alienate precisely the people they need to blow the whistle on suspicious activity.” 149

G. DOJ Has Likely Used a Fictitious Excuse to Close Hearings

The possibility of terrorists learning intelligence sources and methods from immigration court hearings is quite likely a pretext. In reality, the Government appears to prefer closed immigration hearings not because of any actual threat to national security posed by open hearings, but because closing hearings makes it easier to deport aliens. The pretextual nature of the Government’s excuses for blanket closure of these hearings becomes apparent after one considers the information that has “leaked” out of “special interest” hearings. This information indicates that the Government may have misled the public about the reasons for closing these hearings. Matthew Purdy, a New York Times journalist, writes:

One East Coast immigration judge, who asked that his name remain secret, said the secret cases were “just regular cases” and that he had heard no evidence of terrorism at the hearings. “I’m sure there are plenty of terrorists,” he said. “I haven’t seen any.” He said the people he had seen “were at the wrong place at the wrong time.”

H. Closing Hearings is an Overbroad Response to the Problem of Deporting Terrorists

Events subsequent to the September 11 attacks have made it clear that the DOJ blanket policy of closing immigration court proceedings has been an overbroad response to the problem of terrorism. 151 The “special interest” policy has created a dragnet that has targeted many persons

148. Mae M. Cheng, Uproot: Pakistanis Seek Refuge in Canada, NEWSDAY, Oct. 5, 2003, at A06 (“But after 9/11, they felt like they were targeted by authorities on the grounds that most are Muslim. . . . That has led them to Canada. Here, they are peaceful. They are comfortable.”).

149. Thomas & Isikoff, supra note 120, at 37.

150. Purdy, supra note 15, at 85.

151. For example, many of the “special interest” detainees were Israeli Jews, a group that is highly unlikely to be a security threat to the United States. See, e.g., John Mintz, 60 Israelis on Tourist Visas Detained Since Sept. 11; Government Calls Several Cases ‘of Special Interest,’ Meaning Related to Post-Attacks Investigation, WASH. POST, Nov. 23, 2001, at A22 (“It was obvious they mistook us’ as Arabs from Israel,” said an Israeli army veteran).
who have no connection whatsoever to terrorism. Many of these people have been deprived of liberty for months at a time and in a manner that undercuts the legitimacy of the Government’s terrorism investigations. As one immigration attorney said, “If they’re still holding people who clearly have no tie-in to September 11th, what does it say about the quality of the overall investigation?”

I. Closing Hearings Makes America a Poor Example to the World

In the past, the United States Government has condemned other countries that resorted to secret hearings to try alleged terrorists. There is an obvious resemblance between the practice of holding secret immigration hearings and the former practices of totalitarian regimes. Now the United States Government is engaging in the behavior that it formerly condemned. It has become apparent that “an unknown number of detainees have simply disappeared into what amounts to a secret legal system.” Blanket closure of hearings is a poor example to the rest of the world, and undercuts the American role as an international model for how justice should be administered.

CONCLUSION

The Department of Justice’s blanket closure of certain “special interest” immigration hearings has revealed the grave dangers inherent in such an approach. Immigration hearings are much like criminal trials, and often even more is at stake. Like criminal trials, immigration hearings should be open to public scrutiny, absent an individualized assessment that a particular hearing should be closed. Blanket closure of these hearings is not a weapon that the Government needs in its war on terrorism, and it threatens to undermine our confidence in the workings of our government. Immigrants facing accusations that they are linked to terrorism should be afforded a right to free counsel and full due process. The Department of Justice should not be allowed to determine unilaterally whose hearings should be closed and whose should be open. The Sixth Circuit was emphatically correct that “democracies die behind closed doors.”

May 2004

152. Id. at A22 (quoting attorney David Leopold, who represented several Israeli Jews who were held as “special interest” detainees, but were later released when the Government could produce no evidence connecting them to any terrorist activity).

153. Audi, supra note 5, at 1A.
DANGEROUS DOCTRINE

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The Indefinite Detention of “Enemy Combatants”: Balancing Due Process and National Security in the Context of the War on Terror*

The Committee on Federal Courts

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, 124 S. Ct. 981 (Jan. 9, 2004) (No. 03-6696), concerns a citizen seized with Taliban military forces in a zone of armed combat in Afghanistan;


* This report was completed before the United States Supreme Court issued its decisions in Rumsfeld v. Padilla, Rasul v. Bush and Hamdi v. Rumsfeld. For a discussion of these cases, please see the Postscript on page 167.
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. II, § 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 expan-
sion 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 Com-
mander 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.
The Indefinite Detention of “Enemy Combatants”: Balancing Due Process and National Security in the Context of the War on Terror

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The Committee on Federal Courts

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, 124 S. Ct. 981 (Jan. 9, 2004) (No. 03-6696);

In addition, one alien, a student from Qatar, Ali Saleh Kahlahl 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. 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. Eric Lichtblau, Wide Impact From Combatant Decision Is Seen, N.Y. Times, June 25, 2003, at A14.

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.
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.

No criminal charges have been filed against either Hamdi or Padilla. 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.

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 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

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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. 93-102, below.
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

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,
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. at 710-18. 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. at 718-24.

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 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. 54, n.4), 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

—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).
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 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. at 698. 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.

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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.

So far no trials before military commissions have been ordered, though detailed rules to govern such trials have been promulgated (see pp. 137, 145-147, below). Those rules do not provide for such military trials of citizens.
A. 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 wise 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?

In this report we will:

• restate the basic substantive and procedural “rights” of detainees, outside of the war context;

• 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;

• 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;

• set forth our own analysis of why the President’s war power should not be construed to embrace such detentions, at least absent express authorization by Congress; 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.
I. 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 pre-occupation 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 prop-
erty, 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 lib-
government action depriving a person of life, liberty, or prop-
erty 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.


Due process requires an express statutory basis for detentions. Com-
mon law crimes, recognized in England, were held incompatible with our
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 vio-
lated, 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 prob-
able cause as a prerequisite to extended restraint of liberty following ar-
rest.” Gerstein v. Pugh, 420 U.S. 103, 114 (1975); County of Riverside v.
McLaughlin, 500 U.S. 44 (1991) (Fourth Amendment requires prompt judi-
cial determination of probable cause, within 48 hours of arrest, as prereq-

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.
uisite to extended pretrial detention following a warrantless arrest). “Probable cause exists 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. 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 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 con-

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.
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). 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 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

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, 337 F.3d 1289 (11th Cir. 2003), cert. granted, 72 U.S.L.W. 3460 (U.S. Jan. 16, 2004) (No. 03-7434).
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 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:

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 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).
. . . 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

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

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 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
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.


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.


When the Due Process Clause requires a hearing, “it requires a fair

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.
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. 60-61, 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
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:


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. 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).

The constitutional right to legal representation by governmental detainees not charged with a crime is measured by the Due Process Clause. The general test of due process rights outside the criminal and military justice contexts, including whether a right to appointed counsel should

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).


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).

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).
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. Dept 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).

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 ques-

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. McDonnel, 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
tion 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:

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.”


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)

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).
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).

In contrast, foreign nationals subject to detention or other action abroad by United States agents generally do not enjoy constitutional protection, 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

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).

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.

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).
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.

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), aff’d, 321 F.3d 1134 (D.C. Cir.), cert. granted, 72 U.S.L.W. 3323 (No. 03-334).

D. The rights of foreign nationals in the United States


Generally, there is no distinction between the procedural due process

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 Attorney General). The Su-

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).

"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:

Persons 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).

preme Court has observed that “Congress regularly makes rules [gover-
ing aliens] that would be unacceptable if applied to citizens,” Matthews v. Diaz, 426 U.S. 67, 80 (1976), a proposition “firmly and repeatedly en-
dorsed,” 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 implement-
ing 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 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 Con-

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 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).
gress, but is entitled to procedural due process with respect to such depor-
tation proceedings. While detention is permissible for the “limited pe-
riod” 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 hierar-
chy of rights recognized in times of peace, firmly imbedded in our consti-
tutional structure and case law. These rights include, with respect to citi-
zens or aliens detained in the United States or its sovereign territory:

• the right not to be detained except pursuant to a statute au-
  thorizing the detention;
• 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 eviden-
tiary 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.

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 govern-

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. 153-61, below).
ment, 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. 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.

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).
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 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 deci-

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.
sions. The Supreme Court, in Ex parte 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 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

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.
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). 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.

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.
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. 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.

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.

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”).

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:
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

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

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.
38. See Ex parte McCordie, 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
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, 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. 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 war. 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 in conformity to the laws and the Constitution of the United States. Id. at 18-19.

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

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.

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.
tion 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

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

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 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, promul-
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 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.


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 per-
son responsible for his subordinates; bear a fixed distinctive sign 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.\footnote{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).\footnote{48}

Another distinction is that Quirin relied on congressional authorization for the use of military commissions,\footnote{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. 84, 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

\footnote{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).

\footnote{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).

\footnote{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.
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 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 warmaking, 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,” 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

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.
have ground for believing that in a critical hour such persons
could not readily be isolated and separately dealt with, and
constituted a 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) ("Young-
stown"), the Court rejected President Truman’s claimed exercise of his war
power during the Korean War in seizing steel mills to ensure against dis-
ruption 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 some-
ting to the less threatening nature of the Korean conflict, and particu-
larly 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 autho-
ration, and, in the view of several 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 at-

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 con-
cededly loyal.” Id. at 297.
tempt 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. 98, 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 permit-
ting 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 the Padilla situation, i.e.,

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 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. 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 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

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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.
sort of factual determinations on which Padilla's classification as an enemy combatant rested. Padilla 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.

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.
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. at 712; Hamdi at 476.

Both Padilla courts placed important reliance for this point on The Prize Cases. (See pp. 41-42 above). Padilla at 589, 595-96; Padilla Cir. at 712. 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

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).

Padilla Cir. at 733.
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.

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. 92, 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. at 710-24. Surprisingly, the infringement of individual due process rights inherent in the detention was not a main focus of the opinion (see pp. 130-31 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 com-

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 p. 160 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).
batant thereby falling within the President's constitutional and statutory authority.

Padilla Cir. at 732-33.

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 risk a “constitutionally problematic intrusion into the most basic responsibilities of a coordinate branch.” Id. at 473.

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. 60 above). Judge Mukasey found that § 4001(a) did in fact unambiguously require

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. at 723, 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. 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. The serious negative consequences of recognizing 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. 103-112, below).

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 Linndh 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. Linndh, 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. 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., 343 F.3d 140 (2d Cir. 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, or to which they accede, out of a sense of legal obligation and mutual concern” (id. at 158)—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.
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. 112-130, 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. 130-136, 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. 137-39, below). But in any event, after reviewing the military commission orders promulgated for enemy combatant trials (see pp. 145-47, 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. 148-49, below). The most important is that the enhanced fairness of such civilian proceedings will result in a likely greater acceptance in this country and abroad of the justness of their results (see pp. 149-53, 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. 112-120, 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. 59-61, 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. 52, 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

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

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. 149 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. 107, 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. 72, above), detentions which present distinct issues not addressed in this report.
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. 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. 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 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. 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


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.
“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. But where the exercise of the war power 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. 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.

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.

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.


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.
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 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)). 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. 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 application and criminal charges against Egyptian national following September 11, 2001, based on what proved to be false information provided

67. The government’s secret detentions of these unidentified aliens, mostly 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).
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").

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

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.

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 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,” 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 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.

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 (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.

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

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

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

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.

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”).
their citizens for opposition political activity. We will be in a poor posi-
tion to complain of arbitrary executive detentions by these regimes, by-
passing their judicial systems, if we have engaged in much the same con-
duct 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 af-
after September 11 to deflect criticism of their own rights abuses.

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 de-
tentions. We now look again at the few relevant war power case preced-
ents. In our view, they provide no definitive answer to the constitu-
tional 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 in-
definite 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;

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, includ-
   ing military tribunals . . . . There is no doubt that the events of September 11
   created a new concept of democracy that differs from the concept that West-
   ern 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 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.

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 detention. 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. 142-43, 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.

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,”
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 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.

(Youngstown, 343 U.S. at 613), citing United 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. 80-82, above). However, the dramatically different circumstances of the Civil War, when military detentions of alleged Confederate sympathizers are said to have been frequent (see pp. 80-82, above).

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. 83-85, above).
1. 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. 103-12, 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. 130, 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:

[The 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.

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[It] 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

Applying the Rossiter analysis to the war on terrorism would lead to

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.
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 Court, in Youngstown, rejected President Truman’s attempted invocation of his war power to justify his seizure of the steel mills. 79 See pp. 92-93, above. The court was unanimous

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.

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.
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. Nor have the decisions by the Supreme Court in *Quirin, 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 p. 137 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. We trust that today neither

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:

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
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).

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 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.

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).
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.

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

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.

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 action in Youngstown affected only property rights, while the indefinite detentions violate core due process values.
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. 76-79, above (discussing Martin v. Mott and Luther v. Borden). In addition, judicial deference is also heightened by the fact that the President and 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 adju-
dicate 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,

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)).
for the domestic war on terror seems closer to a law enforcement effort than to a military campaign.\(^{85}\) Most 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 unilateral military judgment as to the “level of force” required to combat al Qaeda or other terrorists. With

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\(^{85}\) 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 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).
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. 713; see pp. 92-93 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. 65). 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 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:

87. See generally Clinton Rossiter, Constitutional Dictatorship (1948) (arguing that such is necessary in times of great national peril, such as total war).
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 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. 148-49, 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

\(^88\) 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).
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 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:

- [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

\(^{89}\) 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.

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.


Second, since there is little doubt that after arrest accused terrorists will be subject to pre-trial preventive detention (see p. 63), 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). 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 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

90. The case also might be held in a state of suspense—with appropriate Speedy Trial Act findings—while intelligence officials pursue their inquiries.
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, 282 F. Supp. 2d 480 (E.D. Va. 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 p. 156).

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.

1. 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. at 714-15. We do not agree with this total negation of a 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

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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.
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. 84 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

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 re-

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. at 714-15.

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 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. at 717-18), and pays an unexplained tribute to the “guarantees of the Fourth and Fifth Amendments to the Constitution.” Id. at 724.

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. 133 n.95, below).
lied 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. 93, 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 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

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:

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 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. at 713.

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 offering core due-process protections. See, e.g., Powers, Due Process for Terrorists? The Case for a Federal Terrorism Court, The Weekly Standard, 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.
• 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. 72-75, above), and encourage additional discrimination against Arabs and Muslims.

Nor would such distinctions make sense. Padilla and Hamdi, both citizens, probably have less attachment to this country than millions of

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 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).
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.

1. 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. Specific congressional legislation addressing the enemy combatant context, and invoking Congress’ own war powers, properly would elicit 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 re-
moved; c) and they pose a threat to national security.99 The 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 com-
batants 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 ar-
gued above, such power does not include indefinite detentions in the
United States, and to that extent the statute does have force.

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 p. 62, above).

100. The Second Circuit views 18 U.S.C. § 4001(a) as casting in doubt the continuing
“usefulness” of Quirin (Padilla Cir. at 716), 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 719-20).

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 author-
ized 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. 145-147, 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 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.

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. 122 n.84, above).


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, 21 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.
§ 821. 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.

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 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. 153-61, below).

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.
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. 135-66, 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 enforce-

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”).
ment of civilian standards of criminal procedure. The Supreme Court has upheld the constitutionality of this delegation of power.

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. But the UCMJ contains provisions that give courts-martials jurisdiction over non-servicemen in narrow circumstances. 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. 142-45, below).

2. Protection of core values and judicial oversight


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. 359-72 (1806).
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

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 cases 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 juris-

112. Formerly the United States Military Court of Appeals. See http://www.armfor.uscourts.gov.
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.
diction of courts-martial to crimes committed by military personnel that had a relationship to their military service (a “service connection”).

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 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.

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. While the Constitu-

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, Reiford 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).

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.

tion makes no mention of military commissions, Presidential authority to establish them is traceable to the Commander in Chief war power clause of Article 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 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 govern-

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.
mental 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, Army Law 8, 12-13 (March 2002); City Bar Report at 10-14. If, then, the Presi-

124. Duncan v. Kahanamoku, 327 U.S. 304 (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
dent 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 p. 138).

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. 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 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. 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, seemingly indefinite detention, suspension of the exclusionary rule, and exclusive jurisdiction, the latter provision perhaps intended to prohibit habeas corpus relief. Under the PMO, a detainee could be

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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.


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
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 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

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.

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.
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 security or the participants in the proceeding. See, e.g., Ruth Wedgewood, After September 11, 36 New Eng. L. Rev. 725, 728 (2002); Wedgewood, 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.

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.
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. See Hyman at 94-95. See generally United States v. Rahman, 189 F.3d 88, 111-12 (2d Cir. 1999).

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.


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.

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.

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

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. 123 n.86, above.
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. 70-71, 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. 142-45, above). To the extent such protections are denied, so too is justice as our society traditionally defines it under the Constitution.\footnote{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).}

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.

The significance of this consideration extends beyond the boundaries of our society. Just as the use of indefinite detentions may encourage repression abroad (see pp. 111-112, 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. 109-11, 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. 70 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

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).

As Mr. McGrath explained these decisions, the court is to exclude and “seal” any confiden-
Ultimately 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 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.

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.
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).

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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. 29, 2002); United States v. Bin Laden, No. S (7) 98 CR. 1023, 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).
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 information, the public interest in its non-disclosure, 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); 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, unless it concludes “that the interests of justice would not be served by dismissal” (id.), in which event the court has broad discretion in designing an appropriate remedy.

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

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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).

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).
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 the court must ensure against such unautho-
rized 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 speci-
fied 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,
ter 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 By
the Chief Justice of the United States for the Protection of Classified In-
formation, ¶¶ 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 vague-

145. The rules also authorize the government to investigate the background, or “trustworthi-
ness”, 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
cautions 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 han-
dling sensitive materials, coordination with Justice Department security personnel, and pro-
cedures for disposal of the materials after the completion of court proceedings. §§ 7, 8, 9, 11
& 13.

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

“ENEMY COMBATANTS”


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demonstrates, in analogous circumstances, the potential of such an outcome.\textsuperscript{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.\textsuperscript{147} But the long-recognized authority of the court to protect sensitive information even at trial suggests that this concern does not pose an irremediable 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);

\textsuperscript{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 pp. 128-129, above).

\textsuperscript{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.

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.

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 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, prop-

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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).
nents 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.

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. Evid. 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

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

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.
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 partici-
parted 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 pro-
ceeding 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.

IV. 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.

February 6, 2004
(Revised March 18, 2004)
POSTSCRIPT:

THE SUPREME COURT'S JUNE 2004 DECISIONS

On June 28, 2004, the United States Supreme Court decided three cases which bear upon the issues discussed in our Committee's February 2004 report, published below, entitled The Indefinite Detention of “Enemy Combatants.”

However, the Court did not reach the merits of the main focus of our report: the indefinite detention as enemy combatants of United States citizens seized in the United States, the issues posed in Rumsfeld v. Padilla, No. 03-1027, 72 U.S.L.W. 4584.

Rather than reach the merits in Padilla, the five-member majority of the Court dismissed the habeas petition, without prejudice, on the ground that the petition should have been brought in the district in which Padilla is detained (the District of South Carolina), rather than the district in which he was initially seized (the Southern District of New York). Justice Stevens, writing for a minority of four, would have reached the merits, and opined that the administration’s detention decisions “have created a unique and unprecedented threat to the freedom of every American citizen.” 72 U.S.L.W. at 4594.

In Rasul v. Bush, No. 03-343, 72 U.S.L.W. 4576, the Court decided, as a matter of statutory interpretation, that the district courts have jurisdiction under 28 U.S.C. § 2241 to consider habeas petitions filed by foreign nationals detained as “enemy combatants” at the Guantánamo Bay Naval Base in Cuba. The Court did not address the showing that petitioners would have to make at their habeas hearing to secure their release from detention, or comment on the procedures that should be followed at such hearings.

The third decision rendered on June 28, Hamdi v. Rumsfeld, No. 03-6696, 72 U.S.L.W. 4607, did reach the merits. It may provide some clues, but surely no clear guidance, as to how the Court might decide the merits of Padilla, should that case ever return to the Court.1 Hamdi is an American citizen who was seized in Afghanistan, and only thereafter trans-

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1. Padilla may be mooted insofar as it concerns the indefinite detention issue if, as has been rumored, Padilla is about to be indicted on criminal charges. However, no such indictment has been returned as of the date of this writing.
ported to the United States where he is still held by the Defense Department in South Carolina as an “enemy combatant.”

The six-member majority of the Court, in an opinion written by Justice O’Connor, reversed the Fourth Circuit’s dismissal of Hamdi’s petition, but in an opinion that leaves unsettled the ultimate power of the President to effect and continue indefinite detentions. The majority upheld the President’s power to detain Hamdi, if properly classified as an “enemy combatant”, and to continue to detain him as long as “United States troops are still involved in active combat in Afghanistan” (72 U.S.L.W. at 4611). The Court held Hamdi’s detention, to this extent, authorized by the November 2001 joint congressional resolution for the use of military force against those responsible for the attacks of September 11 (the “AUMF”). The Court did not view due process to bar Hamdi’s detention, relying principally on *Ex Parte Quirin*, 317 U.S. 1 (1942). *Quirin* did not involve detention, but rather the immediate military trial of an alleged citizen enemy combatant. But the Court opined that “nothing in *Quirin* suggested” that Hamdi’s citizenship should preclude his “mere detention for the duration of the relevant hostilities,” thereby preventing Hamdi from “returning to the front during the ongoing conflict.” 72 U.S.L.W. at 4610-11.

The Court was not dismissive of Hamdi’s fear of prolonged detention, even “for the rest of his life,” if for the duration of the “unconventional” war on terror, unlikely to have a finite conclusion. But it found no need to reach the possibly unique issues so posed given the ongoing armed conflict in Afghanistan. (72 U.S.L.W. at 4611).

