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Law v. National Security: When Lawyers Make Terrorism Policy

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LAW v. NATIONAL SECURITY: WHEN LAWYERS MAKE TERRORISM POLICY

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Never in the history of the United States [have] lawyers had such extraordinary influence over war policy as they did after 9/11.

Jack Goldsmith[1]

While the Constitution protects against invasions of individual rights, it is not a suicide pact.

Justice Goldberg[2]

ABSTRACT

Are lawyers strangling our government's ability to fight the first war of the twenty-first century? Does judicial adventurism and the fear of litigation undermine the War Against Terrorism? In essence, is our national security apparatus overlawyered? This article analyzes how some lawyers have produced a synthetic "litigation culture" over the war on terror. It argues that litigation concerning electronic surveillance, interrogation and all manners of prisoner treatment has chilled counterintelligence since 9/11.

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[1] JACK GOLDSMITH, THE TERROR PRESIDENCY 129 (2007).

[2] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-65 (1963).

I. INTRODUCTION

Are lawyers strangling our government's ability to fight the first war of the twenty-first century? Does judicial adventurism and the fear of litigation undermine the war against terrorism? In essence, is our national security apparatus overlawyered?[3] Consider the following:

- Salim Gherebi, an enemy combatant imprisoned at Guantanamo Bay, Cuba is suing the President and the Secretary of Defense for $100 million in compensatory damages and $1 billion in punitive damages for violation of his rights under the U.S. Constitution.[4]
- Saifullah Paracha, another suspected terrorist held at Guantanamo, seeks a court order to improve his

[3] Robert Novak, *Just Say No to Terrorist Lawsuits,* HUMAN EVENTS, November 17, 2005, http://www.humanevents.com/article.php?id=10320&keywords=terrorit.
[4] *Id.*

mail delivery, medical treatment and establish judicial review over "opportunities for exercise, communication, recreation, and worship."[5]

- Convicted terrorism conspirator Jose Padilla has sued John Yoo, a former member of President Bush's administration, claiming that Yoo's legal arguments led to Padilla's alleged illegal detention at a Navy brig.[6] In the federal suit filed against former Justice Department (now law Professor) John Yoo, Padilla seeks $1 in damages and a judgment declaring that the policies violated the Constitution.[7]
- A court in Paris convicted five former inmates of Guantanamo Bay on terrorism-related charges, including use of false passports to integrate into terrorist structures in Afghanistan.[8] A sixth man, who was held for 17 months in a French prison awaiting trial, was acquitted, claiming he traveled to Afghanistan for "spiritual reasons."[9] His lawyer said he would sue for "reparations" from Washington for his client's time at Guantanamo.[10]

These cases represent a litigation explosion of over 174 lawsuits filed on behalf of disconsolate, terrorist prisoners, none of them U.S. citizens. This article analyzes how a swarm of civil libertarian lawyers have produced a synthetic "litigation culture" over the war on terror.[11] It argues that frivolous,[12] agenda driven litigation concerning

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[5] *Id.*

[6] Adam Liptak, *Padilla Sues Former U.S. Lawyer Over Detention*, NY TIMES, Jan. 5, 2008, *available at* http://www.nytimes.com/2008/01/05/washington/05padilla.html?ei=5124&en=b14713fba02287dd&ex=1357275600&partner=permalink&exprod=permalink&pagewanted=print.

[7] *Id.*; *Padilla Gets 17-year Prison Sentence on Terror Charges*, JURIST: LEGAL NEWS AND RESEARCH, Jan. 22, 2008, *available at* http://jurist.law.pitt.edu/paperchase/2008/01/padilla-gets-17-year-prison-sentence-on.php.

[8] Associated Press, *Paris Court Convicts Five Former Inmates*, ST. PETERSBURG TIMES, Dec. 20, 2007, at A9.

[9] *Id.*

[10] *Id.*

[11] Michael Barone, *The Overlawyered War*, U.S. NEWS & WORLD REPORT, Sept. 24, 2007, at 43, *available at* http://www.usnews.com/articles/opinion/mbarone/2007/09/16/the-criminalizing-of-warfare-has-brought-the-overlawyered-war.html.

[12] The Supreme Court is now addressing "enemy combatant" status for the third time. Legally baseless claims occur when the tribunal has already resolved the issue and a party persists in advancing it. *See* Stok v. Miller, 888 So. 2d 132 (Fla. Dist. Ct. App. 2004); Visoly v. Security Pacific Credit Corp., 768 So. 2d 482, 491 (Fla. Dist. Ct. App. 2000) (advancing the guidelines that define frivolous claims as: a) claims contradicted by overwhelming evidence and; b) undertaken primarily to

electronic surveillance, interrogation and all manner of prisoner treatment has chilled counterintelligence after 9/11.[13] This fear of litigation has created a paralyzing culture of risk aversion and legalism in the intelligence establishments.[14] These parsed and contextualized lawsuits, "lawfare,"[15] are tantamount to legal harassment and have encumbered executive decisions after 9/11.[16] Government officials now worry that their scrutinized war judgments will result in prosecution by independent counsels, the Justice Department of future administrations, or international courts.[17]

This article begs one, central question: Is America's struggle to eject radical terrorists from our country being lawyered to death?[18] This 'litigation' issue has been the subject of frictional debate among legal scholars and civil libertarians.[19] The analysis here seeks to point out difficulties the courts will encounter in reviewing national security decisions during the war on terrorism,[20] and postulates the following: (1) prevention stops terrorist-induced catastrophes from happening; (2) a strong Executive government is essential to secure enduring liberty; (3) terrorist behavior is not simply a criminal act but an act of war; (4) civil liberties, therefore, must sometimes yield in applying rules of war to terrorist conflicts; and (5) unprecedented civil liberties litigation is responsible for creating a "parallel legal system."

