

Tulsa Law Review

Volume 47
Issue 2 *Symposium: Justice Aharon Barak*

Fall 2011

Imprisonment without Trial

Owen Fiss

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Owen Fiss, *Imprisonment without Trial*, 47 *Tulsa L. Rev.* 347 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol47/iss2/5>

This Legal Scholarship Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

IMPRISONMENT WITHOUT TRIAL

Owen Fiss*

The Constitution is a broad charter of governance. It establishes the institutions of government and places limits on their exercise of power. For the most part, the Constitution speaks in broad generalities, and over the last several hundred years many principles have been developed to give specific content to these generalities.

Some of these principles, like the one requiring separation of powers, are inferred from the general structure of the Constitution. Others, like antidiscrimination or its alternative, the antisubordination principle, are rooted in some specific provision such as the Equal Protection Clause, and are meant to give further content to those provisions.

Both types of principles are supposed to guide government officials in discharging their duties and, if required, they can be enforced against these officials by the judiciary. These principles are as endowed with the authority of the Constitution as are the words on the parchment. However, they present themselves to us as an interpretation of those words and can be criticized and, if need be, reformulated in ways that, short of an amendment, the words on the parchment cannot.

One such principle — I refer to it as the principle of freedom — has been violated by the Bush administration and now by the Obama administration in their fight against terrorism. This principle denies the government the power to imprison anyone without charging that individual with a specific crime and swiftly bringing him to trial. The principle of freedom is implicit in the provision of the Constitution that limits the power of Congress to suspend the writ of habeas corpus — the means by which the legality of imprisonment can be tested.¹ More importantly, it should be seen as a gloss on the Fifth Amendment of the Bill of Rights, which denies government the power to deny anyone of “life, liberty, or property, without due process of law.”²

At its core, the principle of freedom denies the government the power to deprive an individual of his liberty without charging the individual with a specific crime and producing evidence of guilt in open court. It also requires the government to give the accused an opportunity to cross-examine the witnesses who testify against him and to

* Sterling Professor of Law, Yale University. Many thanks to Trevor Sutton, Ned Hirschfeld, and John Paredes for their research and editorial assistance. A brief version of this paper appeared in *Slate* (December 4, 2009) and Spanish versions appeared in *Inseguridad, democracia y derecho* (Librería S.A., 2011) and in *El Cronista* (January 2011).

1. U.S. CONST. art. 1, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

2. U.S. CONST. amend. V.

present his own witnesses.

Many of the procedural protections required by the principle of freedom have instrumental value: they are the best means available for arriving at the truth of the matter. They also reflect elemental notions of fairness and are thus one source of the government's legitimacy. They put the government to the burden of proving its charges in open court and give the accused, who is also protected by a presumption of innocence and the right to trial by jury, a reasonable opportunity to defend himself. The underlying assumption is that a government willing to abide by these limitations is likely to win the respect and admiration of its citizens.

Like many constitutional principles, the principle of freedom has a limited number of exceptions. War is one. The Constitution fully recognizes the authority of the United States to engage in war, and the principle of freedom has been adjusted to accommodate the felt necessities of combat. In the throes of war, the government is allowed to capture enemy soldiers and imprison them without the necessity of a trial for the duration of the hostilities. Both Bush and Obama have, in effect, made claim to this exception to the principle of freedom and insisted upon the authority to imprison for prolonged, indefinite periods of time anyone that they determine has fought for the Taliban or al Qaeda.

THE TALIBAN AND THE GENEVA CONVENTION

The continued detention of persons accused of fighting for the Taliban presents a special set of problems arising from the Third Geneva Convention of 1949. This treaty operates within the sphere of the war making authority allowed by the Constitution and should thus be seen as a secondary constraint on the authority of the government to imprison without trial. Under the Third Geneva Convention, enemy combatants can be held for the duration of a war and are to be repatriated at the conclusion of the hostilities.³ The convention also implicitly provides that enemy combatants cannot be prosecuted simply for fighting, although they can be prosecuted for war crimes.⁴ The United States is a signatory of the treaty and is constrained by it whenever the belligerent is also a signatory.

In the fall of 2001, shortly after the terrorist attacks on September 11, the United States launched a war against Afghanistan. At that time, the Taliban, essentially a political organization of religious fanatics, controlled the government of Afghanistan and used its power to support and harbor al Qaeda. The United States invaded Afghanistan when the government refused to turn over Osama bin Laden, then the leader of al Qaeda. The Taliban fighters taken into custody in the course of this war are protected by the Third Geneva Convention simply by virtue of the fact that both the United States and Afghanistan are signatories to the treaty. The fact that the United States had previously refused diplomatic recognition to the Afghanistan government when it was controlled by the Taliban did not preclude the applicability of the Convention.

3. Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

4. *See id.* at art. 87 ("Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.").

At an early stage in this war, President Bush declared that all who fought for the Taliban were unlawful enemy combatants.⁵ By that he meant that members of the Taliban were not entitled to any of the protections of the Third Geneva Convention. Denied the protection of the treaty, the Taliban fighters could, according to Bush, be prosecuted for fighting or, alternatively, held for prolonged, indefinite periods of time, even for life, without being placed on trial. Moreover, under this doctrine there was no obligation to repatriate the prisoners who had fought for the Taliban at the conclusion of the war. President Bush did not in any way recognize the principle of freedom as a limitation of his power.