The Court stressed “the context of this case: a United States citizen captured in a foreign combat zone.” (72 U.S.L.W. at 4612) (emphasis in original). Its holding was only that the AUMF authorized Hamdi’s detention “in the narrow circumstances alleged here” (72 U.S.L.W. at 4608). Thus the decision leaves open whether the Court would reach a different result in Padilla, in which a citizen was detained in the United States, far from the scene of any military conflict, but in what the administration has argued is the worldwide theatre of the war on terror. Nor did the Court reach the scope of the President’s detention powers, absent congressional authorization, acting as Commander in Chief under Article II of the Constitution (72 U.S.L.W. at 4610).

The Court did find that due process entitled Hamdi to test the administration’s claim that he was properly classified as an enemy combatant. It agreed with the Fourth Circuit that a hearsay declaration submitted by the government was sufficient to meet the government’s initial burden of proving the circumstances of Hamdi’s seizure, and it further
held that a presumption in favor of the government’s position was warranted (72 U.S.L.W. at 4615-17). But unlike the Fourth Circuit, the Court held that Hamdi was entitled to notice of the factual basis for his classification as an enemy combatant, and an opportunity to rebut that showing:

[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker. (72 U.S.L.W. at 4608)

Somewhat gratuitously, the Court suggested that military tribunals might be properly employed for this purpose (72 U.S.L.W. at 4616). It avoided the question of whether such detainees as a general matter would have a right to counsel in such proceedings, whether in the district courts or before military tribunals, because the government already had permitted Hamdi himself access to counsel, (72 U.S.L.W. at 4617).

The separate concurring and deciding opinions point in different directions. Justice Souter, joined by Justice Ginsburg, finds Hamdi’s detention not authorized by the AUMF, and therefore prohibited by the Non-Detention Act, 18 U.S.C. § 4001. (72 U.S.L.W. at 4617).

Justice Scalia in dissent, joined by Justice Stevens, opines that the Constitution, absent a suspension of habeas corpus, requires that a citizen “accused of waging war” against the country either be tried for treason or released (72 U.S.L.W. at 4621). He decries the majority’s “Mr. Fix-it Mentality” in crafting procedures justifying a detention without charges. (72 U.S.L.W. at 4627).

Justice Thomas, dissenting, would sustain the administration’s decision to detain Hamdi, which he finds authorized by the AUMF, stressing that the courts “lack the expertise and capacity to second-guess that decision.” (72 U.S.L.W. at 4628).

In sum, the issues discussed in our Committee’s report that follows, which focuses principally on Padilla, as well as the relative merits of trying accused terrorists in the federal district courts as distinguished from military tribunals, remain very much undecided.

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The Committee on International Human Rights and The Committee on Military Affairs and Justice

EXECUTIVE SUMMARY/INTRODUCTION

This Report is a joint effort of the Association of the Bar of the City of New York’s Committees on International Human Rights and Military Affairs and Justice, undertaken to consider allegations—reported in the press and by human rights and humanitarian organizations conducting their own investigations—that individuals detained by the United States at its military and intelligence facilities in connection with the initial War in Afghanistan and the subsequent ongoing conflict in Afghanistan, are being subjected to interrogation techniques that constitute torture or cruel, inhuman or degrading treatment.1 We note at the outset,  

1. For purposes of this Report, the term “War in Afghanistan” refers to the period of international armed conflict in Afghanistan—from October 2001 to June 2002, when the Taliban was the governing force in Afghanistan, and the phrase “ongoing conflict in Afghanistan” refers to the period after June 18, 2002 when Hamid Karzai was elected as Afghanistan’s transitional head of state, and the U.S. and other international parties were operating in Afghanistan at the invitation of this new Afghanistan government. This distinction becomes important in discussing the protections afforded to detainees by the Geneva Conventions. See Section II of this Report.
however, that although this project was initially motivated by allegations regarding the treatment of detainees from the War in Afghanistan, the international law and human rights standards discussed herein—with the exception of Geneva Convention protections applicable only to situations of international armed conflict—apply broadly and with equal force to the treatment of detainees captured in other situations, including detainees picked up in other countries in connection with the broader “War on Terror.” In this Report, we will examine the international legal standards governing United States military and civil authorities in interrogating detainees and propose ways of assuring that those standards are enforced.

The Alleged Interrogation Practices

These allegations first surfaced in December 2002, when the U.S. military announced that it had begun a criminal investigation into the death of a 22 year-old Afghan farmer and part-time taxi driver who had died of “blunt force injuries to lower extremities complicating coronary artery disease” while in U.S. custody at Bagram Air Force Base in Afghanistan. Since then, details about interrogation techniques allegedly employed at U.S. detention facilities—most of which are off-limits to outsiders and some of which are in undisclosed locations—have come from government officials speaking on the condition that they would not be identified and from the few prisoners who have been released. Some examples of “stress and duress” interrogation “techniques” reportedly being practiced by U.S. Department of Defense (“DOD”) and Central Intelligence Agency (“CIA”) personnel at U.S. detention facilities include: forcing detainees to stand or kneel for hours in black hoods or spray-painted goggles, 24-hour bombardment with lights, “false-flag” operations meant to deceive a captive about his whereabouts, withholding painkillers from wounded detainees, confining detainees in tiny rooms, binding in painful positions, subject-

2. An assessment of the parameters and legal implications of the “War on Terror,” a term coined by the Administration, is beyond the scope of this Report.

ing detainees to loud noises, and sleep deprivation.⁴ In addition, the U.S. is reportedly “rendering” suspects to the custody of foreign intelligence services in countries where the practice of torture and cruel, inhuman or degrading treatment during interrogation is well-documented.⁵

The Administration’s Responses

The Association and others have written to U.S. government officials to ask whether there is any factual basis for these allegations and whether steps are being taken to ensure that detainees are interrogated in accordance with U.S. law and international standards prohibiting torture and “cruel, inhuman or degrading” treatment falling short of torture (“CID”).⁶

In response to inquiries from Human Rights Watch, U.S. Department of Defense General Counsel William J. Haynes has stated that: “United States policy condemns and prohibits torture” and that, when “questioning enemy combatants, U.S. personnel are required to follow this policy and applicable laws prohibiting torture.”⁷ CIA General Counsel Scott W.

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⁵ Captives have reportedly been “rendered” by the U.S. to Jordan, Egypt, Morocco, Saudi Arabia and Syria, in secret and without resort to legal process. See, e.g., Peter Finn, Al Qa eda Recruiter Reportedly Tortured; Ex-Inmate in Syria Cites Others’ Accounts, WASH. POST, Jan. 31, 2003, at A14; Dana Priest and Barton Gellman, U.S. Decrees Abuse but Defends Interrogations; “Stress and Duress” Tactics used on Terrorism Suspects Held in Secret Overseas Facilities, WASH. POST, Dec. 26, 2002, at A01; Rajiv Chandrasekaran & Peter Finn, U.S. Behind Secret Transfer of Terror Suspects, WASH. POST, Mar. 11, 2002, at A01.


⁷ See Letter from William J. Haynes II, General Counsel, DOD, to Kenneth Roth, Executive
Muller, citing to the need to protect intelligence sources and methods, has responded to our inquiries by stating only that “in its various activities around the world the CIA remains subject to the requirements of U.S. law” and that allegations of unlawful behavior are reported by the CIA to the Department of Justice and are subject to investigation.8

In response to an inquiry made by U.S. Senator Patrick J. Leahy regarding U.S. policy, Haynes stated that U.S. policy entails “conducting interrogations in a manner that is consistent with the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”), as ratified by the U.S. in 1994, and with the Federal anti-torture statute, 18 U.S.C. §§ 2340 - 2340A, which Congress enacted to fulfill U.S. obligations under the CAT.”9 Haynes also stated that U.S. policy is “to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with” the U.S. obligation, pursuant to Article 16 of CAT, namely, “to prevent other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture” insofar as such treatment is “prohibited by the Fifth, Eighth, and/or Fourteenth Amendments.”10 Haynes assured Senator Leahy “that credible allegations of illegal conduct by U.S. personnel will be investigated and, as appropriate, reported to proper authorities.”11 Furthermore, Haynes stated that the U.S. does not “expel, return (‘refouler’) or extradite individuals to other countries where the U.S. believes it is ‘more likely than not’ that they will be tortured,” that “United States policy is to obtain specific

8. See Letter from Scott W. Muller, General Counsel, CIA to Miles P. Fischer and Scott Horton, chair of the Committee on Military Affairs and Justice and then-chair of the Committee on International Human Rights, respectively (June 23, 2003). A CIA senior official has informally indicated that the agency complies with applicable law in reliance on the advice of its legal staff. However, we have been unable to confirm what legal advice has been given by CIA counsel or what means have been used to assure compliance with that advice.


10. Id.

11. Id.
assurances from the receiving country that it will not torture the individual being transferred to that country,” and that “the United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored.”

Both Haynes and Muller have declined, however, to give details concerning the specific interrogation methods used by U.S. personnel at U.S. military and CIA detention facilities.

**Legal Standards Prohibiting Torture and Cruel, Inhuman or Degrading Treatment**

Although we are not in a position to investigate the factual basis for the allegations of torture and cruel, inhuman or degrading interrogation practices at U.S. detention facilities that have been made, we can describe the legal principles which should guide our military and intelligence personnel in their conduct. Accordingly, in this Report we examine the international and U.S. law standards against which the interrogation practices used on detainees should be assessed. We also address the question of whether there are any circumstances posed by the post-September 11 world in which abrogation of our country’s obligations to prevent and punish torture and cruel, inhuman or degrading treatment should be permitted in the interrogation of terrorist suspects.

**The Convention Against Torture**

First and foremost, the U.S. obligation to prohibit and prevent the torture and cruel, inhuman or degrading treatment of detainees in its custody is set forth in the Convention Against Torture And Other Cruel, Inhuman, or Degrading Treatment (“CAT”), to which the U.S. is a party. When the U.S. ratified CAT in 1994, it did so subject to a reservation providing that the U.S. would prevent “cruel, inhuman or degrading treatment” insofar as such treatment is prohibited under the Fifth, Eighth, and/or Fourteenth Amendments. Thus, the U.S. is obligated to prevent not only torture, but also conduct considered cruel, inhuman or degrading under international law if such conduct is also prohibited by the Fifth, Eighth and Fourteenth Amendments. In interpreting U.S. obligations under CAT, the United States

12. Id.


tions, we look to the U.N. Committee Against Torture’s interpretations of CAT as well as U.S. case law decided in the immigration and asylum law context, under the Alien Tort Claims and Torture Victim Protection Acts and concerning the treatment of detainees and prisoners under the Fifth, Eighth and/or Fourteenth Amendments. We also examine the procedural mechanisms available under U.S. law to punish violations of CAT—including prosecution under federal criminal law (18 U.S.C. §§ 2340-2340A) and the Uniform Code of Military Justice (“UCMJ”).

Other International Legal Standards which Bind the United States

While there is a dearth of U.S. case law applying CAT’s prohibition against torture and cruel, inhuman or degrading treatment in the interrogation context, there is a wealth of international law sources which offer guidance in interpreting CAT. Some of these international legal standards are, without question, binding on the U.S., such as: the International Covenant on Civil and Political Rights (the “ICCPR”),\(^\text{15}\) the law of jus cogens and customary international law. Another international legal instrument which has been ratified by the U.S. and is relevant to the interrogation practices being examined by this Report is the Inter-American Declaration on the Rights and Duties of Man.\(^\text{16}\) Other sources, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms,\(^\text{17}\) also provide guidance.

The applicability of the Geneva Conventions to the detainees from the War in Afghanistan, however, presents a more contentious issue. The Administration’s official position is that the Geneva Conventions do not apply to Al Qaeda detainees, and that neither the Taliban nor Al Qaeda detainees are entitled to prisoner of war (“POW”) status thereunder. Nevertheless, the Administration has stated that it is treating such individuals “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949,” and that the detainees “will not be subjected to physical or mental abuse or cruel treatment.”\(^\text{18}\) The Administration has never explained how it determines what interrogation techniques are “appropriate” or “consistent with military necessity,” or how it squares

\(^\text{17}\) 213 U.N.T.S. 221.
that determination with U.S. obligations under human rights and customary international law. For POW and civilian detainees who meet the relevant criteria of Geneva Convention (III) Relative to the Treatment of Prisoners of War (“Geneva III”) and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (“Geneva IV”), respectively, all coercion is prohibited. Moreover, any detainee whose POW status is in doubt is entitled to a hearing and determination by a competent tribunal and, pending such determination, any such detainee must be treated as a POW. Concern for the safety of U.S. forces weighs in favor of extending POW status liberally. At a minimum, all detainees—regardless of POW or civilian status—are entitled to humane treatment and prompt hearings under human rights and customary international law, including the protections of Article 3 common to all four Geneva Conventions (“Common Article 3”) and Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Related to the Protection of Victims of International Armed Conflicts (“Additional Protocol I”). We urge the U.S. to promptly establish proper screening procedures for all detainees, whether or not they served with forces that met the specific criteria of Geneva III.

**Legal Standards which the United States Should Look to for Guidance**

Other relevant sources of law, such as the seminal 1999 Israeli Supreme Court decision on interrogation methods employed by the Israeli General Security Service, Judgment Concerning The Legality Of The General Security Service's Interrogation Methods,21 and decisions of the European Court of Human Rights, although not legally binding on the U.S., also offer useful guidance in our interpretation of CAT. These foreign decisions indicate that the “War on Terror” is not unprecedented. As the Israeli and Northern Ireland experiences demonstrate, the U.S. is not the only country to have faced terrorism within its borders, despite the unique tragedy.


20. Additional Protocol I, reprinted in 16 I.L.M. 1391. While neither the United States nor Afghanistan is a signatory to Additional Protocol I, it is generally acknowledged that certain provisions are binding as a matter of customary international law. And although the terms of Common Article 3 specifically limit its scope to internal conflicts, it is considered by customary international law to have broader scope.

21. 38 I.L.M. 1471 (Sept. 6, 1999).
Standards in the Time of Terror

There is an inherent tension between the need to obtain potentially life-saving information through interrogation of terrorist suspects and the legal requirement of upholding the standards set forth in CAT. We grappled with the question of whether there are any circumstances under which torture or cruel, inhuman or degrading treatment would be permissible in a post-September 11 world. While we acknowledge the real danger posed to the United States by Al Qaeda and other terrorist organizations, we concluded that there are no such exceptions to CAT's absolute prohibition of torture.

Condoning torture under any circumstances erodes one of the most basic principles of international law and human rights and contradicts our values as a democratic state. Permitting the abuse of detainees in U.S. custody, perhaps under so-called “torture warrants,” not only harms the detainees themselves; it compromises the moral framework of our interrogators and damages our society as a whole. If U.S. personnel are allowed to engage in brutal interrogation methods which denigrate the dignity and humanity of detainees, we sanction conduct which we as a nation (along with the international community) has clearly determined is wrong and immoral. Accordingly, we unanimously condemn the torture of detainees under any circumstances. We note that U.S. constitutional jurisprudence on “cruel, inhuman or degrading” treatment, which has been made relevant to CAT by the U.S. reservation, is an extremely important source of guidance on this subject. On the other hand, much of this jurisprudence evolved in the context of domestic criminal justice administration, and how these precedents would be applied in a case arising out of the interrogation and detention covered by this Report is, in the absence of more definitive authority, a matter of some speculation.

Recommendations

We applaud the statements in William Haynes' June 25, 2003 letter to Senator Leahy affirming the policy of the U.S. regarding its commitment to CAT. To make that policy meaningful, we make the following recommendations:

1. Training and Education. All law enforcement personnel, civilian or
military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of anyone under any form of detention or imprisonment should be informed and educated regarding the prohibition against torture and cruel, inhuman or degrading treatment, as applied in practice. This requires, as provided in Article 11 of CAT, that the U.S. keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of such detainees. Above all, commanders should not condone non-compliance nor permit an environment in which troops are encouraged to provide lip service to compliance but yet think that non-compliance is acceptable.

Given that CIA personnel are not generally subject to the UCMJ, possibly not even when accompanying the armed forces in the field, special procedures should be available to provide reasonable assurance that compliance with CAT is being taught and maintained by intelligence agencies. That assurance might best be provided by the applicable committees of the Congress exercising oversight responsibility in conjunction with the inspectors general of the applicable agencies.

2. Prompt Investigation of Violations. As required by Article 12 of CAT, the U.S. must ensure that allegations of abusive conduct are taken seriously and are fully and impartially investigated. Thus, any individual who alleges that he or she has been subjected to torture must be provided with a meaningful opportunity to complain to, and to have his/her case promptly and impartially examined by, competent authorities. Steps must be taken to ensure that the complainant and witnesses are protected against all ill-treatment and intimidation.

3. Expand the Scope and Reach of Section 2340. Consistent with its obligation under Article 4 of CAT to ensure that all acts of torture are offenses under its criminal law—and since 18 U.S.C. § 2340 does not, by its terms, apply to acts constituting torture committed in extraterritorial detention centers under U.S. jurisdiction—the U.S. must expand the geographic reach of Section 2340 so that the prescriptions of CAT are applicable at all U.S. detention centers.

4. Fully Utilize the UCMJ. The U.S. must more fully utilize the procedures and protections available under the UCMJ to prosecute all violations of CAT by the armed forces or others subject to the UCMJ.

22. CAT, Art. 11.
23. Id., Art. 12.
24. Id., Art. 4.
5. Independent Investigation of Human Rights Compliance in Other Countries. As provided by Article 3 of CAT, the U.S. must not “render” detainees to other countries where there are substantial grounds for belief that the detainees would be in danger of being subjected to torture. In determining whether there are “substantial grounds for belief” that a detainee would be in danger of torture if rendered to another country, U.S. authorities must take into account all the relevant considerations concerning that country, including independently investigating whether there exists a consistent pattern of gross, flagrant or mass violations of human rights in the country.

6. Grant POW Status to Detainees Whose Status is in Doubt and Possibly as a Matter of Policy. The U.S. should adhere to Geneva III's requirement that any detainee whose POW status is in “doubt” is entitled to POW status—and, therefore, cannot be subjected to coercive treatment—until a “competent tribunal,” which must be convened promptly, determines otherwise. We urge the U.S. to consider the policy grounds for extending POW treatment to regular force combatants, whether or not legally required to do so, as it has done in prior conflicts.

7. Prompt Screening and Hearings for All Detainees. In keeping with the spirit of the Geneva Conventions and human rights law, we urge the U.S. to provide proper screening procedures and hearings to all detainees.

We now turn to a more detailed discussion of the international standards applicable to interrogation procedures.

I. THE CONVENTION AGAINST TORTURE

The U.N. Convention Against Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment ("CAT") is the primary source of international law relevant to the treatment of detainees.\(^{29}\) CAT has been ratified by the U.S., and its prohibitions against torture and cruel, inhuman or degrading treatment or punishment have been implemented in our domestic law.

Specifically, U.S. law implements CAT’s prohibition against torture in the immigration and asylum contexts, under the Alien Tort Claims and Torture Victim Protection Acts, by criminal statute and under the UCMJ. Under CAT, the U.S. is also obligated to prevent “cruel, inhuman or degrading treatment or punishment” as defined in international law; however, by express reservation, the U.S. interprets this obligation in keeping with standards of treatment required by the Fifth, Eighth and Fourteenth Amendments. Accordingly, under CAT, American military and intelligence personnel involved in the interrogation of detainees may not torture those detainees, nor may they subject them to cruel, inhuman or degrading treatment that is, or would be, forbidden under the Fifth, Eighth and/or Fourteenth Amendments.

A. CAT’s Definitions of—and Prohibitions against—Torture and Cruel, Inhuman or Degrading Treatment

CAT defines and prohibits torture, as defined, and cruel, inhuman or degrading treatment or punishment in general terms. In addition, it also sets out steps ratifying countries must take to prevent, investigate, and criminalize acts of torture;\(^ {30}\) prohibits the extradition or other rendering (also known as “refoulement”) of a person to a country that would likely subject such person to torture;\(^ {31}\) creates a Committee to oversee the implementation of CAT by ratifying countries; and sets forth procedures for inquiries, individual communications, and inter-State complaints.

CAT’s preamble acknowledges that torture and other cruel, inhuman or degrading treatment or punishment are already prohibited under Article 5 of the Universal Declaration of Human Rights and Article 7 of the ICCPR. Thus, rather than simply mirroring the prohibitions from these instruments, Article 1 of CAT provides additional guidance to states par-

\(^{29}\) Supra note 13.

\(^{30}\) Id. Article 4.1 states: “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”

\(^{31}\) Id. Article 3.1 states: “No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”
ties in preventing and punishing torture by setting forth an explicit definition of torture:

...torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This definition makes it clear that the result of torture need not be physical pain or suffering, but can also be mental. In addition, torture is defined to include such conduct undertaken for the purpose of obtaining information. Finally, the prohibition is not directed at private citizens, acting independently of government; it applies rather to acts committed by government officials and agents, or persons acting with official consent or acquiescence.

CAT's prohibition of torture is absolute. An order from a superior officer or a public authority may not be invoked as a justification of torture. Specifically, Article 2(2) provides: "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."

Although CAT does not provide a definition of CID punishment or treatment, Article 16 requires ratifying countries to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture...." This language suggests that cruel, inhuman or degrading treatment is on a continuum with torture.

CAT requires each signatory state to prevent the commission of the prohibited acts within any territory under the state's jurisdiction. Specifically, each ratifying country must ensure that any official who may be involved in the interrogation of anyone under any form of detention or imprisonment is informed of and educated about the prohibitions against torture and cruel, inhuman or degrading treatment. CAT also requires each ratifying country to ensure that allegations of torture and CID treatment are fully and impartially investigated. See CAT Articles 12 and 16(1).
B. CAT’s Prohibition against Torture and CID Treatment as Interpreted by the U.N. Committee Against Torture

The U.N. Committee Against Torture, created by CAT, is charged with monitoring implementation of the treaty by ratifying countries through the determination of individual complaints, considering country reports submitted under CAT, and resolving inter-State disputes. Given the importance of international standards in interpreting U.S. domestic law as well as the recent Lawrence v. Texas decision, in which the U.S. Supreme Court expressly looked to foreign and international law for guidance, U.N. Committee decisions are relevant to the assessment of whether the actions of U.S. personnel involved in the interrogation of detainees constitute torture or cruel, inhuman or degrading treatment.