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delay or prolong resolution of the litigation; c) legally baseless claims also occur when the tribunal has already resolved the issue and a party persists in advancing it; d) an absence of a justiciable claim of fact or law).

[13] GOLDSMITH, *supra* note 1, at 23.

[14] *Id.* at 94.

[15] *Id.* at 58 ("Lawfare is the strategy of using or misusing law as a substitute for traditional military means to achieve an operational directive.")

[16] Nearly 3,000 innocent civilians were murdered on 9/11, surpassing the previous largest loss of life due to a single attack—the Beslan school massacre in North Ossetia; National Commission on Terrorist Attacks Upon the United States, THE 9/11 COMMISSION REPORT 311 (2004) [hereinafter 9/11 Commission Report]; Douglas A. Hass, *Crafting Military Commissions Post-Hamdan: The Military Commissions Act of 2006,* 82 IND. L.J. 1101 (2007).

[17] GOLDSMITH, *supra* note 1, at 12.

[18] Deroy Murdock, *Real Torture Is Over There*, HUMAN EVENTS, June 8, 2007 http://www.humanevents.com/article.php?id=21047.17.

[19] Otis H. Stephens, Jr., *Presidential Power, Judicial Deference, and the Status of Detainees in an age of Terrorism*, in AMERICAN NATIONAL SECURITY AND CIVIL LIBERTIES IN AN ERA OF TERRORISM 71, 71-75, (David B. Cohen & John W. Wells, eds., 2004).

[20] Brief of Retired Generals and Admirals, Washington Legal Foundation, Allied Educational Foundation, and the National Defense Committee as Amici Curiae in Support of Respondents at 5, Boumediene v. Bush, 2007 WL 2986451 (2006) (No. 06-1195).

In short, the relevant question is not whether curtailing civil liberties imposes costs, to which the answer is obvious: the question is whether the costs exceed the benefits.[21] In the aftermath of the visceral reaction to 9/11, our Constitution may be facing its greatest challenge. That reaction has entailed secret wiretapping and the return of military tribunals. All of these activities have been implemented because we are at "war," but are we compromising our Constitution to do so?[22]

A. *The 'Overlawyered' War*

In a recent Pew opinion poll, an overwhelming number of Americans believe that Iraq and the War on Terror are the most important issues facing the United States.[23] Moreover, only 29% of Americans believe that the United States is winning the war on terrorism.[24] Thus, the stakes in this scholarly debate are unusually high: on the national security side stands tens of thousands of lives, risk to economic prosperity and perhaps our way of life; on the other side, are threats to personal privacy, freedom and civil liberties. Critics believe that the methods and rules of the pre-9/11 world will work against post-9/11 terrorism.[25] "This view is influenced by the experience of Vietnam and Watergate, which saw the greater threat to freedom coming from our own government rather than a foreign foe."[26]

Lawsuits and litigation can not capture the urgency of a national security crisis, such as 9/11.[27] The corrosive circus that constituted the Zacarias Moussaoui trial exemplifies the danger in trying to use normal courtroom rules to prosecute terrorists.[28] Due to this litigation apostasy, as one 9/11 Commissioner observed: "[t]he CIA is insti-

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[21] RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 50-51 (2006).

[22] Sarah M. Riley, *Constitutional Crisis or Deja Vu? The War Power, The Bush Administration and The War on Terror,* 45 DUQ. L. REV. 701, 732-34 (2006).

[23] Tim Rutten, *CNN: Corrupt News Network*, LOS ANGELES TIMES, *reprinted in* ST. PETERSBURG TIMES, Dec. 4, 2007, at A12-13, *available at* http://www.latimes.com/entertainment/la-et-rutten1dec01,0,4122002.column?coll=la-home-center. ("In fact, if you lump the war into a category with terrorism and other foreign policy issues, 40 % of Americans say foreign affairs are their biggest concern in the election cycle. If you do something similar with all issues related to the economy, 31 % list those questions as their most worrisome issue.")

[24] *Only 29% of Americans Say U.S. is Winning War on Terrorism*, GALLUP NEWS SERVICE, June 22, 2007, www.galluppoll.com/content/?ci=27955.

[25] JOHN YOO, WAR BY OTHER MEANS viii (2006).

[26] *Id.*

[27] GOLDSMITH, *supra* note 1, at 175.