Late in 2001, a young American citizen — John Walker Lindh, who admitted fighting for the Taliban but denied any connection whatsoever to al Qaeda — was captured by the United States' forces in Afghanistan. Soon, thereafter, he was prosecuted in federal district court in Virginia for being part of a conspiracy to kill American soldiers. Lindh argued that the prosecution contravened the Third Geneva Convention, since he was being prosecuted simply for fighting. The district court denied Lindh's motion to dismiss and, in doing so, lent support to the doctrine propounded by the Bush administration that treated all Taliban fighters as unlawful enemy combatants.⁶ After Lindh's motion to dismiss was denied, Lindh pleaded guilty to one of the charges and was sentenced to twenty years' imprisonment in a maximum-security facility in Arizona. The plea agreement provided that if, for any reason, the sentence were to be set aside, Lindh would once again be classified as an unlawful enemy combatant and thus subject to imprisonment without a trial for an indefinite period of time, presumably even for life.

The Third Geneva Convention sets forth four conditions that must be met in order for an irregular militia to be brought within its protection. The fighters must (1) wear uniforms or some designation; (2) carry their arms openly; (3) be subject to a command structure; and (4) not commit war crimes.⁷ The district court took liberty with the text of the Convention when it used these criteria to determine whether the Afghanistan army — not some irregular militia — was entitled to the protection of the treaty. By its very terms, the Convention applies to “Members of the armed forces of a Party to the conflict.”⁸ It is generally understood that the Convention provides no protection to spies and saboteurs, in part because they do not wear uniforms, but Bush sought to expand the use of that exception to cover the armed forces of Afghanistan. Unfortunately, the district court endorsed Bush's policy.

The district court can also be faulted for the evidentiary basis it relied on in applying the Geneva Convention criteria to the Afghanistan army. For example, in determining whether the fighters had committed war crimes, the district court looked to practices of the Taliban that had brought it to power rather than the way it fought the war

5. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 13, 2001); *see also* Memorandum from George W. Bush, President, to Richard B. Cheney, Vice President, et al., *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB 134-35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

6. *United States v. Lindh*, 212 F. Supp. 2d 541, 552-58 (E.D. Va. 2002).

7. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

8. *Id.*

against the United States. To compound the error, the district court rested its judgment on books (one of which happened to be published before 2001), not evidence on the record. Admittedly, a trial on how the entire Afghanistan army fought the war might prove to be a difficult, if not impossible, task, but it is a necessary consequence of Bush's refusal to treat the Taliban as the armed forces of a signatory state.

Obama has been careful to avoid using the nomenclature of "unlawful enemy combatants," but with regard to the Taliban he appears to be pursuing the same policy as Bush. On May 21, 2009, in a speech at the National Archives, President Obama announced his strategy for dealing with the prisoners still being held at Guantánamo. By way of example, he listed among those to be held indefinitely without trial a prisoner who had "commanded Taliban troops in battle."⁹ Obama said that this prisoner was being held for his "past crimes"¹⁰ but never specified what those crimes were. If the Taliban prisoners being held at Guantánamo had violated the laws of war, for example by killing civilians, then they should be tried for that crime. However, if their only crime was fighting against American soldiers, as was arguably true of the unnamed Taliban commander mentioned by Obama, then under the terms of the Geneva Convention, they should be turned over to the Afghanistan government, which would then be responsible for determining their fate.

The obligation of repatriation stems from the fact that we are no longer at war with Afghanistan. That war ended by 2004 at the latest, when the Taliban were routed, a new Constitution was adopted for the country, elections were held, and a new government was installed. In fact, a second round of national elections was held in August of 2009. The United States and a limited number of NATO forces are still, as of this writing, operating in Afghanistan, but they are now doing so at the behest of the Afghanistan government, helping to reconstruct the nation, suppress the resurgence of the Taliban, and pursue al Qaeda.

Inevitably, repatriation is a long, arduous process. It does not occur overnight. What is striking about Obama's May 2009 National Archives speech is that he did not acknowledge the obligation to repatriate Afghan soldiers, including the one who led troops in battle. In fact, in announcing that such prisoners will remain incarcerated for indefinite periods of time without trial, he appears to have repudiated such an obligation. In a speech to the American Society of International Law on March 25, 2010, the Legal Advisor to the Department of State, Harold Koh, described recent attempts to improve the detention facilities in Afghanistan. He spoke glowingly of the Department of Defense's efforts "to prepare the Afghans for the day when we turn over responsibility for detention operations."¹¹ There was no recognition, however, of the obligation to

9. Barack Obama, President of the United States, Remarks by the President on National Security (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09.

10. *Id.*

11. Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, The Obama Administration and International Law, at III.B.1.b (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>; see also Alissa J. Rubin, *U.S. Backs Trial for Four Detainees in Afghanistan*, N.Y. TIMES, July 18, 2010, at A6, available at <http://www.nytimes.com/2010/07/18/world/asia/18detention.html> (describing the process of transferring responsibility for prisoners held in Afghanistan) ("One potential problem that has yet to be confronted is that an Afghan court could acquit a detainee whom the American review board deems a

repatriate the Afghan soldiers, nor any indication that these new detention facilities would be used for the Guantánamo prisoners who had fought for the Taliban and who Obama had declared would be subject to indefinite, prolonged imprisonment without trial.