The U.N. Committee has concluded that the following acts constitute torture under CAT:

- daily beatings and detaining someone in a small, uncomfortable space for two weeks;
- forcing someone to sleep on the floor of a cell while handcuffed following interrogation;
- in severe cases, sleep deprivation;
- the threat of torture.

32. See Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (a statute “ought never to be construed to violate the law of nations, if any other possible construction remains”). See also United States v. P.L.O., 695 F. Supp. 1456, 1468 (S.D.N.Y. 1988) (noting “the lengths to which our courts have sometimes gone in construing domestic statutes so as to avoid conflict with international agreements…”).


34. This list is by no means comprehensive. Practices were selected for inclusion here because of their similarity to the practices allegedly used by U.S. agents with respect to detainees held in connection with the War in Afghanistan and the ongoing conflict in Afghanistan. The findings and concluding observations of the Committee Against Torture are available at http://www.unhchr.ch/tbs/doc.nsf.


Furthermore, the U.N. Committee has recommended that the use of a blindfold during questioning be expressly prohibited. More generally, the U.N. Committee has expressed concern that States have defined torture too narrowly, covering only “systematic blows or other violent acts.” The U.N. Committee has also expressed concern whether the penal law of one State was too narrow in defining torture because it failed to prohibit “certain aspects of torture, such as psychological pressure, threats and intimidation.”

The U.N. Committee has found that the following acts amount to cruel, inhuman or degrading treatment or punishment under CAT:

- depriving someone of food and/or water;
- in some cases, binding someone in a restraint chair;
- the use by prison authorities of instruments of physical restraint that may cause unnecessary pain and humiliation; and
- long periods of detention (two weeks or more) in detention cells that are sub-standard (this conduct may amount to torture if the period of detention is extremely long).

The U.N. Committee has found that the following acts may amount to torture when used in combination with other forms of CID:

- being restrained in very painful conditions;
- being hooded;
- the sounding of loud music for prolonged periods;

45. Supra note 36.
• sleep deprivation for prolonged periods;
• violent shaking; and
• using cold air to chill.46

In sum, the U.N. Committee Against Torture has indicated that the classification of treatment as CID or torture is often a matter of severity, intensity, and the totality of the circumstances. Combining several forms of cruel, inhuman or degrading treatment will frequently amount to torture, and ratifying countries are required under CAT to refrain from all such practices, whether they reach the level of severity to be considered torture or not. Thus, according to U.N. Committee jurisprudence, alleged interrogation practices such as forcing detainees to stand or kneel for hours in black hoods or spray-painted goggles, 24-hour bombardment with lights, binding detainees in painful positions, withholding painkillers from wounded detainees, and subjecting detainees to loud noises and sleep deprivation, at a minimum, constitute cruel, inhuman or degrading treatment and may, depending on the circumstances, rise to the level of torture. U.N. Committee decisions critical of blindfolding, psychological pressure and threats and intimidation strongly suggest that “false-flag” operations meant to deceive detainees about their whereabouts and “stress and duress” interrogation techniques are also prohibited.

C. U.S. Law Implementing CAT’s Prohibitions against Torture and Cruel, Inhuman or Degrading Treatment or Punishment

The Senate adopted a resolution of advice and consent to U.S. ratification of CAT, subject to the declaration that it be deemed non-self-executing, on October 27, 1990.47 The U.S. ratified CAT in October 1994,

46. These techniques were found by the Committee to constitute “breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case.” Concluding Observations concerning Israel (1997), U.N. Doc. No. A/52/44, at para. 257.


and CAT entered into force with respect to the United States on 20 November 1994. The implementation in U.S. immigration, extradition, criminal and civil tort law of CAT’s prohibition against torture, as well as the express application of U.S. constitutional standards to CAT’s prohibition against CID treatment, indicates that many of the interrogation practices allegedly being used by the U.S. against detainees may be prohibited under international and U.S. law.

1. U.S. Understandings and Reservations in Ratifying CAT

The United States conditioned its ratification of CAT upon certain understandings related to CAT’s definition of torture in Article 1. In one such understanding, the U.S. specified that mental pain or suffering within the meaning of “torture” refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality.

Another U.S. understanding pertains to defects in criminal procedure: non-compliance with applicable legal procedural standards (such as Miranda warnings) does not per se constitute “torture.”

When ratifying CAT, the United States also took the following reservation: “the United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.”

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48. See Ratification Status for CAT, United States of America (available at www.unhchr.ch).
51. Under international law, reservations are invalid if they violate the "object and purpose"
2. The Implementation of CAT’s Prohibition against Torture in U.S. Legislation, Regulation and Case Law

CAT’s prohibition of official acts amounting to torture has been implemented in the United States through legislation, regulations and case law pertaining to, inter alia, (1) immigration, (2) claims of torture in removal and extradition proceedings, (3) criminal sanctions for torture, and (4) tort claims alleging torture. Through the application of these implementing laws and regulations, U.S. courts have interpreted CAT’s substantive provisions in a variety of contexts.52

(a) U.S. Immigration Law and Torture

As previously noted, all countries that ratify CAT are obligated to ensure that detainees are not deported or extradited to countries where they are likely to be tortured. In 1998, the United States enacted the Foreign Affairs Reform and Restructuring Act of 1998, § 2242, Pub. L. No. 105-277, Div. G, 112 Stat. 2681, 2681-822 (Oct. 21, 1998) (the “FARR Act”), implementing this obligation. In 1999, the Immigration and Naturalization Service (“INS”) promulgated regulations effectuating the FARR Act in the immigration and asylum context, providing aliens in exclusion, deportation or removal proceedings with grounds to seek withholding of removal based on CAT. See 8 C.F.R. § 208.18 (2004), et seq. These regulations incorporate CAT’s definition of torture verbatim, with the following qualification: “Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.” See 8 C.F.R. § 208.18(a)(2) (2004). These regulations further define mental pain or suffering consistently with the U.S. understandings to CAT, and exclude from the definition of torture acts which result in “unanticipated or unintended severity of pain and suffering.” See 8 C.F.R. § 208.18(a)(5) (2004).

A number of federal court cases and Board of Immigration Appeals (“BIA”) decisions address torture claims in the immigration context. The BIA has held that the following abuses of detainees and prisoners, for example, amount to torture: “suspension for long periods in contorted
positions, burning with cigarettes, sleep deprivation, and...severe and repeated beatings with cables or other instruments on the back and on the soles of the feet,’...beatings about the ears, resulting in partial or complete deafness, and punching in the eyes, leading to partial or complete blindness.” Matter of G-A-, 23 I & N Dec. 366, 370 (BIA 2002) (internal citations omitted). Furthermore, persons seeking asylum or withholding of removal have successfully challenged deportation under Sections 208 and 241(b)(3) of the Immigration & Nationality Act (“INA”) when they have a well-founded fear of future persecution. Although “persecution” is not defined in the INA, it is understood to encompass treatment falling short of torture.

(b) U.S. Extradition of Fugitives Who Face Threat of Torture

In the extradition context, torture claims are governed by regulations enacted by the Department of State under the FARR Act. Under these regulations, individuals sought for extradition may present a claim that they are likely to be tortured if surrendered to the requesting state. These claims are considered by the U.S. Secretary of State, who is responsible for implementing CAT’s obligation not to extradite an individual to a State where he or she is in danger of being subject to torture. Specifically, section 95 of 22 C.F.R. (2004) provides, in relevant part, that the Secretary of State must consider whether a person facing extradition from the U.S. “is more likely than not” to be tortured in the State requesting extradition, and that appropriate policy and legal offices must review and analyze the information relevant to the torture allegation. The extradition regulations, and the decisions interpreting them, demonstrate that U.S. administrative bodies and courts view CAT’s prohibition against extradition to torture as binding on the U.S. even when the extraditable individual is accused of wrongdoing.

53. This had also been the position of the Ninth Circuit. See Al-Saher v. INS, 268 F.3d 1143 (9th Cir. 2001) (holding that severe beatings and cigarette burns sustained over periods of days, weeks and months constitutes torture). More recently, however, the Ninth Circuit has held that neither serious persecution (e.g., threats, unjust charges, fines, illegal searches and seizures) nor verbal abuse alone amount to torture. See Gui v. INS, 280 F.3d 1217 (9th Cir. 2002); Quant v. Ashcroft, 2003 U.S. App. LEXIS 6616 (9th Cir. 2003).

54. See, e.g., Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1016-17 (9th Cir. 2000) (individuals certified as extraditable by the Secretary of State who fear torture may petition for judicial review of the Secretary’s decision using CAT standards protecting against non-refoulement); Mu-Xing Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003) (following Cornejo-Barreto’s holding that habeas review is available for CAT claims, but in the context of removal); Ogbudimkpa v. Ashcroft, 342 F.3d 207 (3d Cir. 2003) (same).
(c) U.S. Implementation of CAT’s Criminal Law Requirements

18 U.S.C. §§ 2340 and 2340A were enacted to fulfill CAT’s requirement that each ratifying country criminalize all acts of torture, including attempts to commit torture and complicity in torture. Section 2340 defines torture as:

an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.

“Severe mental pain or suffering” is also defined, using the same wording as the U.S. understandings concerning Article 1 of CAT set forth in Section I(C)(1) above. See 18 U.S.C. § 2340. As discussed further below, however, this statute applies only to U.S. nationals (or others present in the U.S.) who have committed or attempted or conspired to commit acts of torture “outside of the United States.”

(d) U.S. Case Law Interpretations of Torture in Tort Claims

Two U.S. statutes provide for civil suits against those who commit acts of torture abroad. The Alien Tort Claims Act of 1789 (“ATCA”), 28 U.S.C. § 1350, states that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The Torture Victim Protection Act of 1991 (“TVPA”), 28 U.S.C. § 1350, provides that:

[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual;


56. A restrictive interpretation of the scope of the statute is found in the U.S. Dept. of Justice, Criminal Resource Manual 20 (Oct. 1997), which provides: “Section 2340A of Title 18, United States Code, prohibits torture committed by public officials under color of law against persons within the public official’s custody or control. . . . The statute applies only to acts of torture committed outside the United States. There is Federal extraterritorial jurisdiction over such acts whenever the perpetrator is a national of the United States or the alleged offender is found within the United States, irrespective of the nationality of the victim or the alleged offender.”
or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.\(^{57}\)

The TVPA extends a civil remedy to U.S. citizen torture victims, while the ATCA provides a remedy for aliens only.


(e) Conclusion: CAT's Prohibition against Torture as Implemented in U.S. Legislation and Regulation

U.S. domestic laws prohibiting, or providing a cause of action to victims of, torture are consistent with the standards of CAT. However, these U.S. statutes and regulations are limited to specific contexts—such as, refugee claims, extradition of foreign fugitives, criminalizing acts of torture committed outside the U.S. by U.S. officials, and providing compensation to victims of torture committed by aliens. Accordingly, the U.S. has yet to fulfill its obligation, under CAT, to enact laws which adequately prevent U.S. officials and individuals acting with their consent from subjecting any detainee to torture and which punish such conduct wherever it occurs.

3. CAT's Prohibition against “Cruel, Inhuman or Degrading Treatment,” as Interpreted by United States Law

As previously noted, the U.S.'s reservation to Article 16 of CAT provides that the United States considers itself bound by Article 16 only insofar as CID treatment is understood to mean “the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments.”

\(^{57}\) See S. Rep. No. 102-249 (1991) (stating that the TVPA would “carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990”).
The Senate Foreign Relations Committee report states that this reservation is the outgrowth of concern that “degrading treatment or punishment . . . has been interpreted as potentially including treatment that would probably not be prohibited by the U.S. Constitution” and cites, as an example of what the United States would not find “degrading” under the U.S. Constitution, a holding by the European Commission of Human Rights that the refusal of authorities to give formal recognition to an individual’s change of sex might constitute degrading treatment.58 This explanation suggests that the reservation was intended to prevent the importation of foreign social values or mores into U.S. law, rather than any view that international norms of CID treatment are out of step with U.S. law.

In assessing interrogation conduct under Article 16 of CAT, the U.S. should look to international standards defining cruel, inhuman or degrading treatment. If such conduct is prohibited under international law, the U.S. is bound to prevent such conduct unless it would not be prohibited under the Fifth, Eighth and Fourteenth Amendments. The Committees take note that much of the case law under the three Amendments arises in the context of domestic criminal justice proceedings. How this jurisprudence would be applied in a case relating to the detention and interrogation of foreign combatants is not completely clear. For instance, on the one hand some of the special protections provided in the American criminal justice system with respect to interrogations would be of doubtful applicability, particularly considering an asserted state interest in national security. On the other, the absence of a legitimate state interest in punishment might mandate a higher standard of treatment of detainees generally.

(a) Fifth and Fourteenth Amendment Standards

The Constitution’s guarantee of due process forbids compulsion to testify, at least for domestic law enforcement purposes, by fear of hurt, torture or exhaustion. See Adamson v. California, 332 U.S. 46 (1947) (armed Texas Rangers on several successive nights took defendant from county jail into the woods, whipped him, asked him each time about a confession, interrogated him from approximately 11 p.m. to 3 a.m. and warned him not to speak to anyone about the nightly trips); Brown v. Mississippi, 58. See Report of the Committee on Foreign Relations, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 25 (1990) (statement of M r. Pell) (citing Case of X. v. Federal Republic of Germany (No. 6694/74)).
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297 U.S. 278 (1936) (confessions obtained by mock executions and whip-pings); Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (defendant was taken into custody by police officers and for 36 hours thereafter was held incommunicado, without sleep or rest, and interrogated without respite by relays of officers, experienced investigators, and highly trained lawyers); see also Ashcraft v. Tennessee, 327 U.S. 274 (1946). However, the presence of unlawful police coercion motivated by “immediate necessity to find the victim and save his life” to extract a confession has been found by one appeals court to be insufficient to exclude a subsequent confession.59

Due process also prohibits actions taken under color of law that are “so brutal and offensive to human dignity” that they “shock the conscience.”60 The Supreme Court has given content to the phrase “shocks the conscience” by reference to the spectrum of fault standards in tort law. Intentional infliction of injury unjustifiable by any government interest is the sort of official action which could rise to the conscience-shocking level.61 All applicable sources of law are consistent in prohibiting such extreme conduct.

(b) Eighth Amendment Standards

The Eighth Amendment prohibits “cruel and unusual punishments.”62 In the context of law enforcement, U.S. courts have long held that the norms articulated under the Cruel and Unusual Punishment Clause establish a minimum level of protection, applicable even to pretrial detainees.63

While the Supreme Court initially interpreted the Eighth Amendment as prohibiting only barbaric or torturous punishments, this interpretation was early broadened in two respects: (i) to prevent disproportionate

59. Leon v. Wainwright, 734 F.2d 770 n.5 (11th Cir. 1984) (kidnapping conviction confirmed based on a confession obtained following a prior coerced confession).
62. The UCMJ, discussed below, provides that no “cruel or unusual punishment” may be adjudged by any court-martial or inflicted upon any person subject to the UCMJ (10 U.S.C.S. § 855). In general, military courts have applied the Supreme Court’s interpretation of the Eighth Amendment to claims raised under this provision. See, e.g., United States v. Avila, 53 M.J. 99, 2000 CAAF LEXIS 569 (C.A.A.F. 2000). Thus, under the UCMJ, POWs and persons who under the law of war are subject to trial for military offences by a military tribunal are not to be punished in a cruel or unusual manner, within the meaning of the Eighth Amendment.
63. City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983). See also County of Sacramento v. Lewis, 523 U.S. 833, 849-50 (1998) (citation omitted) (“We held in City of Revere v. Massachusetts Gen. Hospital that ‘the due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner’”).
punishments (Weems v. United States, 217 U.S. 349 (1910)) and (ii) to address non-physical forms of cruel and unusual punishment (e.g., Trop v. Dulles, 356 U.S. 86 (1958) (in case involving denationalization as a punishment for desertion from the United States Army, the Court noted that “evolving standards of decency that mark the progress of a maturing society” should inform interpretation of the Eighth Amendment)). In 1947, the Supreme Court recognized that wanton or unnecessary infliction of pain also constitutes cruel and unusual punishment. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947).

In cases brought by prisoners under the Eighth Amendment alleging that excessive force was used against them by government officials, courts consider both the objective component (whether the wrongdoing was “harmful enough” to implicate the Eighth Amendment) and the subjective component (whether the officials acted with a sufficiently culpable state of mind) of the challenged conduct. Hudson v. McMillian, 503 U.S. 1, 8 (1992). In order to establish that the objective component of an Eighth Amendment violation is satisfied, a prisoner need not prove he has sustained significant injury. However, the extent of injury suffered is one factor that may suggest “whether the use of force could plausibly have been thought necessary” in a particular situation, “or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.”64 The subjective component involves, in the context of force used by prison officials, “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.”65

D. Enforcement of CAT under U.S. Law
1. 18 U.S.C. §§ 2340-2340B

As stated above, the United States’ attempt to comply with its obligation under CAT to criminalize torture is codified in 18 U.S.C. § 2340A. Section 2340A criminalizes conduct by a U.S. national or a foreign national present in the U.S. who, acting under color of law, commits or attempts to commit torture outside the United States. The statute is exclusively criminal and may not be construed as creating any right enforceable in a civil proceeding. See 18 U.S.C., § 2340B. Section 2340A generally applies to acts committed by U.S. nationals overseas (everywhere except

“all areas under the jurisdiction of the United States, including any of the places described in sections 5 and 7 of this title and Section 46501(2) of Title 49.”) When the Section was enacted the reach of the cross-referenced provisions, notably 18 U.S.C. § 7, was uncertain.66 However, Section 7 was broadened in the USA PATRIOT Act to clarify jurisdiction over crimes committed against U.S. citizens on U.S. property abroad by extending U.S. criminal jurisdiction over certain crimes committed at its foreign diplomatic, military and other facilities, and by cross-reference excluded those places from the reach of Section 2340A. The resulting drastic limitation of jurisdiction under 18 U.S.C. § 2340A appears unintended. We recommend that Congress amend Section 2340A to assure that it applies to U.S. government premises abroad without prejudice to the expansion of U.S. criminal jurisdiction under other statutes.

The U.S. did not enact a specific criminal statute outlawing torture within the United States, out of deference to federal-state relations and because it determined that existing federal and state criminal law was sufficient to cover any domestic act that would qualify as torture under CAT.67 It is submitted that the inapplicability of state law to U.S. facilities abroad and the lack of other federal criminal law comparable to Section 2340A leaves a serious vacuum in carrying out the obligations of the U.S. under CAT.

Unfortunately the U.S. has never enforced 18 U.S.C. § 2340A, and has thereby fallen far short of its obligations under international law and its professed ideals. The United States has failed to utilize 18 U.S.C. § 2340A to prosecute either U.S. agents suspected of committing torture outside the jurisdiction of the U.S. or foreign torturers living within the United States. Indeed, Amnesty International reported in 2002 that in the eight years following the enactment of 18 U.S.C. § 2340 and § 2340A, not a single case had been brought under that section.68

66. Compare U.S. v. Gatlin, 216 F.3d 207 (2d Cir 2000) with U.S. v. Corey, 232 F.3d 1166 (9th Cir 2000). However, the question was substantially mooted for most purposes by the passage of the Military Extraterritorial Jurisdiction Act of 2000, Pub. L. 106-503, 112 Stat. 2488, which subjects persons accompanying the armed forces abroad to U.S. civilian criminal jurisdiction, even if outside the “special maritime and territorial jurisdiction.”


2. Uniform Code of Military Justice

The UCMJ may be used to prosecute in courts-martial certain acts of ill-treatment carried out, whether within the United States or overseas, by American military personnel and possibly certain civilians accompanying such personnel. This federal statute is essentially a complete set of criminal laws that includes both crimes that are normally part of a criminal code as well as uniquely military and wartime offenses.

As a jurisdictional matter, the UCMJ applies worldwide (10 U.S.C. § 805), and persons subject to the UCMJ include any U.S. service member (10 U.S.C. § 802) as well as certain civilians “[i]n time of war ... serving with or accompanying an armed force in the field” (10 U.S.C. § 802(a)(10)) and POWs (10 U.S.C. § 802(a)(9)). Because courts-martial have jurisdiction to try “any person who by the law of war is subject to trial by a military tribunal” for any offense against the laws of war (10 U.S.C. § 818), the UCMJ would seem to apply also to “unlawful combatants” deemed by the Administration not to qualify for POW status under Geneva III.

The broad statutory application of the UCMJ to civilians associated in various ways with the armed forces has been judicially limited in deference to the requirements of Article III, Section II, of the Constitution and the Fifth and Sixth Amendments protecting the right to trial by jury. As so limited, the UCMJ does not apply to civilians who have no military status in peacetime, even if they are accompanying United States forces overseas as employees or dependents. Although courts’ interpretations of the terms “serving”, “accompanying” and “in the field” suggest a broad application, the “time of war” requirement is construed narrowly when applied to civilians.

As recently as 1998, the Court of Appeals for the Armed Forces analyzed the propriety of the application of the UCMJ to civilians and stated:

69. The UCMJ does not define the term POW. Thus it is uncertain whether POW in the UCMJ has the same meaning as in Geneva III.

70. United States v. Averette, 19 U.S.C.M.A. 363, 365-66, 41 C.M.R. 363, 365-66 (1970) (the phrase “in time of war” is limited to “a war formally declared by Congress”; even though the Vietnam conflict “qualified as a war as that word is generally used and understood[,] ... such a recognition should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction”). Cf. United States v. Anderson, 17 U.S.C.M.A. 588, 589, 38 C.M.R. 386, 387 (1968) (United States’ involvement in Vietnam conflict “constitutes a ‘time of war’ . . . within the meaning of” Article 43(a) of the UCMJ, which provides that there is no statute of limitations over certain offenses committed “in time of war”).