[28] YOO, *supra* note 25, at xi.

tutionally averse to risk," and lawyers are a big part of the problem.[29] Michael Scheuer, the chief of the Bin Laden unit at the CIA observed, "[t]here is no operation at the CIA that is conducted without approval of lawyers. I can't go to the bathroom at the CIA without a lawyer."[30] National Security Advisor Stephen Hadley, himself a Yale-trained lawyer, complained in a NSC meeting: "[a] lot of times lawyers dominate our deliberations and we get in trouble down the line. When lawyers get together they consider things in their sphere of expertise, but they exclude a lot of issues that matter, like public relations, congressional politics and diplomacy."[31]

Emblematic of this 'overlawyered' theme, former CIA director George Tenet told *60 Minutes* that when al Qaeda operative Khalid Sheikh Mohammad was captured by U.S. agents in Pakistan, he scoffed at his captors: "I'll talk to you guys after I get to New York and see my lawyer."[32] In fact, "the CIA has become so wary of possible criminal charges that it urges agents to buy insurance."[33]

Critics make a reasonable sounding case: we must trust courts to make decisions on important social issues that check the excesses of the Executive Branch, and it should be no different in war time.[34] While this is an appealing argument, it has no legal basis in two hundred years of history.[35] Until 2004, courts had never reviewed a single case of the military detention of an enemy alien held abroad during wartime.[36]

Some lawyers seek a radical reordering of our system for conducting war.[37] They demand a new role for courts in overseeing basic military decisions.[38] These lawsuits beget a sweeping criticism of the legal system: that it has placed the Presidency in the throes of a litiga-

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[29] GOLDSMITH, *supra* note 1, at 95; 9/11 COMMISSION REPORT at 93.

[30] GOLDSMITH *supra* note 1, at 130.

[31] *Id.* at 132.

[32] GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 255 (2007) ("Had that happened, I am confident that we would have obtained none of the information he had in his head about imminent threats against the American people.")

[33] Barone, *supra* note 11, at 43.

[34] YOO, *supra* note 25, at 161.

[35] YOO, *supra* note 25, at 161-162.

[36] *Id.* at 162 n.80 (citing Ex parte Yamashita, 327 U.S. 1 (1946) ("The only case that came close, that of General Yamashita in World War II, made it to the Supreme Court only because his military trial was held in the Philippines, at the time an American possession.")).

[37] *Id.* at 149.

[38] *Id.*

tion explosion over the war on terror.[39] Legalists have leveled the charges of "shredding the Constitution" at the Executive branch and give new meaning to the term "fog of war."[40] Some lawyers have mistakenly cast security as a rival to freedom.[41] Freedom does not refer simply to the absence of governmental restraint.[42] More fundamentally, it refers to the absence of fear, the spread of which is the terrorist objective.[43]

Let this article be clear, each action taken by the President, as well as the Department of Justice and the war crimes tribunals, is carefully targeted at a narrow class of individuals—terrorists. The President's legal powers are focused against terrorists. The overriding goal has been to prevent and disrupt terrorist activity by questioning, investigating and arresting those who violate the law and threaten national security.[44] According to Brad Berenson, a former associate White House counsel, "[t]he President's response from 9/11 forward was to use every power and means at his disposal to try to prevent another attack."[45]

Many highly criticized policies—the detention of unlawful combatants and their confinement at Guantanamo, trials by military commissions, and the terrorist surveillance program—are necessary presidential tools on the war on terror. This article rejects the charge that the President has disregarded the rule of law. Quite to the contrary, this administration has been strangled by law, and since 9/11 this war has been lawyered to death.[46]

The Supreme Court's decisions in *Hamdi*, *Hamdan* and *Rasul,* as well as the pending landmark cases of *Boumediene v. Bush*[47] and *Al-Odah v. United States,*[48] represent an unprecedented jurisdictional

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[39] Joshua D. Kelner, *The Anatomy of an Image: Unpacking the Case for Tort Reform 2006*, 31 U. DAYTON L. REV. 243, 261-62 (2006).

[40] John Ashcroft, *The War on Terrorism Has Not Eroded Civil Liberties*, *in* CIVIL LIBERTIES: OPPOSING VIEWPOINTS (Auriana Ojeda ed., Greenhaven Press 2004).

[41] Viet Dinh, *Freedom and Security after September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 400 (2002).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 401.

[45] Dawn E. Johnsen, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power,* 54 UCLA L. REV. 1559, n.107 (2007).

[46] Barone, *supra* note 11, at 43.

[47] Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

[48] *Id.*

intrusion by the federal courts far beyond their normal areas of expertise.[49]

The policy debate over whether the war with Iraq is (a) justified, (b) a violation of international law, or (c) totally unrelated to war with al Qaeda is a necessary debate, but it should have no effect on the President's essential constitutional authority to conduct a war free from the threat of litigation.

II. WHAT CONSTITUTES A 'WAR ON TERROR'

The extraordinary threat of terrorism calls for extraordinary measures. Senator Saxby Chambliss echoed this sentiment: "[o]ur prior concept of war has been completely altered, as we learned so tragically on Sept. 11, 2001. We must address threats in a different way."[50]

Clearly a war on terror is not a traditional war. It will endure without a legally clarifying surrender.[51] Terrorists typically are not "state actors" (although some states may sponsor terrorism).[52] Terrorists do not act in compliance with the rules of war. In fact, their very philosophies and tactics are specifically designed to harm the civilians those rules and norms are meant to protect.[53] Terrorists are not easily identifiable, and consist of a myriad of groups, cells and philosophies.[54]

Al Qaeda does not seek to confront and defeat its enemies' armed forces on the battlefield. Instead, it seeks to achieve its political aims by launching surprise attacks—primarily on civilian targets—using unconventional weapons, such as concealing bombs on trains or using airplanes as guided missiles.[55] Al Qaeda seeks victory by demoralizing an enemy's society and coercing it to take desired action.[56]

Some have argued that the War on Terrorism is similar to the War on Drugs, and the War on Poverty.[57] These "Wars" also had non-

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[49] John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 574-75 (2005); Jules Lobel, *The Commander in Chief and the Courts*, 37.1 PRES. STUDIES QUARTERLY 49 (2007).