In the same speech, the Legal Advisor reminded his audience of the conflict in Afghanistan and characterized the military operation in that country that began in 2001 as a war against the Taliban, not Afghanistan.¹² Such a characterization has enabled the administration to ignore the 2004 transfer of sovereignty and to treat the battle against the Taliban in Afghanistan today not as an effort to suppress the insurgency but rather as a continuation of the war that began in 2001. From my perspective, however, such a characterization of the initial military invasion is ill-advised, as wrong as would be an attempt by the administration to characterize the invasion of Iraq in March 2003 as a war against the Baath party, not Iraq. Such a characterization would postpone indefinitely the obligation of repatriation, suspending it until all insurgencies are suppressed, and thus would run counter to the humanitarian purposes underlying the Geneva Convention. The Taliban prisoners Obama referred to in his National Archives speech did not participate in the insurgency, but rather have been imprisoned at Guantánamo for years on end. They stand accused of fighting against United States forces when we invaded the country in the fall of 2001 and according to Obama are being held only for their “past crimes.”¹³

AL QAEDA AND THE PRINCIPLE OF FREEDOM

Al Qaeda cannot possibly claim the protection of the Third Geneva Convention. All of its soldiers are unlawful, or perhaps more properly, unprivileged, enemy combatants. This, remember, was the same classification President Bush (and by implication, President Obama) had applied to the Taliban. While the argument for placing the Taliban outside the reach of the Convention was founded upon a strained interpretation of a provision of the treaty concerning irregular militias, there is a much more straightforward argument for reaching the same conclusion regarding al Qaeda. For the most part, the Convention only constrains the United States when a belligerent is a signatory. Al Qaeda is not such a signatory, nor could it be, for it is a far-flung international terrorist organization that operates in secret and does not (yet) lay claim to any national territory. The Convention provides that a signatory may be bound by it in its relationship to a non-signatory, but only if the non-signatory acts in accordance with the Convention¹⁴ — a condition al Qaeda most assuredly does not satisfy.

Even though executive action towards al Qaeda is not constrained by the treaty (and perhaps customary humanitarian law), it nevertheless remains subject to the

continuing threat. Then whose law will prevail? ‘Anybody not found guilty can be released, but we have an interest in not releasing people that pose a risk to the people of Afghanistan and to us,’ said Capt. Gregory Belanger, director of legal operations for Task Force 435.”)

12. Koh, *supra* note 11, at III.B.

13. Obama, *supra* note 9.

14. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”).

Constitution and in particular to the principle of freedom — unless, of course, this action fits within the exception allowed for war. The Bush administration took the position that al Qaeda was responsible for the 9/11 attacks and for that reason launched a war against al Qaeda. Obama has meticulously avoided using Bush's mantra of the "War on Terror," but he has repeatedly declared, "We are at war against al Qaeda."¹⁵

Although the campaign against al Qaeda may be characterized as a war, thereby allowing the United States to target or capture al Qaeda fighters, it is no ordinary war and the exceptions to the principle of freedom must be adjusted accordingly. In its fight against al Qaeda, the Bush administration was prepared to treat the entire world as a battlefield. The administration insisted that the prerogatives of the United States as a belligerent allowed it to seize and perhaps even target members of al Qaeda anywhere they could be found, be this at O'Hare Airport, the streets of Milan, driving on a road in Yemen, or at a university in Peoria, Illinois. However, by acknowledging this prerogative we undermine and endanger the very nature of the civilized life as we know it and defeat the values that underlie the principle of freedom.

To guard against such a danger, it is necessary to calibrate the concept of the battlefield and to distinguish between active theaters of armed conflict (so called hot battlefields) and other locations where suspected terrorists might be found. Suspects not residing within a theater of war can of course be apprehended outside of it, but only through the ordinary processes of the law, not the kind of action typically undertaken by the military on a battlefield. Such suspects cannot be targeted, nor can they be seized or kidnapped by military forces and bundled off to some secret or military detention facility.

Analogous restrictions must be placed on the authority of the United States to imprison individuals accused of having al Qaeda links, even if they were captured on the battlefield and allegedly engaged in armed conflict. In this case, the restrictions must be temporal in nature and reflect the almost unending character of the war against al Qaeda. Much of our military action has been aimed at capturing or killing Osama bin Laden. That objective was achieved on May 1, 2011, but it has not brought an end to the war against al Qaeda. Other leaders have emerged. Account must also be taken of the fact that al Qaeda has units throughout the world that are capable of acting on their own.

Accordingly, just as it is unthinkable to treat every place on earth where al Qaeda fighters might be as if it were a battlefield, it is unthinkable to allow the government to hold al Qaeda suspects until the war between the United States and al Qaeda has ended — a time that we cannot readily foresee. To allow persons accused of being al Qaeda soldiers to be imprisoned for the duration of hostilities would constitute such an enormous expansion of the exception to the principle of freedom as to undermine the principle itself and threaten the values it serves.

15. See, e.g., Barack Obama, President of the United States, Remarks by the President on Strengthening Intelligence and Aviation Security (Jan. 7, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-intelligence-and-aviation-security> ("We are at war. We are at war against al Qaeda, a far-reaching network of violence and hatred that attacked us on 9/11, that killed nearly 3,000 innocent people, and that is plotting to strike us again."); see Obama, *supra* note 9 ("Now let me be clear: We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat.")