71. The Court of Appeals for the Armed Forces (formerly the Court of Military Appeals) is a civilian Article I court hearing appeals from the intermediate appellate courts for each of the Army, Navy (and Marines) and Air Force, subject to possible appeal to the United States Supreme Court.
As a matter of constitutional law, the Supreme Court has held that Congress may not extend court-martial jurisdiction to cover civilians who have no military status in peacetime, even if they are accompanying United States forces overseas as employees or dependents.

Willenbring v. Neurauter, 48 M.J. 152, 157, 1998 CAAF LEXIS 43 (C.A.A.F. 1998). The line of cases in this area generally focuses on the application of the UCMJ to civilian contractors and civilian dependents of service members. See, e.g., Robb v. United States, 456 F.2d 768 (Ct. Cl. 1972) (civilian engineer employed by U.S. Navy in Vietnam was not subject to UCMJ); Reid v. Covert, 354 U.S. 1 (1957) (no jurisdiction over civilian dependents of service members stationed overseas in peacetime for capital offenses). No cases directly address whether CIA operatives conducting para-military operations with the regular armed forces or interrogations within a military base are considered civilians for purposes of UCMJ application. In Reid v. Covert, the Supreme Court stated, “[e]ven if it were possible, we need not attempt here to precisely define the boundary between ‘civilians’ and members of the ‘land and naval Forces.’ We recognize that there might be circumstances where a person could be ‘in’ the armed services . . . even though he had not formally been inducted into the military or did not wear a uniform.” See 354 U.S. at 22. 72 In any event, where a CIA operative is a detached service member who has not been formally discharged from military service (as is often the case in practice), the UCMJ would generally apply to such person in time of war or peace.

The UCMJ provides the strongest substantive basis for potential prosecution of torture or CID treatment in federal criminal law, specifically outlawing cruel or unusual punishment, torture under 18 U.S.C. § 2340 and a variety of related offenses. Article 55 of the UCMJ provides that:

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

10 U.S.C. § 855. 73 Article 55 is unique in its specific definition of “cruel

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72. As previously noted, the Military Extraterritorial Jurisdiction Act of 2000, see supra note 66, eliminated any gap in jurisdiction resulting from Reid v. Covert by conferring jurisdiction on federal courts over civilians accompanying the armed forces abroad.
73. The protections of Article 55 apply to “any person subject to” the UCMJ. And as stated previously, the UCMJ would seem to apply to unlawful combatants under 10 U.S.C. § 818.
or unusual punishment” as a standard of treatment.74 While most military courts have followed the Supreme Court’s analytical framework of protections under the Eighth Amendment as they pertain to cruel and unusual punishment,75 several military courts have found that Article 55 provides greater protections than those given under the Eighth Amendment.76 It is notable that Article 55 applies at least the equivalent of the protection afforded by the Eighth Amendment even if the victim is not otherwise entitled to constitutional rights (e.g., a non-citizen apprehended and detained outside the U.S. and arguably not entitled to such rights).77

Moreover, the UCMJ effectively provides a basis for the prosecution of military personnel in courts-martial for the offense of torture in violation of 18 U.S.C. § 2340. Article 134 of the UCMJ (10 U.S.C. § 934) provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the UCMJ: Clause 1 offenses involving disorders and neglect to the prejudice of good order and discipline; Clause 2 offenses involving conduct of a nature to bring discredit upon the armed forces; and Clause 3 offenses entailing non-capital crimes or offenses that violate Federal law.

74. The Articles of War preceding the UCMJ prohibited “cruel and unusual punishment,” but the phrase was changed to “cruel or unusual punishment” in Article 55 (emphasis added). See Articles of War 41, Manual for Courts-Martial, U.S. Army, 1929 at 212, and 1949 at 284. The legislative history of Article 55 provides no rationale why the word “and” was changed to “or.” United States v. White, 54 M.J. 469, 2001 CAAF LEXIS 497 (C.A.A.F. 2001).


77. Compare the federal criminal civil rights statutes, 18 U.S.C. §§ 241 and 242, and the civil statute 42 U.S.C. § 1983, all of which apply only where the victim is entitled to constitutional rights.
In order to successfully charge an individual under Clauses 1 and 2 of this Article, the government must show: (i) that the accused did or failed to do certain acts; and (ii) that, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Under Clause 1, the acts must be directly prejudicial to good order and discipline, rather than remotely so. Under Clause 2, discredit is interpreted to mean “injure the reputation of,” and encompasses conduct that brings the service “into disrepute or which tends to lower it in public esteem.” With respect to Clause 3 offenses, as a general rule, any offense created by Federal statute may be prosecuted as an Article 134 offense. United States v. Perkins, 47 C.M.R. 259 (Ct. of Mil. Rev. 1973).

Thus, a service member whose conduct is alleged to violate 18 U.S.C. § 2340, the federal enactment of CAT, could be prosecuted under Article 134 of the UCMJ, as a Clause 3 violation. Moreover, multiple counts alleging Article 134 violations also could be brought in such a situation, as such conduct could be construed as prejudicial to good order and discipline and/or of a nature to bring discredit upon the armed forces. Perkins, 47 C.M.R. at 263-264.

Finally, criminal charges for torture or CID conduct could be brought under a variety of other provisions including “cruelty.” The last of these

79. Manual, Paragraph 60.c (3).
80. According to the Manual, however, the doctrine of preemption “prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny type offense, either under Article 121 or, because of preemption, under Article 134.” Manual, Paragraph 60.c (5)(a). In effect, Article 134 may not be employed to salvage a charge where the charge could not be sustained under the substantive offense provisions of the UCMJ or Federal statute. Accordingly, conduct which violated Article 55 discussed above or any other substantive provision of the UCMJ could not be charged under Article 134. These remain alternative, not cumulative provisions.
82. See Article 93 of the UCMJ (10 U.S.C. § 893). Two Marines face charges for assault,
offenses is generally intended to be applied to mistreatment of U.S. service members by their superiors, but by its terms it is not so limited and has been applied to intentional mistreatment of detainees. And in instances where specific orders are in place regarding the treatment of detainees, as is recommended in this Report, failure to obey such orders is punishable under 10 U.S.C. § 892. A number of service members in Iraq are or have been investigated or tried for assaulting detainees, under the assault provision of the UCMJ (Article 128), and in at least one case the alleged assault occurred in the context of an interrogation.

The UCMJ is thus the substantively most extensive body of federal criminal law relating to the interrogation of detainees by U.S. military personnel and, in time of war, its reach could possibly extend to civilians such as CIA agents accompanying such personnel. It prohibits such persons from subjecting detainees to torture and “cruel or unusual punishment” within or without the United States and regardless of the applicability of constitutional rights.

E. Summary

CAT’s prohibition against torture is absolute. By ratifying CAT, the

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83. Article 93 prohibits a person subject to the jurisdiction of the UCMJ from committing acts of “cruelty toward, or oppression or maltreatment of, any person subject to his orders.” The phrase “any person subject to his orders” in Article 93 is defined as: “not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the...[UCMJ] or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.” Manual for Courts-Martial, United States, (1995 edition), Part IV, P 17c(1).

84. An officer in Iraq was charged under Article 28 (10 U.S.C. § 928) for firing his pistol near an Iraqi detainee’s head in the course of an interrogation in order to elicit details about a planned ambush or assassination. Thomas E. Ricks, Amy Accuses Officer In Iraq Of Firing Pistol Near Prisoner, WASH. POST, Oct. 30, 2003, at A14. The officer faced a possible court-martial and up to eight years imprisonment. Following a UCMJ Article 32 hearing (which is akin to a grand jury or preliminary hearing), the division’s commanding general ordered that the officer be fined and allowed to retire. See U.S. Officer Fined for Harsh Interrogation Tactics (Dec. 13, 2003) (available at http://www.cnn.com/2003/US/12/12/spriq.west.ruling).
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The United States has accepted that the prohibition of torture is non-derogable. Moreover, by implementing prohibitions against torture in immigration, extradition, criminal and civil tort law contexts, the U.S. has given CAT’s prohibition against torture the force of U.S. law. Furthermore, by stipulating that CAT’s prohibition on CID treatment or punishment means the cruel and unusual treatment or punishment prohibited by the U.S. Constitution, the U.S. has made relevant the case law providing that detainees cannot be subjected to interrogation techniques: that force them to answer law enforcement questions by “fear of hurt, torture or exhaustion,” Adamson v. California, supra; that are “brutal and offensive to human dignity,” Rochin v. California, supra; that fall below the “evolving standards of decency that mark the progress of a maturing society,” Trop v. Dulles, supra; or which deliberately inflict force or pain (in the context of restoring prison order or safety), Hudson v. McMillian, supra. However, U.S. enforcement of CAT in our domestic criminal law—particularly with respect to acts of torture or CID treatment by U.S. civilians or by U.S. officials in extra-territorial areas under U.S. jurisdiction—has been incomplete. We urge the U.S. to fill in the gaps in preventing and punishing torture and CID treatment left by 18 U.S.C. § 2340A and to fully utilize the UCMJ to fulfill its obligations under CAT.

II. THE GENEVA CONVENTIONS

The four Geneva Conventions of 1949 are the core of the international law of armed conflict applicable to the treatment of detainees, albeit not the complete body of applicable law. The applicability of the Geneva Conventions to persons captured by the United States in connection with the War in Afghanistan and the ongoing conflict in Afghanistan, however, is highly controversial. The most hotly contested issue is whether those Al Qaeda and Taliban detainees who were captured before the creation of the Karzai government are entitled to POW status under Geneva Convention III Relative to the Treatment of Prisoners of War (“Geneva III”). This issue is of particular significance because Geneva III flatly prohibits “any form of coercion” of POWs in interrogation—the most protective standard of treatment found in international law. Likewise, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (“Geneva IV”) protects “civilian” detainees who qualify as “protected persons” from “coercion.” We also should note that the

85. See Section II(C) for a discussion of who qualifies as a “protected person” under Geneva IV.
issues regarding Geneva III and Geneva IV are affected by whether the person was detained either before or after the Karzai government was established. Before the Karzai government, the U.S. was engaged in an international armed conflict with Afghanistan, which was governed by the Taliban (albeit the U.S. did not recognize that government). After the establishment of the Karzai government, the conflict in Afghanistan became an internal one—as the U.S. and other international organizations were present in Afghanistan with the consent of the Karzai government to assist in maintaining order. Geneva III and Geneva IV apply only in situations of international armed conflict and, therefore, ceased to apply once the Afghan conflict became an internal one. See Geneva IV, Art. 6.

In this section, we will examine the Administration’s position that Al Qaeda and Taliban detainees are not POWs under Geneva III and some critiques of the Administration’s position. We submit that, regardless of whether a detainee enjoys status as a POW or civilian protected person under the Geneva Conventions, the Conventions nevertheless are relevant to the interrogation of detainees in the following respects:

First, the requirements of humane treatment embodied in Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I protect all detainees captured in situations of international or internal armed conflict, regardless of “legal” status. Of course, all detainees—

86. “Common Article 3” provides that detainees “shall in all circumstances be treated humanely” and prohibits the following acts “at any time and in any place whatsoever”: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;” and “outrages upon personal dignity, in particular humiliating or degrading treatment.” Common Article 3 also provides that the “wounded and sick shall be collected and cared for.” Although neither the United States nor Afghanistan is a party to Additional Protocol I, it is generally acknowledged that relevant sections of Protocol I constitute either binding customary international law or good practice, in particular the minimum safeguards guaranteed by Article 75(2). See Michael J. Matheson, Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, reprinted in The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U. J. INT’L L. & POL’Y 415, 425-6 (1987).

Article 75 provides that “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions” “shall be treated humanely in all circumstances” and that each state Party “shall respect the person, honour, convictions and religious practices of all such persons.” Paragraph 2 of Article 75 prohibits, “at any time and in any place whatsoever, whether committed by civilian or military agents”: “violence to the life, health, or physical or mental well-being of persons, in particular . . . torture of all kinds, whether physical or mental,” “corporal punishment,” and “mutilation”;
ing those captured outside of Afghan territory or in connection with the “War on Terror”—are entitled to the protection provided by human rights law, including CAT, the ICCPR and customary international law.

Second, notwithstanding its position on the POW status of Taliban and Al Qaeda detainees, the Administration has undertaken that it will treat all detainees in a manner consistent with the principles of Geneva III. Accordingly, the interrogation techniques reportedly being used on detainees at Bagram and other U.S. detention facilities should be considered in light of the text and spirit of the Geneva Conventions.

Third, if there is doubt as to whether a detainee meets Geneva III criteria for POW status, that detainee is entitled to interim POW status until a “competent tribunal” determines his or her legal status. Because the U.S. government has not convened “competent tribunals” to determine the status of any detainees, all detainees for whom POW status is in doubt are entitled to interim POW status.87

Finally, even accepting the interpretation that the Third and Fourth Geneva Conventions contain gaps leaving certain detainees captured in the War in Afghanistan (i.e., citizens of co-belligerents and neutrals) without POW or “protected person” civilian status, the Geneva Conventions are supplemented by human rights law and customary international legal norms which have the force of law in the United States. For example, even where a detainee may not be entitled to a hearing under Geneva III, he is entitled to a hearing to determine the justification for his detention under Article 9 of the ICCPR. Many detainees may not be combatants at all and may be simply innocent bystanders mistakenly detained or wrongfully turned over to the U.S. military by the Northern Alliance.88 They deserve

“outrages upon personal dignity, in particular humiliating and degrading treatment . . . and any form of indecent assault”; and “threats to commit any of the foregoing acts.”

The U.S. rejection of Additional Protocol I was explained in a presidential note to the Senate in the following terms: “Protocol I. . . . would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations. . . .” See 1977 U.S.T. LEXIS 465.


prompt hearings in which they are given an opportunity to establish their non-combatant status.

**A. Application of the Geneva Conventions to the Afghan Conflict Generally**

Both the U.S. and Afghanistan are parties to the Geneva Conventions. Article 2 common to all four Conventions provides that the Conventions “apply to all cases of declared war or of any other armed conflict” between two or more parties to the Conventions so long as a state of war is recognized by a party to the conflict. The Conventions also apply to all cases of partial or total occupation of the territory of a signatory, even if the occupation meets with no armed resistance. See Geneva Conventions, Art. 2. Signatories to the Conventions are bound by its terms regardless of whether an additional party to the conflict is a signatory. Id. The Administration’s position is that the Geneva Conventions apply to the War in Afghanistan.\(^{89}\)

**B. Geneva III**

1. **Relevant Legal Standards**

Under Geneva III, combatants are entitled to POW status if they are members of the armed forces (other than medical personnel and chaplains). The specific requirements for combatant/POW status are set forth in Article 4 of Geneva III\(^{90}\) and Articles 43 and 44 of Additional Protocol I.\(^{91}\)

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90. Article 4-A of Geneva III provides, in part:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict.
If there is any doubt as to whether captured persons meet Article 4’s criteria for POW status, such persons are entitled to interim POW status until a “competent tribunal” determines their legal status.  

and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.

Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. . . .

91. Article 43 of Additional Protocol I provides: “The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.”

92. See Geneva III, Art. 5; see also, U.S. Dept. of Army, Field Manual 27-10, “Law of Land Warfare”, Art. 71 (1956); U.S. Dept. of Army, Regulation 190-8 Military Police, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” § 1-5(a)(2) (1997). Under U.S. military regulations, a “competent tribunal” pursuant to Article 5 of Geneva III consists of three commissioned officers. The regulations also require that persons whose status is to be determined be advised of their rights; be permitted to attend all open sessions, call witnesses and question witnesses called by the tribunal; be permitted (but not compelled) to testify or otherwise address the tribunal; and be provided with an interpreter.

The regulations provide for the tribunal’s determination of a detainee’s status in closed session by a majority vote and require a preponderance of the evidence to support the tribunal’s finding. See Erin Chlopak, Dealing with the Detainees at Guantánamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions, Hum. Rts. Br., (Spring 2002), at 6, 8.

It should be noted that the “competent tribunal” outlined in Army Reg. 190-8, § 1-6 is a quick, administrative process that is highly dependent upon the availability of witnesses during ongoing combat and support operations. Unsworn statements may be presented as evidence, and a record of the proceedings is developed. Although the tribunal may or may not include military lawyers such as members of the Staff Judge Advocate General (“JAG”), JAG lawyers will subsequently review the record. The record may also be the basis for any further proceedings for war crimes or for any other penalty.

Fundamentally, the tribunal determines only status and does not adjudicate liability. Tribunals are required under Geneva III only when status of the detainee is in doubt. When, for example, ten thousand uniformed members of a regular enemy infantry division surrender as a body, there is no need for a tribunal. When, however, non-uniformed, but possibly military, personnel mix with refugees, that is a classic situation for such tribunals.
Geneva III mandates that POWs be treated humanely at all times. This includes freedom from physical and mental torture, acts of violence, intimidation and insult, and exposure to public humiliation. \textsuperscript{93} Pursuant to Article 14, POWs also “are entitled in all circumstances to respect for their persons and their honour . . . . [and] shall retain the full civil capacity which they enjoyed at the time of their capture.”

With respect to interrogation, in particular, Article 17 of Geneva III provides: “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.” Under Article 17, POWs are only obligated to provide their name, rank, date of birth, and army, personal or serial identification number or equivalent information. Geneva III does not, however, prohibit non-coercive interrogation of POWs. POWs may be interrogated, but they are not obliged to respond to such interrogation, nor may they be threatened, coerced into responding or punished for failing to respond. The Geneva Conventions also do not “preclude classic plea bargaining”—i.e., the offer of leniency or other incentives in return for cooperation. \textsuperscript{94}

Thus, to the extent detainees from the War in Afghanistan are considered POWs or to the extent their POW status is in “doubt” pending the determination of status by a competent tribunal, interrogation tactics which rise to the level of “coercion” are prohibited by Geneva III.

2. The United States’ Position
In sharp contrast with past conflicts (such as Vietnam and Korea) in which it was U.S. policy to presume that military prisoners were entitled

93. Specifically, Article 13 of Geneva III provides:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

to POW status regardless of the possible nonqualification of their forces under Geneva III, from the very outset of the War in Afghanistan, United States officials labeled captured Al Qaeda and Taliban prisoners “unlawful combatants,” and stated that the Geneva Conventions were, therefore, entirely inapplicable to their treatment. The United States reasoned that Al Qaeda was not entitled to the protections of the Geneva Conventions because: (1) Geneva III could not apply to members of a nonstate organization, such as Al Qaeda, (2) the conflict was not an internal conflict such that Al Qaeda members could benefit from the protection of Common Article 3, and (3) in any event, Al Qaeda members failed to meet the requirements set forth in Article 4(A)(2) of Geneva III. The United States argued further that, since Afghanistan was not a functioning state during the conflict and the Taliban was not recognized as a legitimate government, Geneva III could not apply to the Taliban.

After vigorous criticism was leveled against these arguments, Secretary of State Colin Powell requested that the Administration reconsider its position. On February 7, 2002, in response to Powell’s comments, the Administration partially reversed its initial position. Although the Administration continues to argue that the Geneva Conventions are inapplicable to Al Qaeda captives, President Bush announced that Geneva III was applicable to the Taliban because both the U.S. and Afghanistan were signatories to the Convention and the parties had been involved in an armed conflict. However, President Bush further argued that because the Taliban had violated the laws of war and associated closely with Al Qaeda, “[u]nder the terms of the Geneva Convention ... the Taliban detainees do not qualify as POWs.” The decision in United States v. Lindh, 212 F. Supp.
They behaved like them, they worked with them, they functioned with them, they cooperated with respect to communications, they cooperated with respect to supplies and ammunition.”


100. Applying the four-part test from Article 4(a)(2) of Geneva III to the determination, the Lindh court found that the Taliban had an insufficient internal system of military command or discipline, that the “Taliban typically wore no distinctive sign that could be recognized by opposing combatants,” and that the “Taliban regularly targeted civilian populations in clear contravention of the laws and customs of war.” Lindh, 212 F. Supp. 2d at 558. Implicitly the Lindh Court held that the four conditions listed in Geneva III, Article 4(a)(2) also apply to “regular armed forces.” Id. at 557. In concluding that the Taliban were not regular armed forces, the Lindh court stated “[i]t would indeed be absurd for members of a so-called ‘regular armed force’ to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war. Simply put, the label ‘regular armed force’ cannot be used to mask unlawful combatant status.” Id., at n.35.

See also Int’l Comm. of the Red Cross, Commentaries to Article 4(a)(1) Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, ICRC Database on Int’l Humanitarian Law (available at http://www.icrc.org/ihl.nsf/b466ed681ddfcd42e57600000a1260f9/3ca76f4a4daeb32ec12563ed004254067?Open Document) (“It is the duty of each State to take steps so that members of its armed forces as well as militias associated to them which are captured by the adversary in an international armed conflict are protected by the Third Geneva Convention. There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status.”).

3. Critiques of the United States’ Position

International humanitarian and human rights organizations and legal bodies, including the International Committee of the Red Cross (“ICRC”), and the Inter-American Court of Human Rights, Amnesty In-
international,\textsuperscript{103} the International Commission of Jurists,\textsuperscript{104} the Secretary General of the United Nations,\textsuperscript{105} the United Nations High Commissioner for Human Rights,\textsuperscript{106} as well as certain U.S. and foreign international law scholars\textsuperscript{107} have criticized the U.S. position on several grounds.