[50] R. Robin McDonald, *Is Habeas Obsolete in the Age of Terrorism?*, FULTON COUNTY DAILY REPORT, Oct. 11, 2006.

[51] George W. Will, *Questions for Mukaskey*, JEWISH WORLD REVIEW, September 20, 2007, *available at* www.jewishworldreview.com/cols/will092007.php3?printer_friendly.

[52] JESSICA STERN, THE ULTIMATE TERRORISTS 7 (1999).

[53] BRUCE HOFFMAN, INSIDE TERRORISM 34-36 (1998).

[54] *Id.* at 4.

[55] OLIVER ROY, GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH 52–54 (2004).

[56] *Id.* at 55-57.

[57] Yoo, *supra* note 25, at 578.

state actors, such as drug cartels and organized crime groups.[58] Yet, September 11th is different in kind and degree.[59] First, al Qaeda represents a foreign threat that originates outside the United States rather than domestic forces. Al Qaeda may seek financial gain to fund its terrorist operations, but monetary advancement is not its purpose.[60] Second, al Qaeda has proven that it is capable of inflicting a degree of violence that crosses the line separating crime and war.[61] These are just two reasons why the current judicial system is ill-equipped to deal with the plethora of issues that surround war and national security.

Thus, the traditional sense of "war" can hardly apply to a conflict against terrorism. Until 9/11, criminal law enforcement was the predominant way of framing the struggle with terrorists. After September 11th, the focus had to shift towards more expansive terms. The President declared this new narrative: "[t]he war against this enemy is more than a military conflict. It is the decisive ideological struggle of the twenty-first century, and the calling of our generation."[62]

In the past, wartime meant a traditional understanding of battle.[63] There was a fixed period of hostilities, a known enemy and set rules to follow.[64] The conflict we currently face does not fit this mold.[65] The Supreme Court seems to agree with this new definition of war. In its most recent cases dealing with the War on Terror, the Court has been reluctant to think of terrorism as a traditional war and even more reluctant to apply the traditional law of war to a conceivably never-ending conflict.[66]

A. *Law v. National Security*

Jack Goldsmith, the former head of the Justice Department's Office of Legal Counsel, made the following observation on his trip to Guantanamo Bay:

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[58] *Id.*

[59] *Id.*

[60] *Id.* at 578-79.

[61] *Id.*

[62] Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1023 (2004) ("Terrorism was obviously not new with 9/11, nor were attacks by al Qaeda against Americans new on that day. What changed was the framework through which they were seen.").

[63] Sarah M. Riley, *Constitutional Crisis or Deja Vu? The War Power, the Bush Administration and the War on Terror,* 45 DUQ. L. REV. 701, 740 (2006).

[64] *Id.*

[65] *Id.*

[66] Joanne Mariner, *The Supreme Court, the Detainees and the War on Terrorism*, FINDLAW, July 5, 2004, http://writ.lp.findlaw.com/Mariner/20040705.html.

> Perhaps the oddest thing about my fortieth-birthday trip to GITMO and the naval brigs was that the plane was full of lawyers. . . they dominated discussions on detention, military commissions, interrogation, GITMO and many other controversial terrorism policies. . . the main reason why lawyers were so involved is that the war itself was encumbered with legal restrictions as never before.[67]

Goldsmith details in his new book, *The Terror Presidency*, how CIA agents feared prosecution for the activities they performed in the War on Terror.[68] A failed prosecution or lawsuit, Goldsmith observed, can produce devastating headlines and legal fees. It is not only lawsuits that counterterrorism officials are worried about, but also threatened prosecution and grand jury proceedings.[69]

Prior to September 11, 2001 suspected terrorists were prosecuted under a law enforcement model based on the procedures of the criminal justice system.[70] For example, Ramzi Yousef, the architect behind the 1993 bombing of the World Trade Center, was tried and convicted in U.S. District Court.[71] After 9/11, however, the emphasis changed, and the rules associated with criminal trials yielded to military exigency.[72] The expanded use of presidential power in the immediate aftermath of 9/11 reflects this basic shift to a military justice model.[73]

The Authorization for Use of Military Force Act (AUMF) that Congress passed immediately after the 9/11 terrorist attacks provided the President with the ability:

> [T]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[74]

The days when society considered terrorism a law enforcement problem limited to the Federal Bureau of Investigation and the federal

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[67] GOLDSMITH, *supra* note 1, at 129-30.

[68] *Id.* at 179.

[69] *Id.*

[70] Stephens, *supra* note 19, at 11.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Riley, *supra* note 22, at 732.

judiciary will not return.[75] The President emphasized the contrast between ordinary law and a state of exception when he said: "[a]fter the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. With those attacks, the terrorists and their supporters declared war on the United States, and war is what they got."[76]

Curtailment of civil liberties in time of war, rightly or wrongly, is a byproduct of warfare and survival of a nation. As Judge Learned Hand concluded in remarks entitled *The Spirit of Liberty* delivered during World War II: "[a] society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few."[77]

According to Goldsmith, there was a "daily clash inside the. . .administration between fear of another attack, which drives officials into doing whatever they can to prevent it, and the countervailing fear of violating the law, which checks their urge toward prevention."[78] Goldsmith continued by stating every "weapon used by the U.S. military, and most of the targets they are used against, are vetted and cleared by lawyers in advance."[79] In this respect, the national security community resembles larger society: fear of lawsuits and frivolous litigation.[80] This litigation culture has required the Central Intelligence Agency to employ more than one hundred lawyers, while the Pentagon has approximately 10,000 attorneys.[81]

While previous wars were traditionally viewed as "political intercourse, carried on with other means,"[82] the War on Terror has now become a litigation haven for lawyers. Goldsmith concludes, "[n]ever in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11."[83]

Exceptional threats require exceptional methods that formal litigation (discovery, motions, bond hearings, etc.) are not equipped to

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[75] YOO, *supra* note 25, at 574.