The principle of freedom does not prohibit the United States from capturing and holding al Qaeda suspects for a brief period. Such a detention policy can be justified in terms of the necessities of military conflict. What the principle does prohibit, however, is imprisonment for sustained or prolonged periods without placing the prisoner on trial, for such a policy is not required by the exigencies of warfare. The Bush administration was, of course, allowed some leeway when it began its war against al Qaeda and captured persons it believed were members of al Qaeda, but it soon became clear that the administration was prepared to incarcerate suspects seized far from an active theater of armed conflict and to do so for a prolonged period of time, maybe forever, without ever placing them on trial. Some of these prisoners were held in naval brigs in South Carolina and Virginia. For the most part, however, they were imprisoned (for reasons that still remain unclear) at Guantánamo Naval Station in Cuba.

The prison in Guantánamo was opened in January 2002, and over the next seven years close to 800 prisoners were incarcerated there at one time or another.¹⁶ Some of these prisoners were accused of fighting for the Taliban, but most were accused of al Qaeda links. During this period, some were transferred to other prisons, and others were released due to either diplomatic pressure or decisions by military tribunals established by the Department of Defense in July 2004 (as part of the strategy of depriving the Guantánamo prisoners of access to federal courts to advance their claim of freedom through the writ of habeas corpus). In January 2009, when Obama took office, Guantánamo had 240 prisoners, some of whom had been incarcerated there for as long as seven years.¹⁷

Upon taking office, President Obama signed an executive order requiring that the prison at Guantánamo be closed in one year's time, but it remained unclear what might happen to the prisoners still confined there. Accordingly, in his National Archives speech in May 2009 he announced a tripartite policy — free those who had succeeded in their petitions for habeas corpus, place others on trial either before military commissions or civilian courts, and continue the imprisonment without trial for the group that remained. Almost fifty individuals fall within this third category.¹⁸ Admittedly, it is sometimes difficult to know when a detention will be brief enough to be justified by the necessities of war and thus allowed by the exception to the principle of freedom. In this instance it is not.

To Obama's credit, he, unlike Bush and his defenders, appears to be using the power to imprison without trial only reluctantly. When he announced the policy in May 2009, Obama called the prospect of prolonged, indefinite incarceration "the toughest single issue that we will face."¹⁹ Yet, rather than honor the principle of freedom, Obama continued Bush's policy and declared by way of justification that some of the Guantánamo prisoners "cannot be prosecuted."²⁰ He did not explain why trials were not an option. Certainly it cannot be the case that American law is incapable of dealing with

16. GUANTANAMO REVIEW TASKFORCE, FINAL REPORT I (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

17. *See id.* at 1, 15.

18. *Id.* at 23.

19. Obama, *supra* note 9.

20. *Id.*

al Qaeda agents or terrorism in general. Bush tried and convicted a number of al Qaeda terrorists during his tenure, and Obama has put or plans to put a number on trial too, including the alleged mastermind of the 9/11 attack, Khalid Sheikh Mohammed. At first Mohammed was to be tried before a civilian court in Manhattan, but in the face of congressional opposition and eventually legislation prohibiting transfer of any of the Guantánamo prisoners to the United States even for trial, Obama decided in the spring of 2011 to place him on trial before a military commission.

Many have speculated that Obama's refusal to try some of the prisoners stemmed from a concern that the evidence against them was the product of torture, and thus tainted. This kind of evidence has long been subject to an "exclusionary rule" that prohibits the use of evidence that has been acquired in violation of the Constitution or some federal statute. But if this was Obama's reason, he effectively created a bifurcated exclusionary rule: evidence secured through torture cannot be used at trial, but it can be used as the basis for incarcerating a suspect, even for the rest of his life.

Such a bifurcated exclusionary rule would create all the wrong incentives. Government interrogators would know that a confession secured through torture could serve as the basis for prolonged incarceration, despite the fact that upon taking office, Obama issued an order banning torture.²¹ This bifurcated rule would also compound the wrong suffered by the Guantánamo prisoners who were tortured and are now being held indefinitely without trial: first they were subject to excruciating pain, and now the fruits of that abuse will keep them in prison with no end in sight. The Constitution should not allow any deprivation of liberty to be based on evidence procured through torture, regardless of whether deprivation is the result of a trial or a presidential decision.

Alternatively, the concern animating Obama's, and before him Bush's, unwillingness to go to trial may not have been the use of tainted evidence, but rather the disclosure of secret evidence in the course of the prosecution. An example of such evidence might be the identity of undercover agents. The government is, of course, entitled to a measure of secrecy, but that should not, and in fact never has justified imprisonment without a trial. In a good number of criminal prosecutions touching on national security, defendants have sought information that the government deemed top secret. Courts have been more than capable of accommodating these concerns, typically by examining the evidence in private without the accused or his lawyer and evaluating its relevance to the case.²² If the judge determines that the evidence is important, the government can make it available to the accused, offer a substitute, or drop the case. The remedy has never been to suspend the trial and incarcerate the prisoner indefinitely.

Nor can the policy of imprisonment without trial be justified on the ground of preventing some extraordinary harm, such as the detonation of a radioactive bomb. One al Qaeda operative — Jose Padilla, who was taken into custody in 2002 at O'Hare Airport in Chicago as he alighted from a flight that originated in Pakistan — was accused of planning such a crime. He was "accused" not in the formal sense of the term, but

21. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4893-94 (Jan. 22, 2009).

22. See, e.g., *United States v. Moussaoui*, 365 F.3d 292, 310-11 (4th Cir. 2004) (balancing national security interests against constitutional rights in the production of evidence).

rather in press releases by the Department of Justice.²³ After seven years' imprisonment, the government finally brought him to trial — but for an entirely different crime.²⁴ No other al Qaeda suspect, not even any of those held at Guantánamo, has been accused of such an extraordinary crime. Even if one were, the burden would remain on the government to prosecute that individual for that crime, even if it carried a risk of acquittal.