(a) Article 5 Presumes POW Status Until the Determination of Status by a Competent Tribunal

Critics of the Administration position argue that non-civilian detainees from the War in Afghanistan either clearly qualify as POWs or their POW status is in “doubt.” Geneva III mandates that a detainee whose status is in “doubt” must be treated as a POW until his status is decided otherwise by a competent tribunal under Article 5. Indeed, Article 5’s presumption that captured combatants are entitled to POW status until their

\begin{itemize}
\item \textsuperscript{103} Amnesty International, Memorandum to the U.S. Government on the rights of people in U.S. custody in Afghanistan and Guantánamo Bay (available at http://web.amnesty.org/aicdoc_pdf.nsf/index/AMR510532002ENGLISH/$File/AMR510532.pdf) (The United States’ “selective approach to the Geneva Conventions threatens to undermine the effectiveness of international humanitarian law protections for any U.S. or other combatants captured in the future.”)
\item \textsuperscript{104} ICJ, Rule of Law Must be Respected in Relation to Detainees in Guantánamo Bay (Jan. 17, 2002) (available at http://www.icj.org/ews.php?id_article=2612&lang=eng) (“The United States has refused [POW] status to Taliban fighters even though, as members of the armed forces, they are entitled to it.”)
\item \textsuperscript{105} Kofi Annan, Press Encounter outside No. 10 Downing Street, London, (Feb. 25, 2002) (unofficial transcript available at http://www.un.org/aps/sg/offthecuff.asp?nid=103) (“The Red Cross has indicated that anyone who was arrested in the battlefield, or picked up in the battlefield, is a prisoner of war and they do not make a difference between the Al Qaeda and the Taliban. And under the convention, where there is a disagreement, normally you have an independent tribunal to resolve this.”).
\item \textsuperscript{106} Mary Robinson, Statement of the High Commissioner for Human Rights on Detention of Taliban and Al Qaeda Prisoners at U.S. Base in Guantánamo Bay, Cuba (Jan. 16, 2002) (available at http://www.unhchr.ch/hurricane/hurricane.nsf/0C537C6D4657C7928C1256B43003E7D0B?opendocument) (“All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949.”).
\end{itemize}
status is determined by a competent tribunal is one that has been consistently honored by the U.S. since World War II.\textsuperscript{108} Moreover, like Article 5, customary international law also includes the principle that a competent tribunal must resolve any doubt about the status of a captured combatant.\textsuperscript{109} We agree with critics of the Administration position that all combatants whose claim to POW status is “in doubt” must be treated as POWs until such doubt has been resolved by a “competent tribunal.” Accordingly, since no tribunals have been convened for detainees from the War in Afghanistan, all such detainees must be considered POWs under Geneva III.

(b) The Taliban Detainees Were “Regular Armed Forces” and, Therefore, Are Encompassed by Article 4(A) of Geneva III

Critics of the Administration’s position that Taliban fighters are not entitled to POW status because they do not satisfy the requirements of Article 4(a)(2) of Geneva III\textsuperscript{110} assert that Taliban captured in the War in Afghanistan are entitled to POW status either under: Article 4(a)(1) because they are “[m]embers of the armed forces” of Afghanistan; or Article 4(a)(3) as they are “[m]embers of regular armed forces who profess allegiance to a government of an authority not recognized by the Detaining Power.”\textsuperscript{111}

\textsuperscript{108} See \textit{Jennifer Elsea, Treatment of “Battlefield Detainees” in the War on Terrorism}, \textit{Cong. Research Serv.}, RL31367, at 30 (2002) (available at http://fpc.state.gov/documents/organization/9655.pdf) (stating that the United States “has in the past interpreted [Article 5] as requiring an individualized assessment of status before privileges can be denied”). See also \textit{The Judge Advocate General’s School, Operational Law Handbook} 22 (William O’Brien ed., 2003) (instructing judge advocates to “advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of [Geneva III], at least until their status may be determined”).

\textsuperscript{109} Michael J. Matheson, while serving as Deputy Legal Advisor of the U.S. State Department, stated:

\begin{quote}
We [the United States] do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement before a judicial tribunal and to have that question adjudicated.
\end{quote}

Matheson, supra note 86.


\textsuperscript{111} Not only did the Taliban profess such an allegiance, but they were the strongest military
INTERROGATION OF DETAINEES

(c) Policy Arguments Favoring Broad Grant of POW Status to Non-Civilian Detainees from the War in Afghanistan

Several policy arguments favor granting POW status liberally even assuming that Geneva III does not apply to Taliban or Al Qaeda detainees captured in the War in Afghanistan.

First, depriving Taliban and Al Qaeda of POW status because they do not obey the laws of war sets a dangerous precedent, inviting other state parties to claim that another party is not obeying the rules of war and that they are, therefore, free from the obligations of Geneva III. International humanitarian law applies regardless of whether or not the other party to the conflict respects such laws.112 Reciprocity arrangements are generally rejected in international humanitarian law as they can so easily be abused at the expense of civilians or persons rendered “hors de combat.”113

Second, it is in the U.S.’s self-interest to ensure that the Geneva Conventions—a regime of vital importance to the safety of our own armed forces—are interpreted as broadly as possible. Otherwise, an opposing state party could use the argument that the U.S. has violated the laws of war to deny captured U.S. soldiers POW status. In fact, North Korea and Vietnam have already used this argument as a basis to deny captured U.S. prisoners POW protections under the Geneva Conventions.114 Indeed, it


113. As the ICRC Commentaries on Article 1 state: “it is not merely an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations ‘vis-à-vis’ itself and at the same time ‘vis-à-vis’ the others. The motive of the Convention is so essential for the maintenance of civilization that the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from all parties.” ICRC Commentaries to Article 1, Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, ICRC Database on Int’l Humanitarian Law (available at: http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/49cfe5505d5912dlc12563ed00424cdd?Open Document). See also Geneva III, Art. 13.

was reportedly these very examples that prompted Colin Powell, out of concern for the safety of U.S. forces, to request that President Bush reconsider the Administration’s initial position.\footnote{Colin Powell apparently made remarks to this effect in a memo leaked to the press on January 27, 2002. See Editorial, Bush’s Call on Captives, The Boston Globe, Jan. 29, 2002, at A10.}

We accordingly urge liberal extension of POW treatment where that would encourage reciprocal treatment of U.S. service personnel and advance more generally foreign policy and national security interests. We further believe that, even to the extent that POW status is denied to detainees, such detainees must be afforded the protections of international criminal law, as well as international human rights and humanitarian law.

\textbf{C. Geneva IV}

Geneva IV applies in international armed conflicts to the same extent as Geneva III. It covers “protected persons” defined as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” See Geneva IV, Article 4.\footnote{Legal commentators have argued that persons who have directly participated in the War in Afghanistan and who do not qualify as POWs under Geneva III (i.e., detainees considered to be “unlawful combatants” by the U.S.) should automatically be considered “protected persons” under Geneva IV, unless other exceptions apply. See, e.g., Michael Ratner, Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture, 24 Cardozo L. Rev. 1513, 1518 –19 (2003) (“There is no gap between the two conventions”). Recent decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) have held that, “if an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of [Geneva IV].” See The Prosecutor v. Delalic, IT-96-21-T, at para. 271 (1998); see also Prosecutor v. Tadic, IT-94-I-A, 38 I.L.M. 158 (1999).}

The fact that a person may have unlawfully participated in a conflict is not relevant to Geneva IV protections, apart from a significant national security exemption. The term “protected persons” includes persons detained as spies or saboteurs as well as other persons suspected of engaging in activities hostile to the security of the detaining power. Specifically, Article 5 provides:

\begin{quote}
Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of
\end{quote}
State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

As drafted, (i.e., the use of the words “the latter”), it would appear that the national security derogation is available only to the State on whose territory the conflict is occurring (i.e., in the War in Afghanistan, only to the Northern Alliance), and there is no authority whether or not an allied State, such as the United States, can benefit from such exemption.

In an exception of great importance in Afghanistan, given the number of third country participants in the conflict, “protected persons” does not include “[n]ationals of a State which is not bound by the Convention,” “[n]ationals of a neutral State who find themselves in the territory of a belligerent State” and “nationals of a co-belligerent State ... while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.” See Geneva IV, Article 4. For example, a Pakistani picked up on the battlefield in Afghanistan would fall within the exceptions to “protected person” status under Geneva IV.

However, in no event would such provision permit the State to commit “grave breaches” as defined in Article 147, which includes torture or inhuman treatment and willfully causing great suffering or serious injury to body or health, upon a “protected person.” See Geneva IV, Art. 146. Furthermore, to the extent that any physical or moral coercion (otherwise prohibited by Article 31 of Geneva IV) might fall below the level of “grave breach” and thus be derogable, the ICRC commentary to the national security derogations contained in Article 5 of Geneva IV, involving persons engaged in activities hostile to the security of the state notes that:

widespread application of the Article may eventually lead to the existence of a category of civilian internees who do not receive the normal treatment laid down by the Convention but...
are detained under conditions which are almost impossible to check. It must be emphasized most strongly, therefore, that Article 5 can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will follow. This article should never be applied as a result of mere suspicion.

Like POWs under Geneva III, “protected persons” under Geneva IV cannot be subjected to coercive interrogation tactics. Specifically, Article 31 of Geneva IV provides that “[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.” Article 32 further provides that “any measure of such a character as to the cause the physical suffering or extermination of protected persons” is prohibited and that “[t]his prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality, whether applied by civilian or military agents.”

By its terms, Geneva IV ceases to apply “on the general close of military operations” in the case of an international conflict. See Geneva IV, Art. 6. Whether military operations have reached a “general close” after the establishment of the Karzai government in June 2002 and whether the change in character of the conflict from an international one to a multi-national conflict within a single State against non-State opponents terminated application of Geneva IV are issues open to controversy. Thus, the ability of some civilians captured in Afghanistan to claim “protected person” status under Geneva IV today is subject to additional debate. However, regardless of the characterization of the current conflict, torture and inhumane treatment of civilian detainees from the War in Afghanistan or the ongoing conflict in Afghanistan, whether or not they qualify as “protected persons” under Geneva IV, is not permitted. All such persons are still entitled to the protections of international human rights law and to humane treatment under Common Article 3 and Article 75 of Additional Protocol I.

D. Summary

None of the detainees from the War in Afghanistan or the ongoing conflict in Afghanistan fall outside of international humanitarian law.

117. Such determination does not negate application of Common Article 3 to an “armed conflict not of an international character” or certain other provisions of international humanitarian law and the law of armed conflict.
An individual detained during the armed conflict in Afghanistan—whether considered an international or internal armed conflict—is either protected by Geneva III as a POW, by Geneva IV as a civilian “protected person,” or, at the very minimum, by Common Article 3 and Article 75 of Additional Protocol I. Of course, all detainees—regardless of where or when they were captured—are entitled to the protection of human rights law (including CAT and the ICCPR) and customary international law.

Detainees protected as POWs or civilians under Geneva III or Geneva IV cannot be subjected to coercion of any kind. In addition, those detainees whose POW status is in doubt are entitled to interim POW status until a competent tribunal determines otherwise. At least some Afghan detainees are entitled to such tribunals, and the U.S. is long overdue in providing any process whatsoever to detainees, many of whom may simply be innocent non-combatants, wrongfully detained. We, therefore, urge the U.S. to establish proper screening procedures for all detainees.

III. OTHER INTERNATIONAL LEGAL STANDARDS

The legal standards set forth in the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man, and customary international law also apply to the treatment of detainees held by the United States.

A. The International Covenant on Civil and Political Rights

1. Relevant Legal Standards

Like CAT, the ICCPR expressly prohibits both torture and CID. Specifically, Article 7 of the ICCPR provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” However, the ICCPR goes further than CAT in its non-derogability provision, expressly stating that neither torture nor CID treatment can be justified by exceptional circumstances such as war, internal political stability


119. Congressional ratification of the ICCPR with respect to the prohibition against cruel, inhuman or degrading treatment is subject to a reservation mirroring that taken by the U.S. under CAT: “The United States considers itself bound by Article 7 to the extent that ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments....” Id.
or other public emergencies. (See ICCPR, Art. 4). Article 10 also provides that: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

The Human Rights Committee, established under Article 28, adjudicates complaints filed by individuals or states parties alleging violations of the ICCPR. The Committee has found the following conduct to violate Article 7's prohibition against cruel, inhuman or degrading treatment or punishment: threatening a victim with torture, prolonged solitary confinement and incommunicado detention, and repeated beatings. Moreover, the Human Rights Committee has specifically criticized interrogation procedures such as handcuffing, hooding, shaking and sleep deprivation as violations of Article 7 in any circumstances.

Although the ICCPR does not expressly prohibit states parties from "rendering" individuals to countries where they are likely to be mistreated, the Human Rights Committee has explained that, under Article 7, states parties "must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement." Accordingly, the Human Rights Committee has stated that “[i]f a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”

2. Enforcement
(a) U.S. Courts

In ratifying the ICCPR, the U.S. Senate declared that Articles 1 through 27 are not self-executing. Thus, while the Supreme Court has not squarely


decided the issue, the majority of federal appeals courts have held that the ICCPR provides no privately enforceable rights and is not binding on federal courts.124 The Second and Ninth circuit courts, however, have cited the ICCPR as evidence that customary international law prohibits arbitrary arrest, prolonged detention and torture.125

(b) The Human Rights Committee

The Human Rights Committee is empowered to: (i) receive state party reports and comment on those reports (see ICCPR, Art. 40(4)); (ii) rule on complaints filed by a state party that another state party is not fulfilling its obligations under the ICCPR (see ICCPR, Art. 41);126 and (iii) rule on complaints filed by individuals “who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies.”127

B. Organization of American States’ Instruments

1. Relevant Legal Standards

The U.S. is a member of the Organization of American States (the


125. See Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001) (recognizing that an international prohibition exists against “prolonged and arbitrary detention” and citing, among other sources to ICCPR, Art. 9); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383-84 (9th Cir. 1998) (same); United States v. Romano, 706 F.2d 370, 375 n.1 (2d Cir. 1983) (citing to ICCPR for articulation of rights of a person charged with a criminal offense); Filartiga v. Peña-Irala, 630 F.2d 876, 883-84 (2d Cir. 1980) (citing ICCPR as one example that international law universally rejects torture).

126. In ratifying the ICCPR, the U.S. Senate declared that “The United States . . . accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.” See supra note 118.

“OAS”). Article XXV of The American Declaration of the Rights and Duties of Man (the “American Declaration”), which was adopted by the Ninth International Conference of the OAS in 1948, provides:

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

On June 1, 1997, the U.S. signed, but has not yet ratified, the American Convention On Human Rights (1969) (the “American Convention”). Article 5 of the American Convention, which sets forth Rights to Humane Treatment, provides:

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

Moreover, pursuant to Article 27(2) of the American Convention, the Rights to Humane Treatment may not be suspended “[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party.”

With respect to the treatment of detainees, the Inter-American Commission on Human Rights (the “Inter-American Commission”)—which represents all member countries of the OAS and was established under Chapter VII of the American Convention—has determined that, “when the State holds a person in detention and under its exclusive control, it becomes the guarantor of that person’s safety and rights.” In this regard, the Commission has found the following practices to be violations of Article 5 of the American Convention: threats to summon family members and pressure them to “talk”; threats to kill detainees; blindfolding detainees and forcing them to run around; “prolonged isolation and deprivation of communication”; solitary confinement; confining detainees in


small cells with other prisoners; keeping detainees in cells that are damp and/or without adequate ventilation; keeping detainees in cells without beds; forcing detainees to sleep on the floor or on newspaper; depriving detainees of necessary hygiene facilities; beatings with rifles; and kicks in various parts of the body, especially in the stomach.  

The Inter-American Court of Human Rights (the “Inter-American Court”)—established pursuant to Chapter VIII of the American Convention—has held that, “in order to establish if torture has been inflicted and its scope, all the circumstances of the case should be taken into consideration, such as the nature and context of the respective aggressions, how they were inflicted, during what period of time, the physical and mental effects and, in some case, the sex, age and state of health of the victims.”  

“The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.”  

The Inter-American Court has found the following practices to violate Article 5 of the American Convention and/or Article 2 of the Inter-American Convention To Prevent and Punish Torture:  


133. The U.S. is not a signatory to the Inter-American Convention To Prevent and Punish Torture, O.A.S. Treaty Series No. 67. Article 2 of this Convention defines torture as “any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”
ees with physical torture; restriction of visiting rights; incommunicado detention; incarceration in solitary confinement and/or in a small cell with no ventilation or natural light; prohibiting detainees from engaging in physical exercise or intellectual efforts; deprivation of necessary hygiene facilities; deficient medical treatment; and throwing detainees to the ground. 134 “[A]ccording to international standards for protection, torture can be inflicted not only via physical violence, but also through acts that produce severe physical, psychological or moral suffering in the victim.” 135 The Inter-American Court also has held that: “Prolonged isolation and being held incommunicado constitute, in themselves, forms of cruel and inhuman treatment, harmful to the mental and moral integrity of the person and to the right of all detainees of respect for the inherent dignity of the human being.” 136

Moreover, the Inter-American Court has warned that the fact that a State is confronted with terrorism does not, in itself, warrant the use of force:

Any use of force that is not strictly necessary, given the behavior of the person detained, constitutes an affront to human dignity . . . in violation of Article 5 of the American Convention. The need to conduct investigations and the undeniable difficulties inherent to combating terrorism are not grounds for placing restrictions on the protection of the physical integrity of the person. 137


In a case brought before the Inter-American Commission by detainees alleging violations of the United States' obligations under the American Declaration by U.S. armed forces in Grenada in 1983, Coard, et al. v. United States, the Inter-American Commission expressly extended the protections of human rights and humanitarian norms to extraterritorial conduct by U.S. military forces and criticized the U.S. for delay in providing procedure to detainees. 138 Acknowledging the need to balance between public security and individual rights, the Inter-American Commission in Coard held that: “What is required when an armed force detains civilians is the establishment of a procedure to ensure that the legality of the detention can be reviewed without delay and is subject to supervisory control. . . . [C]ontrol over a detention [cannot] rest[ ] exclusively with the agents charged with carrying it out.” Coard, at paras. 58-59.

2. Enforcement
The Inter-American Commission has competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to the American Convention. 139 “The main function of the Commission” is “to promote respect for and defense of human rights.” 140 Any person may lodge a petition with the Commission complaining of violation of the American Convention by a State Party, so long as effective domestic remedies available to the petitioner have been exhausted. 141

On March 12, 2002, in response to a petition challenging detentions

138. Coard, et al. v. United States, Inter-Am. C.H.R. Report No. 109/99 (Sept. 29, 1999) ("Coard"). The Coard petitioners alleged that U.S. forces arrested them during the period in which it consolidated control over Grenada; that they were held incommunicado for many days; and that months passed before they were taken to a magistrate, or allowed to consult with counsel. “During this period petitioners were threatened, interrogated, beaten, deprived of sleep and food and constantly harassed.” Coard, at para. 17. The petitioners alleged that their whereabouts were kept secret, and that requests by lawyers and others to meet with them were rejected. They also alleged that U.S. forces subjected them to threats and physical abuse—including threatening to hand the detainees over to Caribbean authorities and allowing Caribbean authorities to “soften” the detainees. Coard, at paras. 18-19.

139. See supra note 128, Art. 33.

140. Id., Art. 41. The Commission has also been willing to apply other relevant legal standards, including the Geneva Conventions.

141. Id., Arts. 44 and 46. The Inter-American Court also has competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to the American Convention. Id., Art. 33. Only States Parties and the Commission have the right to submit a case to the Inter-American Court, however, and only after the case has been considered by the Inter-American Commission. Id., Art. 61.
at Guantánamo Bay coordinated by the Center for Constitutional Rights,142 the Inter-American Commission adopted precautionary measures addressed to the United States concerning the Guantánamo detainees.143 Specifically, the Commission asked the U.S. “to take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal.”144 In so doing, the Inter-American Commission explained:

[Where persons find themselves within the authority and control of a state and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law. In short, no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights.145

With regard to the Guantánamo Bay detainees in particular, the Inter-American Commission observed that: “[T]he information available suggests that the detainees remain entirely at the unfettered discretion of the United States government. Absent clarification of the legal status of the detainees, the Commission considers that the rights and protections to which they may be entitled under international or domestic law can/

142. A federal habeas corpus petition on behalf of named detainees at Guantánamo which was filed in parallel was dismissed for lack of jurisdiction because “the military base at Guantánamo Bay, Cuba is outside the sovereign territory of the United States.” Rasul v. Bush, 215 F. Supp. 2d 55, 72 (D.D.C. 2002), cert. granted, 2003 WL 22070599 (U.S. Nov. 10, 2003).
143. See Rules of Procedure of the Inter-American Commission on Human Rights, Art. 25(1): “In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.”)
145. 41 I.L.M. at 533.
not be said to be the subject of effective legal protection by the State." 146 The Inter-American Commission further noted that, regardless of the legal status of the Guantánamo Bay detainees, their legal protections “may in no case fall below the minimal standards of non-derogable rights.” 147 Thereafter, the Commission issued a renewed request to the U.S. government for precautionary measures, stating that new factual allegations regarding torture or other ill-treatment of detainees “raise questions concerning the extent to which the United States’ policies and practices in detaining and interrogating persons in connection with its anti-terrorist initiatives clearly and absolutely prohibit treatment that may amount to torture or may otherwise be cruel, inhuman or degrading as defined under international norms.” 148

C. Customary International Law and Jus Cogens

1. Relevant Legal Standards

Customary international law has long prohibited the state practice of torture, without reservation, in peace or in wartime. 149 On December 9,

146. Id.

147. Id., at 534. The Inter-American Commission invited the U.S. to provide information concerning compliance with these precautionary measures. In response, the United States argued that: (i) the Commission did not have jurisdiction to apply international humanitarian law, particularly the Geneva Conventions, as well as customary international humanitarian law; (ii) the Commission lacks authority to request precautionary measures with respect to States which are not party to the American Convention; and (iii) in any event, precautionary measures are neither necessary nor appropriate because the detainees are not entitled to prisoner of war status, do not meet Geneva Convention criteria for lawful combatants and are, instead, enemy combatants. See Response of the United States To Request For Precautionary Measures—Detainees in Guantánamo Bay, Cuba, reprinted in 41 I.L.M. 1015, 1028-1030 (2002). The U.S. stated, however, that it “is providing the detainees with protections consistent with international humanitarian law.” Id. at 1031. The U.S. also asserted that it had no obligation to convene a tribunal to determine the detainees’ status, and that the detainees had no right to counsel or to have access to courts. Id. at 1034. The U.S. Response did not address interrogation techniques. However, on December 2, 2003, the Pentagon announced that U.S. citizen and Taliban soldier Yaser Esam Hamdi would be given access to a lawyer, “as a matter of discretion and military policy,” but that the decision “should not be treated as a precedent” and was “subject to appropriate security restrictions.” See Associated Press Newswires, Pentagon OKs Lawyer For Terror Suspect, Dec. 3, 2003; Jerry Markon and Dan Eggen, U.S. Allows Lawyer For Citizen Held as “Enemy Combatant”, WASH. POST, Dec. 3, 2003, at A01.