[76] Scheppele *supra* note 62 ("Terrorism was obviously not new with 9/11, nor were attacks by al Qaeda against Americans new on that day. What changed was the framework through which they were seen.").

[77] WILLIAM REHNQUIST, INTER ARMA SILENT LEGES (1998), *reprinted in* CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST- 9/11 WORLD at 27 (Katherine B. Darmer, Robert M. Baird & Stuart E. Rosenbaum eds., Prometheus Books 2004).

[78] Barone, *supra* note 11, at 43.

[79] *Id.*

[80] *Id.*

[81] GOLDSMITH, *supra* note 1, at 91.

[82] CARL VON CLAUSEWITZ, ON WAR 87 (Michael E. Howard & Peter Perret trans.) (1976).

[83] Barone, *supra* note 11, at 43.

handle.[84] In fact, one could argue that the judiciary may undermine, rather than promote, national security policy in the War on Terrorism by refusing to afford deference to the political branches.[85] De novo judicial expansion into military tactics such as interrogation and prisoner of war status represent an unprecedented intrusion into the Executive's traditional war powers. At the formal level, the decisions in *Rasul, Hamdi and Hamdan (*discussed subsequently*)* required the Supreme Court to, in effect, overrule judicial precedent from the end of World War II.[86]

Justice Clarence Thomas has summarized this position succinctly by explaining that the courts "lack the expertise and capacity to second-guess" the battlefield decisions made by the military, and ultimately the President.[87] The design and operation of the Judiciary, Thomas argues, gives it a weak institutional vantage point from which to manage foreign affairs and achieve national security goals. To ensure the most effective national policy on terrorism, these decisions should be allocated to the institution that has a structural advantage in making such important decisions.[88] Justice Thomas concludes that because the federal Judiciary suffers institutional disadvantages with regard to foreign affairs, it is a poor choice for that branch to carry out national security policy.[89]

Litigation has also interfered with the President's need for secrecy. Gathering intelligence information, and other clandestine affairs against nations, are all within the President's constitutional responsibility for the security of the nation.[90] Citizens, as well as lawyers, have the right to criticize the conduct of foreign affairs. However, the President has the right and the duty to strive for internal secrecy in areas where disclosure may reasonably be thought to be inconsistent with the national interest.[91] A similar view was expressed in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*:[92] "[t]he President, both as Commander-in-Chief and as the Nation's organ for

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[84] *See generally* George W. Bush, President of the United States, State of the Union Address (Jan. 31, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/01/20060131-10.html.

[85] *See* Yoo, *Courts at War,* 91 CORNELL L. REV. 574, 600 (2005).

[86] *See* Johnson v. Eisentrager, 339 U.S. 763, 780-81 (1950) (holding that German nationals convicted by a U.S. military commission after World War II did not have the right to the writ of habeas corpus).

[87] Hamdi v. Rumsfeld, 542 U.S. 507, 513-14, 579 (Thomas, J., dissenting).

[88] Yoo, *Courts at War,* 91 CORNELL L. REV. 574, 591 (2005).

[89] *Id.*

[90] U.S. CONST. art. II, § 2, cl.1.

[91] United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972).

[92] Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."[93]

III. MODERN PRESIDENTIAL POWER AND THE COURTS: WORLD WAR II

The President has greater competence than the courts in national security matters—a position accepted by the Supreme Court in the 1944 Japanese relocation case, *Korematsu v. United States.*[94] The Court observed that Congress is "reposing its confidence in this time of war in our military leaders—as inevitably it must."[95] The *Korematsu* Court announced the principle that "the power to protect must be commensurate with the threatened danger."[96] In so doing, constitutional limits on the President are relegated when the nation is perceived to be in a state of emergency. The Court justified the exclusion order for all persons of Japanese ancestry, because "authorities feared an invasion. . .and felt constrained to take proper security measures."[97] Moreover, the court reasoned that the military urgency of the situation demanded the exclusion.[98]

Civil libertarians liken terrorist cases to the *Korematsu* case, however, there is no parallel.[99] The Japanese-Americans detained by FDR were American citizens, not enemy combatants, whose disloyalty was (wrongly) assumed because of their nationality.[100] Today, our military has not detained anyone because they are Muslim or Arab, but only those caught on the battlefield or working with al Qaeda.[101]

In the famous 1952 *Steel Seizure*[102] case, Justice Jackson wrote that "presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[103] It is in this context that the President's ability to dominate foreign policy is maximized.[104]

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[93] *Id.* at 111; *see* U.S. CONST. art. II, § 2, cl.1.

[94] Korematsu v. United States, 323 U.S. 214, 216 (1944).

[95] *Id.*

[96] *Id.* at 220-23 (holding that the exclusion of U.S. citizens of Japanese ancestry from West Coast areas was constitutional based on national security threats and the exigencies of war).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] YOO, *supra* note 25, at 148.