In defending his initial decision to place Khalid Sheikh Mohammed on trial before a civilian court in Manhattan, Obama's Attorney General, Eric Holder, sought to minimize the risk of an acquittal and in so doing produced an even more barbarous offense to the principle of freedom. In testifying before a Senate committee, Holder suggested that even if Mohammed were acquitted at trial, he could be imprisoned indefinitely, even for life, as an enemy combatant.²⁵ Such a policy would make the trial pointless and defeat the very values the principle of freedom seeks to further. Indeed, imprisonment after acquittal would be far worse than imprisonment without trial. The exceptions to the principle of freedom must be narrowly cabined to protect the values furthered by the principle and, in any event, cannot be adjusted on a case-by-case basis to reflect the President's assessment of the gravity of the threat posed if the prisoner is acquitted, or much less, allow the President to imprison the accused after he has been acquitted.

Many have criticized President Bush's conduct during his "War on Terror" as an exercise of excessive unilateralism. They faulted him for acting on his own without seeking the involvement or concurrence of the other branches of government. Fully aware of this line of criticism, President Obama declared in his May 2009 National Archives address, "[i]n our constitutional system, prolonged detention should not be the decision of any one man,"²⁶ and then he went on to promise to develop a system that involved "judicial and congressional oversight" of his decision to incarcerate someone as an enemy combatant.²⁷

On September 24, 2009, Obama announced that he would not turn to Congress to establish the promised oversight system.²⁸ He said that support for his action was already

23. See, e.g., Press Release, Dep't of Justice, Statement of Attorney General John Ashcroft Regarding the Padilla Case (Feb. 20, 2004); see also Letter from Paul Wolfowitz, Deputy Sec'y of Def., to James Comey, Deputy Att'y Gen. (May 28, 2004), available at <http://news.findlaw.com/wp/docs/padilla/pad52804dodsum.html>.

24. Press Release, Dep't of Justice, Jose Padilla Charged With Conspiracy To Murder Individuals Overseas, Providing Material Support To Terrorists (Nov. 22, 2005), available at http://www.justice.gov/opa/pr/2005/November/05_crm_624.html.

25. See *Oversight of the U.S. Department of Justice: Hearing Before the Sen. Comm. on the Judiciary*, 111th Cong. 22, 33-34, 42 (2009) (statement of Eric Holder, Att'y Gen. of the United States) ("And one of the things that this administration has consistently said, in fact, Congress has passed legislation that would not allow for the release into this country of anybody who was deemed dangerous. And so that if there were the possibility that a trial was not successful, that would not mean that that person would be released into our country. That is not a possibility. But, again, I want to emphasize that I am confident that we will be successful in the trial of these matters.").

26. Obama, *supra* note 9.

27. *Id.*

28. Peter Baker, *Obama to Use Current Law to Support Detentions*, N.Y. TIMES, Sept. 24, 2009, at A23.

provided by the statute — Authorization for the Use of Military Force (“AUMF”)²⁹ — passed by Congress immediately after 9/11. On March 25, 2010, the Legal Advisor to the Department of State also made reference to this statute in defending the administration’s detention policy before the American Society of International Law.³⁰ Yet these references to the AUMF seem inappropriate. That statute authorized the President to use whatever force was necessary to apprehend and bring to justice whoever he determined was responsible for the 9/11 attacks. As such, the statute gave legislative authorization for the war against al Qaeda and against Afghanistan for harboring and sheltering al Qaeda. In technical terms, the AUMF provided the congressional declaration of war required by the Constitution; however, it in no way functioned as the kind of oversight system Obama initially promised, which of necessity would be concerned with the prolonged detention of particular individuals.

On March 7, 2011, almost two years after his National Archives speech, Obama issued an executive order establishing an oversight system that sought to address the plight of particular individuals who were imprisoned but never tried. This oversight system was neither judicial nor legislative, as originally promised, but rather lodged in the executive branch. Power is vested in a board consisting of senior officials from six government departments and offices — the Departments of State, Defense, Justice and Homeland Security, and the Offices of the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff — to determine whether the continued detention of each prisoner “is necessary to protect against a significant threat to the security of the United States.”³¹ This board’s determination is subject to a veto by the heads of the various departments and offices. If the board determines that a prisoner no longer remains a threat to the United States, and that determination is allowed to stand, the Secretary of State and Secretary of Defense are, by the terms of the executive order, required to make “vigorous efforts” to arrange for the prisoner’s transfer to another country.³² Obama’s new oversight system can thus be seen as a handcrafted parole procedure. The problem, however, is that the procedure is controlled by political appointees and the prisoners have never been tried or adjudged guilty of any crime by a court of law.

Others who have defended imprisonment without trial, such as David Cole,³³ have proposed an oversight system that would be less politically sensitive and in fact make the judiciary primarily responsible for case-by-case assessments of the executive’s decision to detain an individual. Such a scheme would be a great improvement over what Obama has offered, but still would not satisfy the principle of freedom, for it requires not simply oversight by the judiciary but a trial.

The procedures governing a trial seek to protect the innocent by casting the burden

29. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

30. Koh, *supra* note 11.

31. Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011), *available at* http://www.lawfareblog.com/wp-content/uploads/2011/03/Executive_Order_on_Periodic_Review.pdf.