149. In order for a state’s practice to be recognized as customary international law, it must fulfill two conditions:
Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitas*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.


150. GA Res. 3452 (XXX), U.N. GAOR, Supp. No. 34 at 91 (hereinafter the “Torture Resolution”).


152. Report by the Special Rapporteur, id., at paras. 72, 82.

153. See *Restatement (Third) of Foreign Relations Law* § 702 (1986). See also Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996); In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 716 (9th Cir. 1992); Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1006 (9th Cir. 2000); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y.)

**INTERNATIONAL HUMAN RIGHTS; MILITARY AFFAIRS AND JUSTICE**

1975, the United Nations General Assembly adopted by consensus the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Punishment. The Torture Resolution together with CAT and the ICCPR—ratified by 133 and 151 States, respectively—embody the customary international law obligation to refrain from behavior which constitutes torture. In addition, in 1985 the United Nations Special Rapporteur on Torture, Pieter Kooijmans, noted the widespread existing domestic legislation in many countries, including the United States, expressly or by implication prohibiting torture as well as cruel, inhuman and degrading punishment.\(^{152}\)

The prohibition of torture is, moreover, one of the few norms which has attained peremptory norm or *jus cogens* status, and is recognized as such by United States courts.\(^{153}\) *Jus cogens* is defined as a peremptory norm...
INTERROGATION OF DETAINES

“accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” While many international agreements expressly prohibit both torture and cruel, inhuman and degrading treatment, it remains an open question as to whether jus cogens status extends to the prohibition against cruel, inhuman or degrading treatment. What is clear, however, is that cruel, inhuman and degrading treatment or punishment is prohibited by customary international law.

U.S. ratification of the ICCPR and CAT are clear pronouncements that we condemn the practice of torture and CID treatment and that we consider ourselves legally bound to prohibit such conduct. Indeed, in 1999, the United States issued a report to the U.N. Committee Against Torture categorically affirming that:

Every act constituting torture under the Convention constitutes a criminal offense under the law of the United States. No official of the Government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in


155. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., Art. 5, U.N. Doc. A/810 (1948) (“no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR, Supp. No. 34, U.N. Doc. A/10034 (1976), at Art. 3 (“Exceptional circumstances such as a state of war or a threat of war, internal political stability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”); ICCPR, supra note 118, at Art. 7 (“no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); Additional Protocol I, supra note 20, at Art. 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (“Additional Protocol II”), reprinted in 16 I.L.M. 1442 (1977), at Art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950), at Art. 3 (declaring that torture and inhuman or degrading treatment or punishment is prohibited); American Convention, supra note 128, at Art. 5 (providing that every person retain the right to be free from torture and ill-treatment); African Charter on Human and Peoples’ Rights, reprinted in 21 I.L.M. 58 (1981), at Art. 5 (prohibiting torture and ill-treatment).
any form. No exceptional circumstances may be invoked as justification for torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstance (for example, during a “state of public emergency”) or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension.156

Furthermore, the United States has enacted the Torture Victim Protection Act,157 has imposed civil liability for acts of torture regardless of where such acts take place,158 and has enacted the Torture Victims Relief Act, providing for monetary assistance for torture victims.159 As previously discussed, not only does the U.S. Constitution prohibit cruel and unusual punishment or treatment by state officials (including under the military justice system), but almost all of the U.S. State constitutions have similar prohibitions.160 Finally, a number of federal judicial proceedings have recognized that the right to be free from torture as well as cruel, inhuman or degrading treatment or punishment is a norm of customary international law.161

In the State Department Country Reports On Human Rights Practices, for example, the United States has expressly characterized the following types of conduct—some of which are allegedly occurring at U.S. detention centers—as “torture” or “other abuse”: tying detainees in painful positions; forcing detainees to stand for long periods of time; incomunicado detention; depriving detainees of sleep; dousing naked detainees with cold water; denial of access to medical attention; interrogation techniques designed to intimidate or disorient; subjecting a detainee to loud music; forcing a detainee to squat or to assume “stressful, uncom-

158. Id.
fortable or painful” positions for “prolonged periods of time”; long peri-
ods of imprisonment in darkened rooms; verbal threats; and instilling
detainees with the false belief that they are to be killed. The following
types of conduct have been defined as cruel, inhuman or degrading treat-
ment: stripping; confinement in severely overcrowded cells; beating; im-
prisonment in small containers; and threats against family members of
detainees.

2. Enforcement
As the Second Circuit stated in Filartiga v. Peña-Irala, 630 F.2d 876
(1980), the United States is bound by customary international law. Thus,
in cases where jurisdictional hurdles have been met, the bans on torture,
arbitrary detention, and at least some aspects of cruel, inhuman and de-
grading treatment have been enforced by U.S. courts as violations of cus-
tomary international law.

IV. SHOULD EXCEPTIONS BE MADE FOR THE “WAR ON TERROR”?:
THE EXPERIENCE OF OTHER JURISDICTIONS
Notwithstanding the clear legal prohibitions against the use of tor-
ture and cruel, inhuman or degrading treatment in U.S. and interna-
tional law, we considered whether, in a post-September 11 world, the threat
posed by terrorists to the United States could ever justify the use of pro-
hibited interrogation practices. We sought to answer the question of whether
there are any circumstances in which torture and CID treatment in the
interrogation of detainees should be permitted.

For additional guidance in answering these questions, we looked to
the experiences of Northern Ireland and Israel, other places where the
struggle between fighting terrorism and upholding the rule of law has
been waged. Both the European Court of Human Rights and the Israeli

162. See U.S. Dept. of State, Bureau of Democracy, Human Rights and Labor, Country
Reports on Human Rights Practices—2002 (for Brazil, Burma, China, Egypt, Israel and the
occupied territories, Jordan, Kenya, Democratic People’s Republic of Korea, Laos, Pakistan,
163. Id. (for Cameroon, Mongolia, Nigeria and Rwanda).
164. See, e.g., Filartiga v. Peña-Irala, 639 F.2d 876 (2d Cir. 1980) (allowing a torture claim to
be prosecuted under the Alien Tort Claims Act, 28 U.S.C. § 1350); see also Forti v. Suarez-
Mason, 672 F. Supp. 1531, 1541-43 (N.D. Cal. 1987) (recognizing torture and arbitrary
detention as violations of customary international law, but finding that universal consensus
regarding right to be free from cruel, inhuman and degrading treatment had not yet been
established).
Supreme Court have confronted the contradictory demands of national security and human rights against the backdrop of terrorism. The legal debate that infuses these courts’ seminal decisions on the use of torture and CID treatment in the interrogation of terrorist suspects offers guidance to the United States in interpreting CAT. These courts have ruled that there are no exceptions to the prohibition against torture and CID treatment. Their rulings express the conviction that the torture and CID treatment of detainees—even when those detainees are suspected terrorists—cannot be justified.

A. Legal Challenges to Interrogation Practices in Northern Ireland and Israel

1. The Republic of Ireland v. The United Kingdom

The European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”) came into force in 1953. Article 3 of the European Convention provides: “No one shall be subject to torture or to inhuman or degrading treatment or punishment.” The judicial body primarily charged with interpreting and enforcing the European Convention is the European Court of Human Rights (the “ECHR”). The ECHR has, in several decisions, applied the European Convention’s prohibition against torture and inhuman or degrading treatment to cases involving interrogation of suspected terrorists who pose a threat to national security.

The most important of these decisions is The Republic of Ireland. The Republic of Ireland case was decided in a legal and political environment conditioned by several years of terrorism in Northern Ireland perpetrated by members of the Irish Republican Army (IRA) and Loyalist groups. By March 1975, over 1,100 people had been killed, over 11,500 injured and £140 million worth of property destroyed. To combat a campaign of violence being carried out by the IRA, in 1971, the Northern Ireland Government introduced regulations providing authorities with extrajudicial powers, including arrest for interrogation purposes and internment.

The Republic of Ireland Decision is a landmark legal discussion of whether specific interrogation practices committed by British security forces against IRA detainees constituted torture or inhuman or degrading treatment.

165. 213 U.N.T.S. 221.
168. Id., at 36.
The impetus for the ECHR's decision was the Republic of Ireland's application before the European Commission of Human Rights alleging, among other things, that various interrogation practices—including specific practices referred to as the “five techniques”—amounted to torture and inhuman or degrading treatment, in contravention of Article 3 of the European Convention.\textsuperscript{169} The “five techniques”—described by the ECHR as methods of “disorientation” or “sensory deprivation”—include a number of practices allegedly being used today by U.S. interrogators:

- Wall-standing: Forcing a detainee to remain spread-eagled against a wall with his fingers placed high above his head against the wall, his legs spread apart and his feet positioned such that he must stand on his toes with the weight of his body resting on his fingers;
- Hooding: Keeping a dark bag over a detainee’s head at all times, except during interrogation;
- Subjection to noise: Holding a detainee in a room where there is a continuous loud and hissing noise;
- Deprivation of sleep; and
- Deprivation of food and drink.\textsuperscript{170}

The European Commission of Human Rights unanimously found that the “five techniques” constituted torture, and that other challenged interrogation practices amounted to inhuman and degrading treatment.\textsuperscript{171} Although the British Government subsequently discontinued the “five techniques” and did not contest the underlying allegations of the case or the Commission’s findings in connection therewith, the Republic of Ireland nevertheless referred the case to the ECHR.\textsuperscript{172} The ECHR took the opportunity to rule upon the legality of the “five techniques,” citing to the European Court's responsibility “to elucidate, safeguard and develop the rules instituted by the Convention.”\textsuperscript{173}

In The Republic of Ireland decision, the ECHR explained that ill-treatment “had to attain a minimum level of severity to fall within Article 3,
the assessment of which was necessarily relative, depending on all the circumstances, including the duration of the treatment, its physical or mental effects and, sometimes, the sex, age or state of health of the victim.”174 The ECHR pointed out that, while the term “torture” attached “a special stigma to deliberate inhuman treatment causing very serious and cruel suffering,” the distinction between torture and inhuman or degrading treatment “derived principally from a difference in the intensity of the suffering inflicted.”175 The ECHR held that since the “five techniques” “were applied in combination, with premeditation and for hours at a time, causing at least intense physical and mental suffering and acute psychiatric disturbances, they amount to inhuman treatment.”176 The ECHR further held that since the “five techniques” aroused “in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, they were also degrading.”177 The ECHR concluded that the “five techniques” violated Article 3’s prohibition against inhuman or degrading treatment, but that they did not amount to torture.178

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175. Id., at 26.
176. Id., at 26.
177. Id.
178. Id., at 79-80. In separate annexed opinions, Judges Zekia, O’Donoghue and Evrigenis disagreed with the majority’s ruling that the five practices did not amount to torture.

In the years since the Republic of Ireland decision, neither time nor the ever-expanding threat of terrorism has diminished the ECHR’s commitment to maintaining an absolute prohibition against torture and inhuman or degrading treatment. In Chahal v. United Kingdom, Case No. 70/1995/576/662 (Nov. 15, 1996), for example, the ECHR rejected Great Britain’s argument that national security considerations justified the deportation of an Indian citizen to India on grounds that he was active in extremist Sikh organizations in England and was suspected of planning terrorist and other violent acts in the country. Chahal argued that, if deported, he would be tortured in India. In ruling that Chahal’s deportation by the United Kingdom would constitute a violation of Article 3 of the Convention, the ECHR stated:

Article 3 enshrines one of the most fundamental values of democratic society. . . . The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.
2. Israeli Supreme Court Judgment Concerning The Legality Of The General Security Service’s Interrogation Methods

As the Israeli Supreme Court notes at the outset of its Judgment Concerning The Legality Of The General Security Service’s Interrogation Methods, the State of Israel “has been engaged in an unceasing struggle for both its very existence and security, from the day of its founding”:

Terrorist organizations have established as their goal Israel’s annihilation. Terrorist acts and the general disruption of order are their means of choice. In employing such methods, these groups do not distinguish between civilian and military targets. They carry out terrorist attacks in which scores are murdered in public areas, public transportation, city squares and centers, theaters and coffee shops. They do not distinguish between men, women and children. They act of cruelty and without mercy.

In 1987, the Landau Commission of Inquiry into the Methods of Investigation of the GSS Regarding Hostile Terrorist Acts (the “Landau Commission”) was established to investigate the interrogation practices of the main body responsible for fighting terrorism in Israel, the General Security Service (the “GSS”), and to reach legal conclusions concerning them. The resulting Landau Report, concluded: “The effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does not reveal information.” The Landau Report explained that: “The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their pur-
pose, the exertion of a moderate measure of physical pressure cannot be avoided."183 The Landau Commission recommended, however, that GSS interrogators should be guided by clear rules “to prevent the use of inordinate physical pressure arbitrarily administered,” and formulated a code of guidelines (set forth in a secret part of the Landau Report) which defined, “on the basis of past experience, and with as much precision as possible, the boundaries of what is permitted to the interrogator and mainly what is prohibited to him.”184 The Landau Commission asserted that the latitude it afforded GSS interrogators to use “a moderate measure of physical pressure” did not conflict with the standards set forth in international human rights conventions—such as the UDHR, the ICCPR and the European Convention—which prohibited torture and cruel, inhuman or degrading treatment or punishment.185

In 1999, in the GSS Interrogation Methods Decision, the Israeli Supreme Court took up the legality of certain interrogation practices employed by the GSS. The Israeli Supreme Court acknowledged that the Landau Commission had approved the use of “a moderate degree of physical pressure,” and that the Landau Commission’s recommendations had been accepted by the Israeli Government.186 The interrogation methods considered by the Israeli Supreme Court in the GSS Interrogation Methods Decision were:

- Shaking: Forcefully shaking a detainee’s upper torso back and forth, repeatedly, and in a manner which causes the neck and head to dangle and vacillate rapidly.
- The “shabach” position: Forcing a detainee who has his hands tied behind his back to sit on a small and low chair whose seat is tilted forward and towards the ground, where one hand is placed inside the gap between the chair’s seat and back support, the detainee’s head is covered by an opaque sack falling down to his shoulders, and powerfully loud music is played in the room.
- The “frog crouch”: Forcing a detainee to crouch on the tips of his/her toes for five minute intervals.
- Excessive tightening of handcuffs: Using particularly small cuffs, ill-fitted in relation to the suspect’s arm or leg size.

183. Id.
184. Id., at 185.
185. Id., at 186.
186. GSS Interrogation Methods Decision, 38 I.L.M. at 1477.
Sleep deprivation: A detainee is deprived of sleep as a result of being tied in the “shabach” position, being subjected to powerfully loud music or intense non-stop interrogations.\textsuperscript{187}

In examining the legality of these GSS interrogation methods, the Israeli Supreme Court acknowledged that, taken individually, some of the components of the “shabach” position have “legitimate” goals: for example, hooding prevents communication between suspects, the playing of powerfully loud music prevents the passing of information between suspects, the tying of the suspect’s hands to a chair protects investigators, and the deprivation of sleep can be necessitated by an interrogation.\textsuperscript{188}

According to the Israeli Supreme Court, however, there is a necessary balancing process between a government’s duty to ensure that human rights are protected and its duty to fight terrorism. The results of that balance, the Israeli Supreme Court stated, are the rules for a “reasonable interrogation”—defined as an interrogation which is: (1) “necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever”; and (2) “likely to cause discomfort.”\textsuperscript{189}

“In the end result,” the Court noted, “the legality of an investigation is deduced from the propriety of its purpose and from its methods.”\textsuperscript{190}

Turning to the specific interrogation methods before it, the Court concluded that shaking, the “frog crouch,” the “shabach” position, cuffing causing pain, hooding, the consecutive playing of powerfully loud music and the intentional deprivation of sleep for a prolonged period of time are all prohibited interrogation methods.\textsuperscript{191} “All these methods do not fall within the sphere of a ‘fair’ interrogation. They are not reasonable. They impinge upon the suspect’s dignity, his bodily integrity and

\textsuperscript{187}. Id., at 1474 -76. The Israeli Government argued that such interrogation methods did not need to be outlawed because, before resorting to physical pressure against detainees, GSS interrogators are instructed to “probe the severity of the danger that the interrogation is intending to prevent; consider the urgency of uncovering the information presumably possessed by the suspect in question; and seek an alternative means of preventing the danger.” Id., at 1475. The Israeli Government also argued that directives respecting interrogation provide that in cases where shaking - considered the harshest interrogation method of those examined in the GSS Interrogation Methods Decision - is to be used, “the investigator must first provide an evaluation of the suspect’s health and ensure that no harm comes to him.” Id., at 1475.

\textsuperscript{188}. Id., at 1480 - 81.

\textsuperscript{189}. Id., at 1482.

\textsuperscript{190}. Id.

\textsuperscript{191}. Id., at 1482-84.
his basic rights in an excessive manner (or beyond what is necessary). They are not to be deemed as included within the general power to conduct interrogations." The Israeli Supreme Court explained that restrictions applicable to police investigations are equally applicable to GSS investigations, and that there are no grounds to permit GSS interrogators to engage in conduct which would be prohibited in a regular police interrogation.193

In so ruling, the Israeli Supreme Court considered the "ticking time bomb" scenario often confronted by GSS interrogators:

A given suspect is arrested by the GSS. He holds information respecting the location of a bomb that was set and will imminently explode. There is no way to defuse the bomb without this information. If the information is obtained, however, the bomb may be defused. If the bomb is not defused, scores will be killed and maimed. Is a GSS investigator authorized to employ physical means in order to elicit information regarding the location of the bomb in such instances?194

The Israeli Supreme Court stated that it was prepared to presume that if a GSS investigator—who applied physical interrogation methods for the purpose of saving human life—is criminally indicted, the "necessity" defense recognized under Israeli Penal Law would be open to him in the appropriate circumstances.195 The Israeli Supreme Court also acknowledged that the legislature could enact laws permitting the interrogation methods that its decision struck down.196 However, the Israeli Supreme Court refused to imply from the existence of the "necessity" defense, as the State argued for it to do, "an advance legal authorization endowing the investigator with the capacity to use physical interrogation methods."197

B. The Legal and Moral Implications of the "Ticking Bomb" Scenario

As the Republic of Ireland and GSS Interrogation Methods Decision demonstrate, in the face of a terrorist threat there is an inherent tension between obtaining potentially life-saving intelligence information through abusive interrogation of detainees and upholding human rights:

192. Id., at 1483.
193. Id., at 1485.
194. Id.
195. Id., at 1486.
196. Id., at 1487.
197. Id., at 1486.
In crystallizing the interrogation rules, two values or interests clash. On the one hand, lies the desire to uncover the truth, thereby fulfilling the public interest in exposing crime and preventing it. On the other hand, is the wish to protect the dignity and liberty of the individual being interrogated.\(^\text{198}\)

International and human rights law is clear: torture and cruel, inhuman or degrading treatment of detainees is prohibited. Those who would, nevertheless, support the use of moderate physical force, sensory deprivation or disorientation techniques in the interrogation of terrorist suspects argue that resort to such methods is, at times, the only way to prevent the death of innocent persons and is, therefore, justified in such cases as the “lesser of two evils.” Proponents of this view would argue that the legitimacy of an act can be measured by whether its utility exceeds its harm. On this point, the Landau Commission took the following position:

To put it bluntly, the alternative is: are we to accept the offense of assault entailed in slapping a suspect’s face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident.

Everything depends on weighing the two evils against each other.\(^\text{199}\)

In the case of detainees being held by the U.S. in connection with the “War on Terror,” however, the “ticking bomb” scenario is further complicated. Any utilitarian justification for subjecting these detainees to interrogation practices prohibited by CAT must necessarily be premised on the certainty (or, at least, the substantiated suspicion) that these individuals do, in fact, possess vital intelligence information. But, here, there is no such certainty. Instead, hundreds of detainees at Guantánamo Bay, Bagram Air Force Base and other U.S. detention facilities have been detained for months without any type of hearing or legal challenge permitted to their detention.

Our answer to the question of whether torture of detainees should ever be permitted in a post-September 11 world is that there are no such circumstances. We condemn the use of torture in interrogation of detainees, without exception. By its terms, CAT permits no derogation of the prohibition against torture—stating that “[n]o exceptional circumstances

\(^{198}\) Id., at 1481.

\(^{199}\) See 23 Isr. L. Rev., at 174.
whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture.” 200 As the Israeli Supreme Court has explained, “A democratic, freedom-loving society does not accept that investigators use any means for the purpose of uncovering the truth. ‘The interrogations practices of the police in a given regime are indicative of a regime’s very character.’” 201

We recognize that some legal scholars and ethicists may well argue that circumstances exist (as in the “ticking bomb” scenario) in which torture and CID treatment in the interrogation of detainees should be permitted. However, we stress that torture of detainees—which is prohibited under international and U.S. law—is never permissible, and should be fully investigated and prosecuted in all cases.

***

In summary, the Association makes the following recommendations:

First, we urge the United States to amend 18 U.S.C. § 2340 to encompass the actions of military and intelligence personnel at U.S. facilities overseas, to fully utilize the UCMJ to protect all detainees from abuse and to independently investigate human rights compliance in countries to which we are “rendering” detainees.

Second, U.S. military and intelligence personnel involved in interrogation of terrorist suspects should be educated regarding the prohibition against torture and CID, and should receive training to comply with those rules.

Third, the U.S. should adhere to its commitments under the Geneva Conventions, extend POW treatment to regular force combatants as a matter of policy, and promptly establish proper screening procedures and hearings for all detainees.

Finally, the Association notes that particularly in these times of terrorism and violence, it is important to protect the rule of law and the standards of decency to which our nation and the community of nations are committed. As the Israeli Supreme Court has stated:

This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. 202

April 2004

200. CAT, Art. 2.
201. GSS Interrogation Methods Decision, 38 I.L.M. at 1481 (internal citations omitted).
202. Id., at 1488.
The Committee on International Human Rights

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** Chair of the Subcommittee responsible for preparing the report.