[101] *Id.*

[102] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[103] *Id.* at 635 (Jackson, J., concurring).

[104] JEREL ROSATI, AT ODDS WITH ONE ANOTHER: THE TENSION BETWEEN CIVIL LIBERTIES AND NATIONAL SECURITY IN TWENTIETH – CENTURY AMERICA, *reprinted in*

John Yoo, the former Associate Attorney General and current Professor of Law at UC-Berkeley, reinforced this view espoused by the *Steel Seizure* case: "[e]ven if the Constitution's entrustment of the Commander in Chief power to the President did not bestow upon him the authority to make unilateral determinations regarding the disposition of captured enemies, the President would nevertheless enjoy such a power by virtue of the broad sweep of the Vesting Clause."[105]

Thus, presidential foreign affairs powers in the Constitution stem from the "Vesting Clause," which vests executive power in the President.[106] Yoo extrapolates this position into the current debate about Guantanamo Bay prisoners by stating that the "handling and disposition of individuals captured during military operations requires command-type decisions and the swift exercise of judgment that can only be made by 'a single hand.'"[107]

A. *Authorization for Use of Military Force (AUMF)*

The basis for expansive presidential war powers against terrorism is the Authorization for Use of Military Force (AUMF) statute that Congress passed immediately after 9/11.[108] According to the text of that statute, the "President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001. . ."[109]

In the early stages of the War on Terror, Yoo wrote a corroborating Justice Department memorandum concluding that the Constitution vests the President with the plenary authority as Commander-in-Chief to use military force abroad—especially in response to grave national emergencies created by unforeseen attacks on the people and territory of the United States.[110]

AMERICAN NATIONAL SECURITY AND CIVIL LIBERTIES IN AN ERA OF TERRORISM at 9 (David B. Cohen & John W. Wells eds., Palgrave Macmillan 2004).

[105] Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 69 n.39 (2007).

[106] U.S. CONST. art. II, § 1, cl. 1.

[107] Wuerth, *supra* note 105, at 69 n.42; *see* THE FEDERALIST NO. 24 (Alexander Hamilton); *see also* John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War*, 84 CAL. L. REV. 167, 172 (1996) (defending originalism in the interpretation of warpowers).

[108] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[109] *Id.* at § 2 (a).

[110] *See generally* Memorandum from John Yoo, Deputy Assistant Attorney General, to Timothy Flannigan, Deputy Counsel to the President, on The President's Constitutional Authority to Conduct Military Operations Against Terrorists and

The AUMF recognized that exceptional threats require exceptional methods.[111] Ordinary criminal law is no longer sufficient to address the nature of the exceptional threat posed by terrorist organizations. Necessity, at times, requires suspension of ordinary law and process. Facts and circumstances themselves, in addition to the events of September 11th, require exceptional political and judicial action.[112]

Based on the AUMF, the President concluded that the Founding Fathers vested the President with primary Constitutional authority to defend the nation from foreign attack, because "the Executive can act quickly, decisively, and flexibly as needed."[113]

In fact, Thomas Jefferson echoed this conclusion: "[t]he transaction of business with foreign nations is executive altogether"—a view shared by Washington, Madison, Chief Justice John Jay and Alexander Hamilton.[114] Like Locke, Montesquieu, and other writers of the time, Jefferson recognized that the entire business of "war" was by nature "executive" in character.[115] He once wrote to Abigail Adams of his decision to act on his own constitutional views, which were counter to several lower federal courts:[116]

> [N]othing in the Constitution has given [judges]. . . a right to decide for the Executive, more than to the Executive to decide for them. . . . The judges, believing the law constitutional, had a right to pass sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the

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Nations Supporting Them (Sept. 25, 2001) *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB at 3 (Karen J. Greenberg & Joshua L. Bratel eds., Cambridge University Press 2005).

[111] *See* George W. Bush, President of the United States, State of the Union Address (Jan. 31, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/01/20060131-10.html.

[112] Thomas P. Crocker, *Still Waiting for the Barbarians, What Is New about Post-September 11 Exceptionalism?*, 19 LAW & LITERATURE 303, 309 (2007).

[113] *See* Memorandum from Alberto R. Gonzales, Attorney Gen., to William H. Frist, Majority Leader, U.S. Senate (Jan. 19, 2006), *available at* http:// www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf [hereinafter DOJ White Paper]; DOJ White Paper, at 29.

[114] *Exercising Congress's Constitutional Power to End a War: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Robert Turner, Professor at Univ. of Va. School of Law).

[115] *Id.*

[116] Dawn E. Johnsen, *Constitutional "Niches:" The Role of Institutional Context in Constitutional Law, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power,* 54 UCLA L. REV. 1559, 1593 n.137 (2007).

> execution of it; because that power has been confided to him by the Constitution.[117]

Jefferson believed that a leaders' first duty was to protect the country. He wrote this to a friend in 1810:

> A strict observance of the written laws is doubtless one of the high virtues of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself with life, liberty, property, and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[118]

The current President repeated this historical sentiment, explaining that while an emergency situation is in effect, "Congress must be able to use broad language that effectively sanctions the President's use of the core incidents of military force."[119] The President continued by stating Congress did precisely this "when it passed the AUMF on September 14—just three days after the deadly attacks on America."[120]

B. Foreign Intelligence Surveillance Act (FISA)

In 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA)[121] as the exclusive means by which the Executive branch may conduct electronic surveillance for foreign intelligence purposes within the United States.[122] Specifically, FISA limits electronic surveillance to investigations of a foreign power for the purpose of obtaining foreign intelligence information.[123] Congress included within the definition of a "foreign power," not only a foreign government, but also "a group engaged in international terrorism or activities in preparation therefore."[124]

FISA also established two special courts: 1) The Foreign Intelligence Surveillance Court (FISC), which is comprised of eleven district court judges appointed by the Chief Justice, and the Foreign Intelli-

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[117] *Id.*

[118] GOLDSMITH, *supra* note 1, at 80.