32. *Id.*

33. See David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693 (2009).

of proof on the government and controlling the discovery and admission of evidence. Theoretically, these procedures can be replicated in an oversight system, but as a practical matter they are likely to be watered down. Otherwise there would be no point to the exercise of the oversight system, for its very purpose is to avoid a trial. Moreover, the allocation of power entailed in an oversight system is necessarily — as a theoretical matter — quite different from that in a trial. For one thing, the jury would be supplanted. In addition, when compared to cases tried without a jury, the responsibility of the judiciary would be diluted. In a trial without a jury, the task of the court is to decide not, as it would under a system of oversight, whether the government has good reason to believe that the suspect has committed a crime, but rather whether in fact the accused is guilty of the crime charged. In such a trial the responsibility for determining guilt and thus to deprive an individual of his liberty is not shared with the executive, but rests entirely on the shoulders of the judiciary, as indeed due process of law requires.

THE SCOPE OF OBAMA'S POLICY

In analyzing the policy of imprisonment without trial, I have treated Obama's stance as a continuation of Bush's. There are, however, two differences between the positions of Bush and Obama arising from the circumstances under which Obama announced his policy, though it remains to be seen whether these differences are of any significance.

One difference arises from the number of persons affected by the policy. Obama announced his policy in the context of deciding the fate of some of the prisoners being held at Guantánamo. Apparently, there are almost fifty prisoners who fall in this category. There were also indications that he would apply this policy to some of the approximately 800 prisoners being held by the United States in Afghanistan. Bush established a prison at the Bagram Air Force Base in Afghanistan and then used it as a secondary facility to detain al Qaeda suspects captured throughout the world, not just in Afghanistan. In February 2009, Obama's lawyers announced in federal court in Washington that they were prepared to continue and defend Bush's policy regarding the Bagram prisoners.³⁴ Thus, some portion of the Bagram prisoners should be added to the ones at Guantánamo in estimating the scope of Obama's policy. Still, the number of persons to whom it applies is limited. Moreover, Obama's policy does not have the open-ended quality of the policy Bush announced, which applied to *all* al Qaeda and Taliban fighters, regardless of where they were captured or incarcerated.

The essentially vestigial quality of Obama's policy is underscored by his treatment of the Nigerian citizen, Umar Farouk Abdulmutallab, accused of trying to detonate a bomb on a Northwest flight as it was about to land in Detroit on Christmas Day 2009. Abdulmutallab was accused of being an operative of al Qaeda and trained by the organization in Yemen, but he was immediately brought within the ambit of the criminal process, not treated as an enemy combatant.³⁵ Similarly, Ahmed Abdulkadir Warsame, a

34. See Charlie Savage, *Obama Upholds Detainee Policy in Afghanistan*, N.Y. TIMES, Feb. 22, 2009, at A6.

35. Press Release, Dep't of Justice, Umar Farouk Abdulmutallab Indicted for Attempted Bombing of Flight 253 on Christmas Day (Jan. 6, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-nsd-004.html>; see also Charlie Savage, *Nigerian Indicted in Terrorist Plot*, N.Y. TIMES, Jan. 7, 2010, at A14.

Somali national accused of working with al Shabaab and al Qaeda, was captured by the U.S. military in the Gulf region on April 19, 2011. He was questioned for intelligence for over two months and then turned over to civilian law enforcement agents, and was arraigned in the Southern District of New York on July 5, 2011.³⁶

These developments strike me as a good turn of events, but there is still reason to object to the detention policy announced by Obama in his National Archives speech. The offense to the principle of freedom and the rule of law does not turn on the number of persons affected. Moreover, President Obama's policy, even if embraced reluctantly and confined to a limited number of those imprisoned by the previous administration, will define what the government is allowed in the years ahead. It will lend a measure of legitimacy to Bush's action and will have the inevitable effect of normalizing what should be seen as an offense to the Constitution.

Another circumstance limiting the scope of Obama's policy is the fact that all the prisoners at Guantánamo and Bagram are foreign nationals. Initially, it was unclear whether Obama believed that the policy could extend to American citizens as well. A brief filed around the time of the National Archives speech stated that the policy of imprisonment without trial was to apply to "persons," with no distinction between American citizens and foreign nationals.³⁷ In 2010, Obama seemed to honor the principle of freedom in his treatment of Faisal Shahzad, a naturalized American citizen. Shahzad was arrested by civilian law-enforcement officials, swiftly charged, and then brought to trial in federal court for attempting to detonate a bomb in Times Square.³⁸ Yet that case did not necessarily indicate that Obama opposed imprisoning any American without trial. After all, his treatment of Shahzad was no different from that afforded to the Nigerian national, Umar Farouk Abdulmutallab. However, at the end of 2011, more than two years after his National Archives speech, Obama went out of his way to draw a distinction between American citizens and foreign nationals. "I want to clarify," he declared, "that my Administration will not authorize the indefinite military detention without trial of American citizens."³⁹

In this declaration, Obama broke from Bush. President Bush was prepared to treat all al Qaeda and Taliban fighters, including American citizens, as unlawful enemy combatants who could be imprisoned indefinitely without trial. This was evident in the case of John Walker Lindh, as well as that of Jose Padilla. It was also evident in the case

36. Press Release, U.S. Att'y, S. Dist. of N.Y., Accused Al Shabaab Leader Charged with Providing Material Support to al Shabaab and al Qaeda in the Arabian Peninsula (July 5, 2011), available at <http://www.justice.gov/usao/nys/pressreleases/July11/warsameindictmentpr.pdf>; see also Charlie Savage & Eric Schmitt, *U.S. to Prosecute a Somali Suspect in Civilian Court*, N.Y. TIMES, July 6, 2011, at A1.

37. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (D.D.C. Mar. 13, 2009).

38. See Andy Newman & Colin Moynihan, *Faisal Shahzad Arraigned on Terror Charges*, N.Y. TIMES, May 18, 2010, <http://cityroom.blogs.nytimes.com/2010/05/18/faisal-shahzad-to-be-arraigned>.

39. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 1, 2 (Dec. 31, 2011). The National Defense Authorization Act for Fiscal Year 2012 codified and affirmed the policy of imprisonment without trial, but in doing so, it declared that the Act was not applicable to American citizens or lawful resident aliens of the United States. See The National Defense Authorization Act for Fiscal Year 2012, Pub. Law. No. 112-81, § 1021(e), 125 Stat. 1298, 1562 (2011) ("Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.").

of Ali Saleh Kahlal Al-Marri, a citizen of Qatar who had lawfully been admitted to the United States for educational purposes. Al-Marri was taken into custody while enrolled as a student at Butler University in Peoria, Illinois and, on the basis of alleged al Qaeda links, was imprisoned as an unlawful enemy combatant in a naval brig in South Carolina for six years. As in the case of Jose Padilla, the government eventually changed its strategy. While a petition for certiorari was pending before the Supreme Court, and for the obvious purpose of mooted the Court's review of its detention policy, the government charged Al-Marri with a specific crime, to which he later pleaded guilty.⁴⁰

The imprisonment of any American citizen brings into play the Non-Detention Act of 1971, which provides that no American citizen can be detained without authorization of Congress.⁴¹ This statute was enacted as a belated repudiation of the program instituted during World War II to relocate all persons (including American citizens) of Japanese ancestry from the West Coast. The 1971 measure might be seen as a watered down version of the principle of freedom — watered down because it only applies to citizens, requires a grant of authority from Congress, not a trial, and seeks to protect the authority of Congress rather than personal liberty.

The force of the Non-Detention Act was further reduced in 2004 in the case of an American citizen, Yasser Hamdi, who had been captured in Afghanistan and accused of fighting for the Taliban. He was deemed an unlawful enemy combatant and held incommunicado. Acting on his behalf, Hamdi's father denied that charge, and insisted that his son was in the country engaged in relief work.⁴² In an opinion by Justice Sandra Day O'Connor, four Justices ruled that the statutory authorization required by the 1971 Act could be found in the AUMF — the statute passed immediately after 9/11 that authorized the use of force to respond to the terrorist attack on that day and that functioned as the declaration of war against Afghanistan.⁴³ Although the government further contended that even if the AUMF did not satisfy the agreement of the 1971 Non-Detention Act, that measure did not protect American citizens who had been captured in an active theater of war, Justice O'Connor avoided ruling on that contention.

In truth, the primary protection for the personal liberty of American citizens is not the Non-Detention Act, but rather the principle of freedom, which should be applied to citizens and non-citizens alike. The primary textual source of the principle is the Due Process Clause. By its very terms, this provision protects the liberty of "any person," and should be seen as limiting the authority of United States officials wherever they act and against whomever they act.⁴⁴

As a general matter, the Due Process Clause, and perhaps the Bill of Rights as a whole, should be read not as a testamentary document distributing property or benefits (individual rights) to privileged classes of persons (American citizens), but rather as

40. See Press Release, Dep't of Justice, Ali Al-Marri Indicted for Proving Material Support to Al-Qaeda (Feb. 27, 2009), available at <http://www.justice.gov/opa/pr/2009/February/09-ag-177.html>; see also John Schwartz, *Admitted Qaeda Agent Receives Prison Sentence*, N.Y. TIMES, Oct. 30, 2009, at A22.

41. Non-Detention Act of 1971, Pub. L. No. 92-128, 85 Stat. 347 (codified at 18 U.S.C. § 4001(a) (2006)) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.")

42. *Hamdi v. Rumsfeld*, 542 U.S. 507, 511 (2004).

43. *Id.* at 509, 517.

44. U.S. CONST. amend. V.

promulgating general norms defining the authority of American officials. Although foreign nationals may not be part of the political community — “We the People” — that endows the Constitution with democratic legitimacy, the members of that political community may define the standards of conduct that they expect of their officials wherever these officers act and against whomever they act. Accordingly, even if the policy of imprisonment without trial is confined to persons who are not American citizens or those not lawfully admitted to the United States, as is true of the persons still incarcerated in Guantánamo or Afghanistan, it would, I contend, violate the Constitution and be as much a breach of the rule of law as Bush’s broad policy.