The views expressed herein are solely those of the Association and the participating Committees.

The Committee on International Human Rights and Military Affairs and Justice would like to thank the following persons for their assistance in the preparation of the report: John Cerone (Executive Director, War Crimes Research Office, Washington College of Law, American University); Ken Hurwitz (Human Rights First); Professor Marco Sassoli (University of Geneva, professor of international law); Brigitte Oederlin and Gabor Rona (International Committee of the Red Cross); Paul, Weiss, Rifkind, Wharton & Garrison LLP (“Paul Weiss”) associates Katarina Lawergren and Marc Miller and former Paul Weiss associate Matias Milet; and New York University School of Law students Ari Bassin, Amber A. Baylor, Angelina Fisher, Tzung-lin Fu, David R. Hoffman, Jane Stratton and Stephanie S. Welch; and New York Law School student Holly Higgins. This report could not have been completed without the indefatigable efforts of Paul Weiss associate Liza Velazquez in helping edit the many drafts of the Report and consolidating the many views and comments of the Committees and Subcommittee into a coherent whole.

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Appendix A

December 28, 2002

President George W. Bush

The White House

1800 Pennsylvania Avenue, NW

Washington, DC 20500

Dear President Bush:

Human Rights Watch is deeply concerned by allegations of torture and other mistreatment of suspected al-Qaeda detainees described in the Washington Post ("U.S. Decrees Abuse but Defends Interrogations") on December 28. The allegations, if true, would place the United States in violation of some of the most fundamental prohibitions of international human rights law. Any U.S. government official who is directly involved or complicit in the torture or mistreatment of detainees, including any official who knowingly acquiesces in the commission of such acts, would be subject to prosecution worldwide.

Human Rights Watch urges you to take immediate steps to clarify that the use of torture is not U.S. policy, investigate the Washington Post's allegations, adopt all necessary measures to end any ongoing violations of international law, stop the rendition of detainees to countries where they are likely to be tortured, and prosecute those implicated in such abuses.

I. Prohibitions Against Torture

The Washington Post reports that persons held in the CIA interrogation centers at Bagram air base in Afghanistan are subject to "stress and duress" techniques, including "standing or kneeling for hours" and being "held in awkward, painful positions." The Post notes that the detention facilities at Bagram and elsewhere, such as at Diego Garcia, are not monitored by the International Committee of the Red Cross, which has monitored the U.S. treatment of detainees at Guantanamo Bay, Cuba.

The absolute prohibition against torture is a fundamental and well-established precept of customary and conventional international law. Torture is never permissible against anyone, whether in times of peace or of war.

The prohibition against torture is firmly established under international human rights law. It is prohibited by various treaties to which the United States is a party, including the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the United States ratified in 1984. Article 7 of the ICCPR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The right to be protected from torture is non-derogable, meaning that it applies at all times, including during public emergencies or wartime.

International humanitarian law (the laws of war), which applies during armed conflict, prohibits the torture or other mistreatment of captured combatants and others in captivity, regardless of their legal status. Regarding prisoners of war, article 17 of the Third Geneva Convention of 1949 states: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." Detained civilians are similarly protected by article 32 of the Fourth Geneva Convention. The United States has been a party to the 1949 Geneva Conventions since 1956.

The United States does not recognize captured al-Qaeda members as being protected by the 1949 Geneva Conventions, although Bush administration officials have insisted that detainees will be treated humanely and in a manner consistent with Geneva principles. However, at minimum, all detainees in wartime, regardless of their legal status, are protected by customary international humanitarian law. Article 75 ("Fundamental Guarantees") of the First Additional Protocol to the Geneva Conventions, which is recognized as restating customary international law, provides that "torture of all kinds, whether physical or mental" against "persons who are in the power of a
II. Possible U.S. Complicity in Torture

It is a violation of international law not only to use torture directly, but also to be complicit in torture committed by other governments. The Post reports being told by U.S. officials they "thousands of prisoners have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners." The Convention against Torture provides in Article 4 that all acts of torture, including "an act by any person which constitutes complicity or participation in torture," is an offense "punishable by appropriate penalties which take into account their grave nature."

The Post article describes the rendition of captured al-Qaeda suspects from U.S. custody to other countries where they are tortured or otherwise mistreated. This might also be a violation of the Convention against Torture, which in Article 3 states: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The U.S. Department of State annual report on human rights practices has frequently criticized torture in countries where detainees have been sent. These include Uzbekistan, Pakistan, Egypt, Jordan and Morocco. The United States thus could not plausibly claim that it was unaware of the problem of torture in these countries.

III. International Prosecutions for Torture and Command Responsibility

Direct involvement or complicity in torture, as well as the failure to prevent torture, may subject U.S. officials to prosecution under international law.

The willful torture or inhuman treatment of prisoners-of-war or other detainees, including "willingly causing great suffering or serious injury to body or health," are "grave breaches" of the 1949 Geneva Conventions, commonly known as war crimes. Grave breaches are subject to universal jurisdiction, meaning that they can be prosecuted in any national criminal court and as well as any international tribunal with appropriate jurisdiction.

The Convention against Torture obligates States Parties to prosecute perpetrators within their jurisdiction who are implicated or complicit in acts of torture. This obligation includes the prosecution of persons within their territory who committed acts of torture elsewhere and have not been extradited under procedures provided in the convention.

Should senior U.S. officials become aware of acts of torture by their subordinates and fail to take immediate and effective steps to end such practices, they too could be found criminally liable under international law. The responsibility of superior officers for atrocities by their subordinates is commonly known as command responsibility. Although the concept originated in military law, it now is increasingly accepted to include the responsibility of civil authorities for abuses committed by persons under their direct authority. The doctrine of command responsibility has been upheld in recent decisions by the International Criminal Tribunals for the Former Yugoslavia and for Rwanda.

There are two forms of command responsibility: direct responsibility for orders that are unlawful and intended responsibility, when a superior knows or should have known of crimes committed by a subordinate acting on the own initiative and fails to prevent or punish them. All states are obligated to bring such people to justice.

http://www.hrw.org/pr/2002/12/aus1222.htm
5/19/2003

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to respond preventively. As an immediate step, we urge that you issue a presidential statement clarifying that it is contrary to U.S. policy to use or facilitate torture. The Post’s allegations should be investigated and the findings made public. Should there be evidence of U.S. civilian or military officials being directly involved or complicit in torture, or in the rendition of persons to places where they are likely to be tortured, you should take immediate steps to prevent the commission of such acts and to prosecute the individuals who have ordered, organized, condoned, or carried them out. The United States also has a duty to refrain from sending persons to other countries with a history of torture without explicit and verifiable guarantees that no torture or mistreatment will occur.

Thank you for your attention to these concerns.

Sincerely,

Kenneth Roth
Executive Director

Cc: Colin Powell, Secretary of State
Donald Rumsfeld, Secretary of Defense
Condoleezza Rice, National Security Advisor
January 31, 2003

The Honorable George W. Bush
The White House
Washington, DC 20301-1010

Dear President Bush:

We are writing to you on a matter of great concern. As you are no doubt aware, on December 26th the Washington Post reported that your Administration has used, tacitly condoned or facilitated torture by third countries in the interrogation of prisoners. These reports are so flagrantly at odds with your many statements about the importance of human rights that we trust that you are equally disturbed by it.

You have repeatedly declared that the United States “will always stand firm for the non-negotiable demands of human dignity.” Surely there is no more basic and less negotiable requirement of human dignity than the right to be free of torture or cruel, inhuman or degrading treatment. As you know, under the Torture Convention “no exceptional circumstances whatsoever” may be invoked to justify torture and no party may return or extradite a person to another state where there are “substantial grounds for believing that he would be in danger of being subjected to torture.” Likewise, under the Covenant on Civil and Political Rights, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

As you declared in your State of the Union address, these solemn commitments of the United States are non-negotiable; in legal terms, there can be no derogation from them. You may also know that it was your father’s Administration that sought and received overwhelming Senate support for the United States to ratify these two treaties.

The Administration’s response to the outrageous statements made by numerous unnamed officials to the Post’s reporters concerning United States use or tolerance of torture and cruel, inhuman and degrading treatment has thus far been wholly inadequate. Whatever the truth of the Post’s allegations, without a more authoritative response to this high-profile story the world will conclude that the United States is not practicing what it preaches. America’s authority as a champion of human rights will be seriously damaged.

What is clearly needed in this instance are unequivocal statements by you and your Cabinet officers that torture in any form or manner will not be tolerated by this Administration, that any US official found to have used or condoned torture will be held accountable, and that the United States would neither seek nor rely upon intelligence obtained through torture in a third country. These statements need to be accompanied by clear written guidance applicable to everyone engaged in the interrogation and rendition of prisoners strictly prohibiting the use or tolerance of torture or cruel, inhuman or
degrading treatment of prisoners and mandating full compliance with the Geneva conventions requirements for the treatment of prisoners.

We urge you in the strongest terms to take this opportunity to demonstrate that torture and cruel, inhuman and degrading treatment is, in fact as well as word, non-negotiable.

Sincerely,

William Schulz
Amnesty International USA

Kenneth Roth
Human Rights Watch

Gay McDougall
International Human Rights Law Group

Louise Kantrow
International League for Human Rights

Michael Posner
Lawyers Committee for Human Rights

Robin Phillips
Minnesota Advocates for Human Rights

Len Rubenstein
Physicians for Human Rights

Todd Howland
RFK Memorial Center for Human Rights
February 5, 2003

President George Bush
Fax 202-456-2461

Dear President Bush:

The National Consortium of Torture Treatment Programs consists of 33 programs throughout the United States that provide medical and mental health care, as well as legal and social services, to survivors of politically motivated torture. I am writing on behalf of our membership to request a dialogue with the Administration regarding recent allegations published in the Washington Post that certain U.S. practices, including “stress and duress tactics” and “rendering” of detainees to foreign intelligence services, may amount to or result in torture.

Members of the Consortium commend your strong denunciation of torture in Iraq during this week’s State of the Union address. As health professionals caring for torture victims, we have witnessed first-hand the devastating impact torture has on the health and well-being of its victims. Every day we see the aftereffects of the abuses you described during your address. We see the scars from shackles, the marks from cigarette burns inflicted during interrogation, the wounds and broken bones from severe beatings, and the disfiguration from acid or flames. We listen to stories of shame and humiliation, of haunting nightmares and memories that will not go away, and of lives shattered by extreme cruelty.

The individuals we care for are among the estimated 500,000 torture survivors now living in the United States. Iraq is only one of 100 countries represented in our client populations last year. Sadly, torture is perpetrated or condoned in nations across the world.

The United States has stated its commitment to end torture in our world, and we commend the Department of State for its continuing efforts in this regard. This nation has also demonstrated its commitment to healing torture survivors who live in this country and abroad through passage of the Torture Victims Relief Act in 1998 and subsequent appropriations to the U.S. Office of Refugee Resettlement, the U.S. Agency for International Development, and the United Nations Voluntary Fund for Victims of Torture.
In order to maintain our country’s commitment to end torture and support healing, we are deeply concerned by the allegations published in the Washington Post. The National Consortium of Torture Treatment Programs takes no position on the credibility of these allegations. We urge the United States government to fully investigate the allegations of torture of detainees, and to place on the public record our nation’s policies and practices with respect to torture.

We request a meeting to discuss a response to the Washington Post allegations. We suggest that participants might include Anthony Banbury, William Haynes, William Taft IV, and Lorne Craner. I hope a member of your staff will contact my office to schedule such a meeting.

Mr. President, torture undermines the fabric of society through fear and terror. As the U.S. Congress articulated in its resolution of June 20, 2001, “When one individual is tortured, the scars inflicted by such horrific treatment are not only found in the victim but in the global system, as the use of torture undermines, debilitates, and erodes the very essence of that system.” We urge you to authorize an investigation of the allegations published in the Washington Post, to communicate the results of that investigation to the American people, and to ensure that the United States does not and will not participate in torture.

Respectfully,

Ernest Duff
President
National Consortium of Torture Treatment Programs

The Honorable Lorne Craner, Assistant Secretary of State for Democracy, Human Rights and Labor, Fax (202) 647-5283
William Haynes, General Counsel, Department of Defense, Fax (703) 693-7278
William Taft, IV, Legal Advisor, Department of State, Fax (202) 647-1037
June 2, 2004

The Honorable Condoleezza Rice
National Security Adviser
The White House
Washington, DC 20500

Dear Dr. Rice:

Over the past several months, unnamed Administration officials have suggested in several press accounts that detainees held by the United States in the war on terrorism have been subjected to “stress and duress” interrogation techniques, including beatings, lengthy sleep and food deprivation, and being shackled in painful positions for extended periods of time. Our understanding is that these statements pertain in particular to interrogations conducted by the Central Intelligence Agency in Afghanistan and other locations outside the United States. Officials have also stated that detainees have been transferred for interrogation to governments that routinely torture prisoners.

These assertions have been reported extensively in the international media in ways that could undermine the credibility of American efforts to combat torture and promote the rule of law, particularly in the Islamic world.

I appreciate President Bush’s statement, during his recent meeting with U.N. High Commissioner for Human Rights Sergio De Mello, that the United States does not, as a matter of policy, practice torture. I also commend the Administration for its willingness to meet with and respond to the concerns of leading human rights organizations about reports of mistreatment of detainees. At the same time, I believe the Administration’s response thus far, including in a recent letter to Human Rights Watch from Department of Defense General Counsel William Haynes, while helpful, leaves important questions unanswered.

The Administration understandably does not wish to catalogue the interrogation techniques used by U.S. personnel in fighting international terrorism. But it should affirm with clarity that America upholds in practice the laws that prohibit the specific forms of mistreatment reported in recent months. The need for a clear and thorough response from the Administration is all the greater because reports of mistreatment initially arose not from outside complaints, but from statements made by administration officials themselves.
With that in mind, I would appreciate your answers to the following questions:

First, Mr. Haynes' letter states that when questioning enemy combatants, U.S. personnel are required to follow “applicable laws prohibiting torture.” What are those laws? Given that the United States has ratified the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), is this Convention one of those laws, and does it bind U.S. personnel both inside and outside the United States?

Second, does the Administration accept that the United States has a specific obligation under the CAT not to engage in cruel, inhuman and degrading treatment?

Third, when the United States ratified the CAT, it entered a reservation regarding its prohibition on cruel, inhuman and degrading treatment, stating that it interprets this term to mean “the cruel, unusual and inhuman treatment or punishment prohibited by the 5th, 8th, and/or 14th amendments to the Constitution.” Are all U.S. interrogations of enemy combatants conducted in a manner consistent with this reservation?

Fourth, in its annual Country Reports on Human Rights Practices, the State Department has repeatedly condemned many of the so-called “stress and duress” interrogation techniques that U.S. personnel are alleged to have used in Afghanistan. Can you confirm that the United States is not employing the specific methods of interrogation that the State Department has condemned in countries such as Egypt, Iran, Eritrea, Libya, Jordan and Burma?

Fifth, the Defense Department acknowledged in March that it was investigating the deaths from blunt force injury of two detainees who were held at Bagram air base in Afghanistan. What is the status of that investigation and when do you expect it to be completed? Has the Defense Department or the CIA investigated any other allegations of torture or mistreatment of detainees, and if so, with what result? What steps would be taken if any U.S. personnel were found to have engaged in unlawful conduct?

Finally, Mr. Haynes' letter offers a welcome clarification that when detainees are transferred to other countries, “U.S. government instructions are to seek and obtain appropriate assurances that such enemy combatants are not tortured.” How does the Administration follow up to determine if these pledges of humane treatment are honored in practice, particularly when the governments in question are known to practice torture?

I believe these questions can be answered without revealing sensitive information or in any way undermining the fight against international terrorism. Defeating terrorism is a national security priority, and no one questions the imperative of subjecting captured terrorists to thorough and aggressive interrogations consistent with the law.
The challenge is to carry on this fight while upholding the values and laws that distinguish us from the enemy we are fighting. As President Bush has said, America is not merely struggling to defeat a terrible evil, but to uphold "the permanent rights and the hopes of mankind." I hope you agree that clarity on this fundamental question of human rights and human dignity is vital to that larger struggle.

Thank you for your assistance.

Sincerely,

[Signature]

[Name]
United States Senator

[Handwritten note]

Condoleezza Rice, I want to make sure we are on the right moral plane if an American is being held abroad.

[Signature]
INTERROGATION OF DETAINEES

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK CITY, NEW YORK 10036-6690

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June 4, 2003

Scott W. Muller
General Counsel
Central Intelligence Agency
1 George Bush Center
Washington, D.C. 20505

Dear Mr. Muller:

We are writing on behalf of the Committees on International Human Rights and Military Affairs & Justice of the Association of the Bar of the City of New York. Founded in 1870, the Association is an independent non-governmental organization with a membership of more than 22,000 lawyers, judges, law professors and government officials, principally from New York City but also from throughout the United States and from 40 other countries. The Committee on International Human Rights investigates and reports on human rights conditions around the world. The Committee on Military Affairs & Justice engages in matters of policy and law relating to the United States Armed Forces. The two committees are investigating reports about the treatment of detainees subject to CIA interrogation at locations outside of the United States, including the centers at Bagram air base in Afghanistan and on the island of Diego Garcia and at Guantanamo.

Over the past six months, several newspapers (the Washington Post, The New York Times and the Wall Street Journal) have reported allegations of abusive treatment by U.S. interrogators of people detained at Bagram. As described in these reports, some of the abusive treatment would qualify under international law as torture or cruel, inhuman and degrading treatment. In addition, the reports state that in some instances, people suspected of having links to terrorism have been apprehended by U.S. officials outside of the United States and rendered to countries where they can be subject to interrogation tactics — including torture — that are illegal in the United States.

Mr. William J. Haynes II, General Counsel of the Defense Department, recently wrote — in response to a letter from the Executive Director of Human Rights Watch to President Bush raising these issues — that "[w]hen questioning enemy combatants, U.S. personnel are required to
follow [United States] policy and applicable laws prohibiting torture.” In addition, Mr. Haynes confirmed that in the event of a transfer of “detained enemy combatants to other countries for continued detention on [the U.S. Government’s] behalf, U.S. Government instructions are to seek and obtain appropriate assurances that such enemy combatants are not tortured.”

Our Committees would like an opportunity to review the Directorate of Operations instructions and any other relevant materials giving guidance to interrogators, so that we may assess the clarity and specificity of the instructions given to U.S. interrogators and other U.S. personnel responsible for handling detainees. It is essential that U.S. personnel understand precisely those actions which are permissible and those which are prohibited by law. Our Committees, therefore, would appreciate it if your office could send us copies of the Directorate of Operations instructions and any other relevant material providing guidance to interrogators.

We are requesting only unclassified materials or classified materials redacted to remove classified information. After we have had an opportunity to review the materials, we would like to arrange a meeting with you to discuss these issues further.

We look forward to hearing from you.

Respectfully,

Miles P. Fischer
Chair
Committee on Military Affairs & Justice

Scott Horton, Chair
Committee on International Human Rights
September 9, 2003

Mr. William J. Haynes, II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Dear Mr. Haynes:

Thank you for your June 25, 2003, letter concerning U.S. policy with regard to the treatment of detainees held by the United States.

I appreciate your clear statement that it is the policy of the United States to comply with all of its legal obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). I also welcome your statement that it is United States policy to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with our government’s obligation, under Article 16 of the CAT, “to prevent other acts of cruel, inhuman, or degrading treatment or punishment” as prohibited under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

This statement of policy rules out the use of many of the “stress and durance” interrogation techniques that have been alleged in press reports over the last several months, including beatings, lengthy sleep and food deprivation, and shackling detainees in painful positions for extended periods of time. It should also go a long way towards answering concerns that have been expressed by our friends overseas about the treatment of detainees in U.S. custody. It should strengthen our nation’s ability to lead by example in the protection of human rights around the world, and our ability to protect Americans, including our service members, should they be detained abroad.

At the same time, the ultimate credibility of this policy will depend on its implementation by U.S. personnel around the world. In that spirit, I would appreciate it if you could clarify how the administration’s policy to comply with the CAT is communicated to those personnel directly involved in detention and interrogation? As you note in your letter, the U.S. obligation under Article 16 of the CAT is to “undertake . . . to prevent” cruel, inhuman or degrading treatment or punishment. What is the administration doing to prevent violations? Have any recent directives, regulations or general orders been issued to implement the policy your June 25 letter describes? If so, I would appreciate receiving a copy.

Patricio Leahy
Chairman
United States Senate
Washington, DC 20510-6002

AGRICULTURE, DENTISTRY, AND FORESTRY
APPROPRIATIONS
JUDICIARY
I understand that interrogations conducted by the U.S. military are governed at least in part by Field Manual 34-52, which prohibits “the use of force, mental torture, threats, intimidation, or exposure to unpleasant and inhumane treatment of any kind.” This field manual rightly stresses that “the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.” Are there further guidelines that in any way add to, define, or limit the prohibitions contained in this field manual? What mechanisms exist for ensuring compliance with these guidelines?

Most important, I hope you can assure me that interrogations working for other agencies, including the CIA, operate from the same guidelines as the Department of Defense. If CIA or other interrogation guidelines in use by any person working for or on behalf of the U.S. government differ, could you clarify how, and why?

I am pleased that before handing over detainees for interrogation to third countries, the United States obtains specific assurances that they will not be tortured. I remain concerned, however, that more assurances from countries that we know to practice torture systematically are not sufficient. While you state that the United States would follow up on any credible information that such detainees have been mistreated, how would such information emerge if no outsiders have access to these detainees? Has the administration considered seeking assurances that an organization such as the International Committee for the Red Cross have access to detainees after they have been turned over? If not, I urge you to do so.

Finally, has the administration followed up on specific allegations reported in the press that such detainees may have been tortured, including claims regarding a German citizen sent to Syria in 2001, and statements by former CIA official Vincent Cannistraro concerning an al-Qaeda detainee sent from Guantanamo to Egypt (see enclosed articles)?

Thank you again for your response to my last letter.