[119] *See* Memorandum from Alberto R. Gonzales, Attorney Gen., to William H. Frist, Majority Leader, U.S. Senate (Jan. 19, 2006), *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf DOJ White Paper at 29.

[120] *Id.*

[121] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1790 (1978) (codified at 50 U.S.C. § 1801-1811).

[122] Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-63 (2000).

[123] *Id.*

[124] 50 U.S.C.§ 1801(a).

gence Surveillance Court of Review (FISCR), which includes three district court of appeal judges appointed by the Chief Justice.[125]

In 2001, the USA PATRIOT Act[126] made significant amendments to FISA (discussed subsequently), and amended subsection 1804(a)(7)(B) to replace "the purpose" with "a significant purpose."[127] The FISA statute now requires the certifying official to state "that a significant purpose of the surveillance [or physical search] is to obtain foreign intelligence information."[128]

Prior to FISA's enactment, virtually every court concluded that the President had inherent power to conduct warrantless surveillance, to collect foreign intelligence, and that such surveillance was an exception to the Fourth Amendment warrant requirement.[129] The Supreme Court in *United States v. United States District Court*[130] made clear that the governmental interests in national security investigations substantially differ from those in traditional criminal investigations.[131] This case, which remains a leading Supreme Court decision in this area, addressed the "delicate question of the President's power. . .to authorize electronic surveillance in internal security matters without prior judicial approval."[132] The Court observed, "domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.' The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information."[133]

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[125] 50 U.S.C. § 1803(a), (b).

[126] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); *see* Mayfield v. U.S., 504 F. Supp. 2d 1023 (D. Or. 2007); *see also* Memorandum in Support of Defendant's Motion to Dismiss the Amended Complaint or for Summary Judgment, and Opposition to Plaintiffs' Motion for Summary Judgment, Mayfield v. U.S., 504 F. Supp. 2d 1023 (D. Or. 2007) (No. CV.04-1427-AA).

[127] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[128] *See* ACLU v. Dep't of Justice, 265 F. Supp. 2d 20, 32 (D.C. 2003) ("'The amended FISA allows [the government] to obtain a surveillance or search order where its primary purpose in making the request is to gather evidence to initiate a criminal prosecution against the targeted foreign agent,' so long as the gathering of foreign intelligence information remains 'a significant purpose'.") (citing *In re* Sealed Case, 310 F.3d 717, 732 (2002)).

[129] *See,* U.S. v. Truong, 629 F.2d 908, 912-14 (4th Cir. 1980).

[130] United States v. U.S. District Court (*Keith*), 407 U.S. 297 (1972).

[131] Keith, 407 U.S. at 321-24; Def.'s Mem. Supp. Summ. J., 2007 WL 1750470; Mayfield v. United States, 504 F. Supp. 2d 1023 (D. Or. 2007).

[132] Keith, 407 U.S. at 299.

[133] *Id.* at 322.

In sum, FISA reflected Congress' effort to fashion a framework by which the Executive branch could conduct electronic surveillance for foreign intelligence purposes within the context of privacy and individual rights.[134] In constructing this framework, Congress concluded that warrantless surveillance is reasonable in relation to the need of the government to gather intelligence versus the protected rights of our citizens, as required by *United States v. U.S. District Court.*[135]

1. In re Sealed Case

In the fall of 2002, the President gained a blunt new weapon in the ongoing war on terror. The Foreign Intelligence Surveillance Court of Review (FISCR) met for the first time in its twenty-four year history to hear the government's appeal of a lower court's interpretation of FISA.[136] *In re Sealed Case*[137] was the only decision ever issued by the FICSR in its twenty-four-year history.[138]

Briefly, the lower court had imposed certain requirements accompanying an order authorizing electronic surveillance of an "agent of a foreign power," as defined in FISA. The FISCR court overruled this lower court's decision and upheld the constitutionality of the USA PATRIOT Act's "significant purpose" test.[139] The FISCR focused on the definition of "foreign intelligence information," which means information that is "necessary to the ability of the United States to protect against sabotage, international terrorism or clandestine intelligence activities by a foreign power or an agent of a foreign power."[140] Because an "agent of a foreign power" may be anyone who knowingly engages in clandestine intelligence on behalf of a foreign power, which includes activities that may be a violation of criminal statutes, the

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[134] S. Rep. No. 95-604, (1977), *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3916.

[135] S. Rep. No. 95-701, (1978), *as reprinted in* 1978 U.S.C.C.A.N. 3973, 3980; Def.'s Mem Supp. Summ. J., 2007 WL 1750470.

[136] 50 U.S.C. §§ 1801-1863 (2000).

[137] 310 F.3d 717 (Foreign Intel. Surv. Rev. 2002).