Unfortunately, the law regarding the applicability of the Bill of Rights to non-citizens is not as clear as it should be, especially in the post-Warren Court era. In 1990, Chief Justice Rehnquist wrote an opinion in the well known case of *United States v. Verdugo-Urquidez*⁴⁵ limiting the reach of the Bill of Rights. He wrote in the context of yet another war — the “War on Drugs” — and declared that the Fourth Amendment and its protection against unreasonable searches and seizures did not in any way constrain United States officials implicated in the search of the Mexican residence of a Mexican citizen who had been forcibly taken to the United States to stand trial. Rehnquist denominated his opinion “the opinion of the Court,”⁴⁶ yet there is reason to doubt that characterization. The fifth vote that he needed came from Anthony Kennedy, then a new appointee, who said that he joined the Chief Justice’s opinion, but actually espoused a much more cosmopolitan conception of the Constitution and Bill of Rights.⁴⁷ According to Kennedy, although the Fourth Amendment did not apply abroad in the same way as it applied to residents in the United States, it still imposed an obligation on American officials wherever they acted — they must always act in a way that comported with the tenets of fundamental fairness.⁴⁸ In the end, Kennedy deemed the search reasonable under the circumstances and on the basis of that assessment refused, as did Rehnquist, to suppress the results of the search.⁴⁹

Kennedy advanced this same cosmopolitan view of the Constitution in 2004 in the very first case before the Court that involved Guantánamo prisoners. The issue in that case — *Rasul v. Bush*⁵⁰ — was whether federal habeas corpus was available to the Guantánamo prisoners. Justice Stevens, writing for the majority, strained to avoid any constitutional pronouncements and treated this issue as purely one of statutory interpretation. He ruled that by the very terms of the federal habeas statute, the writ was available to the Guantánamo prisoners.⁵¹ Justice Kennedy once again wrote a separate opinion in which he advanced his more flexible, but nonetheless cosmopolitan, understanding of the reach of the Constitution.⁵² He was mindful of the need of the judiciary to accommodate the exigencies of a military conflict, but saw that need to have

45. *United States v. Verdugo-Urquidez*, 94 U.S. 259, 261 (1990).

46. *Id.*

47. *Id.* at 275-78 (Kennedy, J., concurring).

48. *See id.*

49. *Id.* at 278.

50. *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (Kennedy, J., concurring).

51. *Id.* at 483-84.

52. *Id.* at 485-88.

been greatly attenuated in the case of the Guantánamo prisoners, so removed in time and geography from an active theater of armed conflict.⁵³ As he then wrote: “Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”⁵⁴

In the Detainee Treatment Act of 2005, Congress responded to Justice Stevens’s opinion in *Rasul* — it was, after all, the opinion of the Court — and amended the applicable federal statute to deny the Guantánamo prisoners access to habeas corpus.⁵⁵ In a 2006 decision involving the use of military commissions to try some of the Guantánamo prisoners, the Supreme Court held that the bar on habeas in the 2005 Act was not applicable to cases that had been pending at the time of enactment.⁵⁶ This “shortcoming” of the 2005 Act was soon remedied in the Military Commissions Act of 2006, which denied the writ of habeas corpus to all aliens designated unlawful enemy combatants and purported to reach all cases, even pending ones, “without exception.”⁵⁷ Two years later, in *Boumediene v. Bush*,⁵⁸ the Supreme Court held unconstitutional the 2006 Act’s ban on habeas as it applied to the Guantánamo prisoners. Not surprisingly, the *Boumediene* opinion was written by Justice Kennedy and reflected the pragmatic cosmopolitanism expressed in his concurrences in *Rasul* and *Verdugo-Urquidez*.

In speaking for the Court in *Boumediene*, Justice Kennedy carefully avoided any broad pronouncements on the rights possessed by foreign nationals. He ruled that the Guantánamo prisoners were entitled to the protection of the provision of the Constitution limiting the powers of Congress to suspend the writ of habeas corpus, but saw that provision as serving the separation of powers. He also announced a multivariate test to determine the reach of his ruling. As he said,

[W]e conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.⁵⁹

The application of this test will vary from case to case. For example, the Court of Appeals for the District of Columbia decided on May 21, 2010, that under the *Boumediene* test the Suspension Clause did not reach prisoners in the Bagram Air Force Base in Afghanistan, largely because the base was located in a theater of armed conflict.⁶⁰ But from the very terms of the test itself and its initial application, it is clear

53. *Id.*

54. *Id.* at 488.

55. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739.

56. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576 (2006).

57. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(b), 120 Stat. 2600, 2636.

58. *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

59. *Id.* at 766.

60. *Al Maqaleh v. Gates*, 605 F.3d 84, 95-99 (D.C. Cir. 2010); *see also* *Maqaleh v. Gates*, 06 Civ. 1669, 2011 WL 666883 (D.D.C. Feb. 15, 2011) (allowing the petitioners to amend their pleading).

that the benefit of the Suspension Clause is not confined to United States citizens, nor is it confined to persons who are incarcerated by the executive within the sovereign territory of the United States.

Boumediene recognized that the essential function of the writ is to guard against arbitrary action by the executive.⁶¹ In the specific context of that case, the action in question was the detention of persons who denied that they had ever taken up arms against the United States. Yet *Boumediene* does not preclude — and the principle of freedom requires — that the writ be available to guard against another form of arbitrary action by the executive: the failure to place on trial individuals who have been accused of terrorism and who have been incarcerated for prolonged periods of time — in some cases, for almost a decade. A habeas proceeding authorized by *Boumediene* may find the prisoner seeking the writ to have fought for al Qaeda and thus properly classified as an unprivileged enemy combatant, but then go on to decide that under the principle of freedom the continued detention of this individual can only be authorized if he is tried and convicted of some specific crime. The constitutional right to freedom must of course accommodate claims of military necessity, but never in a way that relieves the judiciary of its duty to scrutinize these claims with care and to limit the sacrifice of freedom to the smallest possible domain.

61. *Boumediene*, 553 U.S. at 797.