With best regards,

[Signature]

PATRICK LEAHY
United States Senator

I appreciate your concern.
Mr. Kenneth Roth
Executive Director
Human Rights Watch
350 Fifth Avenue, 34th Floor
New York, NY 10118

Dear Mr. Roth:

This is in response to your December 26, 2003, letter to the President and other letters to
senior administration officials regarding detention and questioning of enemy combatants
captured in the war against terrorists of global reach after the terrorist attacks on the United

The United States questions enemy combatants to elicit information they may possess that
could help the coalition win the war and forestall further terrorist attacks upon the citizens of the
United States and other countries. As the President reaffirmed recently to the United Nations
High Commissioner for Human Rights, United States policy condones and prohibits torture.
When questioning enemy combatants, U.S. personnel are required to follow this policy and
applicable laws prohibiting torture.

If the war on terrorists of global reach requires transfer of detained enemy combatants to
other countries for continued detention on our behalf, U.S. Government instructions are to seek
and obtain appropriate assurances that such enemy combatants are not tortured.

U.S. Government personnel are instructed to report allegations of mistreatment of or
injuries to detained enemy combatants, and to investigate any such reports. Consistent with
these instructions, U.S. Government officials investigate any known reports of mistreatment or injuries
to detainees.

The United States does not condone torture. We are committed to protecting human
rights as well as protecting the people of the United States and other countries against terrorism
of global reach.

Sincerely,

William J. Haynes II
Miles P. Fischer, Esquire  
Scott Horton, Esquire  
Association of the Bar of the City of New York  
42 West 44th Street  
New York, New York 10036-6690

Dear Messrs. Fischer and Horton:


As you know, the Director of Central Intelligence is required by law to protect intelligence sources and methods, 50 U.S.C. § 403-3(c)(6), and the Central Intelligence Agency (CIA) does not comment on operational activities or practices. I can assure you, however, that in its various activities around the world the CIA remains subject to the requirements of US law. Pursuant to Executive Order 12333, any allegations of unlawful behavior are reported by the CIA to the Department of Justice, and may be investigated both by that Department and by the Agency’s own Presidential appointed, Senate confirmed Inspector General. This Agency also provides the Congressional intelligence oversight committees with briefings and materials about its various activities, as provided by 50 U.S.C. §§ 413a, 413b(b).

I appreciate the concerns raised in your letter as well as the thoughtfulness of your questions. While I acknowledge that this response does not provide you with all the information you have requested, I want you to know that I share your committees’ interest in ensuring that US personnel understand their obligations under US law and comply with them.

Sincerely,

Scott W. Muller

Central Intelligence Agency
23 June 2003
June 25, 2003

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

I am writing in response to your June 2, 2003, letter to Dr. Rice raising a number of legal questions regarding the treatment of detainees held by the United States in the wake of the September 11, 2001, attacks on the United States and in this Nation’s war on terrorists of global reach. We appreciate and fully heed your concern for ensuring that in the conduct of this war against a ruthless and unprincipled foe, the United States does not compromise its commitment to human rights in accordance with the law.

In response to your specific inquiries, we can assure you that it is the policy of the United States to comply with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture. Its obligations include conducting interrogations in a manner that is consistent with the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”) as ratified by the United States in 1994. And it includes compliance with the Federal anti-torture statute, 18 U.S.C. §§ 2340-2340A, which Congress enacted to fulfill U.S. obligations under the CAT. The United States does not permit, tolerate, or condone any such torture by its employees under any circumstances.

Under Article 16 of the CAT, the United States also has an obligation to “undertake . . . to prevent other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture.” As you noted, because the terms in Article 16 are not defined, the United States ratified the CAT with a reservation to this provision. This reservation supplies an important definition for the term “cruel, inhuman, or degrading treatment or punishment.” Specifically, this reservation provides that “the United States considers itself bound by the obligations under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only in so far as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with this commitment.

[Signature]

06/29/2003 09:29PM
As your letter stated, it would not be appropriate to catalogue the interrogation techniques used by U.S. personnel in fighting international terrorism, and thus we cannot comment on specific cases or practices. We can assure you, however, that credible allegations of illegal conduct by U.S. personnel will be investigated and, as appropriate, reported to proper authorities. In this connection, the Department of Defense investigation into the deaths at Bagram, Afghanistan, is still in progress. Should any investigation indicate that illegal conduct has occurred, the appropriate authorities would have a duty to take action to ensure that any individuals responsible are held accountable in accordance with the law.

With respect to Article 3 of the CAT, the United States does not “expel, return (‘refouler’) or extradite” individuals to other countries when the U.S. believes it is “more likely than not” that they will be tortured. Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. We can assure you that the United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored.

In closing, I want to express my appreciation for your thoughtful questions. We are committed to protecting the people of this Nation as well as to upholding its fundamental values under the law.

Sincerely,

William J. Haynes II
Recent Developments

Following the issuance of the Committees’ Report in the last week of April, 2004,1 we and all Americans were stunned to learn of the abuses at Abu Ghraib Prison in Iraq. Disclosures since then include allegations of more widespread abuses of detainees in both Iraq and from the conflict in Afghanistan. The scope and causes of these known and alleged abuses and issues of responsibility and accountability are now the subject of investigation by Congress, the Departments of Defense and Justice and the military. At the same time, these recent events and disclosures raise additional legal questions concerning the legal standards applicable to the conflict in Afghanistan and the occupation of Iraq which were not thoroughly addressed in our original Report. It is the purpose of this Supplement to address those questions. We therefore examine the following questions:

1. Certain terms are used in this Supplement as defined in our Report.

   The Report was submitted to the General Counsels of the Department of Defense and the Central Intelligence Agency, the Legal Adviser to the National Security Counsel, and Counsel to the Joint Chiefs of Staff, and the Chair and Ranking Member of the committees for the Armed Services, Foreign Relations, Intelligence and the Judiciary of the Senate and the House of Representatives. These committees have held and are holding hearings on aspects of the Abu Ghraib abuses within their respective jurisdiction.

(1) What standards are applicable to treatment of detainees during the occupation in Iraq and what standards apply when the occupation ends?

(2) What is the scope of any exceptions to the standards of the Geneva Conventions for interrogation of detainees in Iraq who pose a security threat and/or are suspected of possessing “high value intelligence”?

(3) To what extent do the Geneva Conventions apply to the detainees from the conflict in Afghanistan?

(4) How and to what extent can CIA personnel and civilian contractors be held accountable for any violations of international law resulting from their participation in any abuses in Iraq?
Application of the Geneva Conventions to the Occupation of Iraq

The U.S. acknowledges that its presence in Iraq is an “occupation” within the meaning of Geneva IV. The U.S., as occupying power, is consequently subject to provisions for the benefit of “protected persons,” including Article 31’s prohibition of “physical or moral coercion to obtain information from them or third parties.” It is clear that not only the abuses in Abu Ghraib but also certain practices contemplated by the “Interrogation Rules of Engagement”—such as extended sleep deprivation and stressful positions—amount to “physical or moral coercion” and are, therefore, violations of Geneva IV.

Who Are Protected Persons?

As noted in the Report at footnote 116, Geneva IV benefits all persons in the hands of an Occupying Power, with exceptions only for nationals of that Power and its allies, nationals of certain neutrals and persons protected by other Geneva Conventions, such as prisoners of war. There is no blanket exception for so-called “unlawful

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3. On the Geneva Conventions and Geneva IV generally, see Part II of our Report.


5. In Senate hearings the Pentagon disclosed “Interrogation Rules of Engagement,” attached to this Supplement as Appendix A which listed certain interrogation practices and specified a second group of practices that required approval of the Commanding General (Lt. Gen. Ricardo Sanchez). This second group included: “Isolation [solitary confinement] for longer than 30 days, Presence of Mil [Military] Working Dogs, Sleep Management (72 hrs max), Sensory Deprivation (72 hours max), Stress Positions (No longer than 45 min).” A week following the disclosure of this document, General Sanchez announced that all of the practices in this second group, other than isolation, would not be permitted. Such form of Rules of Engagement is understood to be one of at least four versions adopted at various times in the fall of 2003 for use in one or more Coalition facilities. It is cited here as illustrative of the approach taken to interrogation standards.

combatants” who fail to qualify as POWs under Geneva III. Once dis-qualified from POW status, such detainees become protected persons under Geneva IV.

Are There Exceptions To The Geneva Conventions For “Security” Detainees Or Detainees Who Possess “High Value Intelligence”? U.S. military authorities maintain that interrogation of certain detainees possessing “high value intelligence” does not have to comply with certain restrictions of Geneva IV because of an exception provided in Article 5 of Geneva IV with respect to persons who threaten the security of a state—so-called “security detainees.” This view is based on a misinterpretation of the plain meaning and purpose of Article 5.

Article 5 provides for two categories of temporary exceptions to certain of its standards in the case of detainees who are definitely suspected of being threats to the security of a Party. The first paragraph of Article 5 provides that “where in the territory of a Party to the conflict,” that Party determines that an individual protected person is definitely suspected of, or engaged in, activities hostile to the security of the State, the Party can suspend that person’s rights and privileges under Geneva IV, where the exercise of such rights are prejudicial to the security of the State. The plain language of this paragraph limits a Party’s ability to suspend certain protections of Geneva IV to situations where a party to the conflict deter-

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7. See Report, fn. 7.
8. On May 23, 2004, it was disclosed that the Coalition response to the ICRC communication cited above asserted that certain detainees in question were “security detainees” not subject to the full obligations of Geneva IV. See Douglas Jehl and Neil A. Lewis, “The Reach of War: The Prisoners,” N.Y. TIMES, May 23, 2004, at A12.
9. For example, in a December 24, 2003 Letter from Brigadier General Janis L. Karpinski to the ICRC regarding ICRC’s visits to Camp Cropper and Abu Ghraib in October 2003, General Karpinski states: “[W]hile the armed conflict continues, and where ‘absolute military security so requires’ security internees will not obtain full GC protection as recognized in GCIV/5, although such protection will be afforded as soon as the security situation in Iraq allows it.”
10. Specifically, Article 5 provides in part:

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State...

See Geneva IV, Art. 5 (emphasis added).
mines that a protected person is posing a security risk in that party’s territory. Accordingly, this paragraph plainly has no application to protected persons detained by the U.S. in Iraq, because such detainees are not persons posing a security risk in the territory of the United States.\textsuperscript{11} Rather, the United States, as an Occupying Power, is subject to the provisions of a separate paragraph of Article 5 applicable to occupation. That separate paragraph\textsuperscript{12} applicable to occupation permits the Occupying Power, where absolute military necessity so requires, temporarily to deny “rights of communication”—but no other rights—for a person detained as a spy or saboteur or as a threat to the security of the Occupying Power. Therefore, during occupation, even detainees who pose a security risk to the Occupying Power have the same protection against coercion as any other detainee.

**What Standards Apply When The Occupation Ends?** The occupation will continue under Article 6 as long as de facto the U.S. “exercises the functions of government” in Iraq. This result cannot be varied by agreement with Iraqi “authorities.” Article 47 provides that agreements between the authorities of the occupied territories and the Occupying Power are not effective to deprive protected persons of the protections of Geneva IV. The ICRC Commentary confirms that Article 47 applies where the Occupying Power has installed and maintained a government in power. For the occupation to end there must be an independent national government internationally recognized as exercising the full functions of government. The establishment of a transitional regime that failed to exercise the full functions of government would not terminate the occupation. When the occupation does end, Article 31 will no longer apply. However, in any armed conflict that may continue between remaining U.S. armed forces in Iraq and Iraqi resistance—a non-international (non-state) armed conflict—the minimal protections of Common Article 3 of the Geneva Conventions would apply.

\textsuperscript{11} Even in a case covered by paragraph 1 of Article 5, the detainee must be treated “with humanity.” See the definition of humane treatment in Common Article 3 of the Geneva Conventions quoted and discussed below, which would clearly exclude the abuses found at Abu Ghraib and probably a number of the practices contemplated by the “Interrogation Rules of Engagement.” If the first paragraph’s broad right of derogation were interpreted to apply to occupied territory, it would make the second paragraph’s narrow derogation superfluous, contrary to principles of interpretation that seek to give meaning to all provisions.

\textsuperscript{12} The second paragraph of Article 5 provides, in part:

>Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military necessity so requires, be regarded as having forfeited rights of communication under the present Convention.
The Applicability of the Minimal Safeguards of Common Article 3 of the Geneva Conventions

Working documents dating from early 2002 have recently become public exposing internal dialogue within the Administration about the application of the Geneva Conventions to the Afghan conflict.\footnote{See, e.g., Michael Isikoff, “Double Standards? A Justice Department memo proposes that the United States hold others accountable for international laws on detainees—but that Washington did not have to follow them itself.” Newsweek, May 22, 2004, available at <www.msnbc.msn.com/id/5032094/site/newsweek/> .}

White House counsel, the Office of the Vice President, the Department of Justice and Department of Defense civilian attorneys, over the objections of Secretary of State Powell and the Joint Chiefs of Staff, argued that the Geneva Conventions did not apply to detainees from the Afghan conflict. The purposes of this interpretation were to preserve maximum flexibility with the least restraint by international law and to immunize government officials from prosecution under the War Crimes Act, which renders certain violations of the Geneva Conventions violations of U.S. criminal law.

Ultimately, the President accepted application of the Geneva Conventions in principle to the conflict with the Taliban, while asserting that Taliban personnel did not qualify under Geneva III for status as prisoners of war. However, the Administration denied that the Geneva Conventions applied at all to Al Qaeda and to the broader War on Terror, although it announced that it would adhere to comparable humanitarian standards. (See Report at text accompanying footnote 95, et seq.) Official correspondence from the General Counsel of the Department of Defense dated June 25, 2003, appended to our Report, stated that the U.S. would comply with applicable international law, including the Convention Against Torture And Other Cruel, Inhuman, or Degrading Treatment (“CAT”).

Notwithstanding those assurances, the foregoing raises serious issues regarding the application of the Geneva Conventions in the War on Terror, notably the minimal protections of Common Article 3 and the actual standards applied in the field.

Each of the four Geneva Conventions has a “Common Article 3,” which provides a safety net in non-international armed conflicts (not between State parties) which are not covered by the full protection of the Conventions.\footnote{Article 3 provides, in pertinent part:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall}
tion-state parties to the Conventions, but between one state-party and non-state forces occurring on the territory of a party to the Geneva Conventions, as in the case of the conflict in Afghanistan after the formation of the Karzai government. In such conflicts, Article 3 expressly applies to armed forces who have “laid down their arms” (surrendered) or been detained. Its broad terms cover all detainees including captured unprivileged or “unlawful” combatants.\(^{15}\)

The internal Administration memoranda mentioned above argue that Common Article 3 does not apply at all to Al Qaeda’s activities in the Afghanistan conflict because, inasmuch as Al Qaeda operated cross-border and with support from persons in countries outside Afghanistan, that conflict is not an armed conflict of a non-international character within the meaning of Article 3. According to a Justice Department memorandum of January 2002 by then Justice Department official and now Professor John Yoo, and his recent op-ed article,\(^{16}\) Article 3 was intended to apply only to large-scale and entirely internal civil wars, for which it cites the example of the Spanish Civil War of the 1930’s.\(^{17}\) In fact, the Geneva Conventions are structured in terms of international armed conflicts (between State parties) and non-international (non-inter-State) conflict. There

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\(^{15}\) In classic inter-state conflicts, combatants might qualify for prisoner of war status under Geneva III or, if disqualified from that status, be subject to the lesser, but significant, protections of Geneva IV. In other armed conflicts, all combatants are covered by Common Article 3.


\(^{17}\) The Spanish Civil War is an ironic example for the Administration to rely on given the internationalization of that conflict with the indirect involvement of the governments of the Soviet Union on one side and Germany and Italy on the other, and including the commitment of a covert Luftwaffe unit, the Kondor Legion, and the Italian Legione Aviazione but without
is no indication that there is any category of armed conflict that is not covered by the Geneva Conventions. Nor should the different status of the Taliban and Al Qaeda in the conflict in Afghanistan affect the question of whether the Geneva Conventions apply to that armed conflict, as Professor Yoo argues. Although their different status may affect how the Geneva Conventions apply to these different groups, it does not affect the question of whether the Geneva Conventions apply. The Geneva Conventions apply to the totality of a conflict including the regular forces, irregulars (whether or not privileged combatants) and civilians.

With respect to interrogation in armed conflict, Common Article 3 requires humane treatment generally and specifically forbids “cruel treatment and torture” or “outrages upon personal dignity, in particular humiliating and degrading treatment.” Such provisions were violated not only by the conduct photographed at Abu Ghraib, but also by practices reported to have been engaged in at other U.S. facilities not only in Iraq, but, if reports are accurate, also from the conflict in Afghanistan.

Enforcement of the Geneva Conventions and the Anti-Torture Statute against Civilians

Our Report fully described the provisions of the Uniform Code of Military Justice defining the standard of treatment for military detainees and providing for criminal enforcement through courts martial of the Geneva Conventions, as applied by regulations and orders, and defining other offenses that would be violated by abuse of detainees.
Because the Congressional investigation and news reports have noted the possible involvement of civilian contractors and CIA personnel in the Abu Ghraib abuses and elsewhere, it is appropriate to consider further the enforcement of such standards against civilians, as well as the military. The War Crimes Act criminalizes as a “war crime” the commission in the U.S. or abroad of a “grave breach” of the Geneva Conventions, violation of Common Article 3, and certain other international offenses, where the perpetrator or the victim is a member of the Armed Forces or a U.S. national. (With respect to the military, given the other recourse against active service members, the statute applies only to those who may have been discharged before prosecution and therefore were outside the jurisdiction of courts martial or who are being prosecuted jointly with civilians.)

The jurisdictional basis for enforcing the War Crimes Act against civilian contractors or others “accompanying” the Armed Forces outside the U.S. is likely to be the Military Extraterritorial Jurisdiction Act (“MEJA”) cited in our Report at footnotes 66 and 72. Indeed, the Department of Justice has recently announced that it is asserting jurisdiction under this statute to open a criminal investigation regarding a civilian contractor in


   (a) Offense. Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

   (b) Circumstances. The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States . . .

   (c) Definition. As used in this section, the term “war crime” means any conduct -

       (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party . . .

       . . . (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict . . .

See 18 U.S.C. § 2441. An internal Administration document referenced above argued against application of the Geneva Conventions specifically to develop a defense against application of the War Crimes Act, in case government officials were alleged to have committed grave breaches of the Geneva Conventions and other offenses thereunder.

20. The Military Extraterritorial Jurisdiction Act provides, in relevant part:

   (a) Whoever engages in conduct outside the United States that would consti-
In the United States, MEJA provides federal court jurisdiction over federal offenses with a penalty of more than one year, thus excluding an offense like simple assault, while including violation of the War Crimes Act or the anti-torture statute implementing CAT, 18 U.S.C. § 2340A, both of which provide for life imprisonment or even capital punishment in crimes causing death. A significant issue under MEJA is whether a contractor was “employed” by the Armed Forces (expressly within the Act), was employed by a contractor serving the Armed Forces or was employed by the CIA. In the latter cases, the reach of MEJA would depend on whether the defendant was “accompanying” the Armed Forces, a factual matter in the circumstances.

Conclusion

Disclosures since we issued our Report indicate violations of the Geneva Conventions in Iraq, where the Administration acknowledges they apply, and a mistaken belief that they have no application at all to detainees in the War on Terror, such as suspected Al Qaeda detainees from the conflict in Afghanistan. Investigations by Congress, the Justice Department, and the military must be pursued vigorously to uncover any violations of international and U.S. law, to prosecute any violations of the War Crimes Act or the Uniform Code of Military Justice, and to determine accountability not merely of subordinate personnel who engaged in such conduct, but of all those in the civilian and military hierarchy who may have authorized or condoned unlawful conduct.

Misinterpretations of the Geneva Convention and CAT must be corrected. It appears that Article 5 of Geneva IV is being misused to evade the application to members of the Armed Forces is, however, limited to those no longer subject to the UCMJ (usually because of discharge) or accused of committing an offense with civilian defendants.

21. As noted in the Report at the text accompanying footnote 66, enforcement of 18 U.S.C. § 2340A was severely limited as to the offenses committed at U.S. military or government facilities by the technical effect of an amendment in the USA Patriot Act. The Report recommends legislation to correct that presumably inadvertent nullification of this important criminal statute.
protections against coercive interrogations to obtain information from detainees with “high value intelligence.” Furthermore, the protections of Common Article 3 are claimed not to apply to detainees from the armed conflict in Afghanistan at Guantanamo, Bagram and elsewhere, although the Administration claims to have assured comparable humane standards. The photographs from Abu Ghraib show that detainees in Iraq have been deprived of CAT’s protections against both torture and cruel, inhuman and degrading treatment that also amounts to cruel and inhuman treatment under the U.S. Constitution and of the standard of treatment established for the military under the UCMJ, and allegations have been made of violations of such standards in Afghanistan and elsewhere. We urge the Administration to re-examine its positions and live up to the legal obligations clearly imposed upon it by the Geneva Conventions, CAT and the UCMJ.

We again urge, as we did in our Report, that civilian and military personnel engaged in the detention and interrogation of detainees in Iraq, Guantanamo and elsewhere receive thorough education, training and clear instructions concerning their obligations under international and U.S. law.

We also urge the restoration of the role of Judge Advocate Officers in advising on, and monitoring, interrogations on site. 22

Finally, we recommend that gaps in U.S. law to punish violations of our international legal obligations under the Geneva Conventions and CAT be remedied by Congress. Our Report discusses the need to cure deficiencies in 18 U.S.C. § 2340A, which criminalizes torture. The Military Extraterritorial Jurisdiction Act should be amended to extend jurisdiction over violations of U.S. law committed by all persons employed by, or serving at the direction of, any U.S. intelligence agency, not merely those that “accompany” the Armed Forces.

Above all, we urge all those who set the tone and climate for our military and civilian government personnel to establish respect for our treaty obligations and the rule of law in the treatment of detainees.

May 2004

22. A member of a participating Committee was recently advised by senior JAG officers that the prior practice of having JAG officers monitor interrogations in the field for compliance with law and regulations had been curtailed at the direction of senior officials.