[138] *See, e.g.*, United States v. Duggan, 743 F.2d 59 (2d Cir. 1984); United States v. Johnson, 952 F.2d 565 (1st Cir. 1991); Michael P. O'Connor & Celia Rumann, *Going, Going, Gone: Sealing the Fate of the Fourth Amendment,* 26 FORDHAM INT'L L. J. 1234, 1237 n.16 (2003).

[139] The Patriot Act contains many important changes to FISA. The most significant being that a search warrant could issue so long as "a significant purpose" of the surveillance was foreign intelligence, as opposed to the previous standard of 'primary purpose' of the search; USA Patriot Act, Pub. L. No. 107-56, § 218; George P. Varghese, *A Sense of Purpose: The Role of Law Enforcement in Foreign Intelligence Surveillance,* 152 U. PA. L. REV. 385 (2003).

[140] 50 U.S.C. Sec. 1801 (e)(1)(B), (C).

FISCR concluded that FISA was never meant to prohibit its use in criminal cases.[141]

Relying on the Supreme Court's historical distinction between domestic security and foreign threats, as well as the "special needs" cases in Fourth Amendment jurisprudence, the court concluded that, both before and after the USA PATRIOT Act amendment, FISA was constitutional.[142]

2. Most Recent "FISCR" Case (2007)

The most recent Foreign Intelligence Surveillance Court (FISC) case was decided on December 11, 2007. The American Civil Liberties Union had asked the surveillance court to release some records in August, 2007. The organization specifically asked for the government's legal briefs and the court's opinions on the National Security Agency (NSA) wiretapping program.[143]

The FISC court ruled that it would not make public its documents regarding the President's warrantless wiretapping program. In another rare public opinion, the court reasoned that the public does not have the right to view these documents because they deal with the clandestine workings of national security agencies.[144] Writing for the court, U.S. District Judge John D. Bates held that releasing the documents would reveal closely guarded secrets that enemies could used to evade detection or disrupt intelligence activities. He concluded that, "all these possible harms are real and significant and, quite frankly, beyond debate."[145]

One of the key documents being sought was the court order that allowed the President to bring the wiretapping program under the court's purview. Previously, the so-called Terrorist Surveillance Program (TSP) allowed investigators to monitor international phone calls and e-mails to or from the United States without court oversight.[146] Judge Bates acknowledged that the public would benefit from seeing the documents, but the dangers of releasing such sensitive materials far outweighed that public benefit.[147] The court reasoned that releasing the documents would reveal national security secrets,

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[141] 50 U.S.C. Sec. 1801 (b)(2)(A), (C).

[142] Def.'s Mem. Supp. Summ. J., 2007 WL 1750470.

[143] Associated Press, *Spy Court Won't Release Eavesdropping Documents*, Dec. 11, 2007, *available at* http://www.msnbc.msn.com/id/22203707/.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

sources could be revealed, and targets could be alerted and compromised.[148]

IV. LITIGATION, FISA AND THE PATRIOT ACT

A. The USA PATRIOT Act: Protecting (or Destroying) Freedom through Executive Action?[149]

The USA PATRIOT Act is an acronym for the full name of the statute: "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." It was signed into law on October 26, 2001 and is 342 pages long, amending over fifteen different statutes.[150]

Congress passed the Act by overwhelming, bipartisan margins, arming law enforcement with new tools to detect and prevent terrorism. The USA PATRIOT Act has been invaluable to the Department of Justice's efforts to prevent terrorism and make America safer, while at the same time preserving civil liberties.[151] Prior to its existence, laws had failed to keep pace with technology. Now, for example, Section 209 of the Act treats unopened voicemail like unopened e-mail, rather than as a telephone conversation.

In passing the USA PATRIOT Act, Congress simply took existing legal principles and retrofitted them to be applicable to a global terrorist network. Many of the Act's tools have been used for decades to fight organized crime. As Sen. Joe Biden (D-DE) explained during the floor debate about the Act: "[t]he FBI could get a wiretap to investigate the mafia, but they could not get one to investigate terrorists. To put it bluntly, that was crazy! What's good for the mob should be good for terrorists."[152]

Until the law was changed under the USA PATRIOT Act, Osama bin Laden could have made a telephone call from Waziristan to Singapore. Despite the fact that it would have been carried by a fiber optic cable that passed through the United States (like the vast majority of long-distance calls), the government would not have been able to

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[148] *Id.*

[149] CHRISTOPHER P. BANKS, PROTECTING OR DEFENDING FREEDOM THROUGH LAW, AMERICAN NATIONAL SECURITY AND CIVIL LIBERTIES IN AN ERA OF TERRORISM 45-46, (David B. Cohen & John W. Wells eds., 2004).

[150] CLE Lecture, No. AV29627, Monroe County Bar Center for Education, THE PATRIOT ACT: LEGAL RIGHTS IN THE WAR ON TERRORISM (Nov. 16, 2005), *available at* https://content.westlegaledcenter.com/cl/programMaterial/MCBA/F89036C_CL.pdf.

[151] BANKS, *supra* note 149, at 45-46.

[152] Cong. Rec., 10/25/01.

listen without prior permission from FISA.[153] In the past, FISA had to approve all interceptions of foreign-to-foreign communications through American wires, fiber optic cables, or switching stations.[154] With warrants to the FISA court backed up, as much as two thirds of potential intelligence from U.S. eavesdropping capabilities was being lost.[155]

The USA PATRIOT Act expands all four traditional tools of surveillance used by law enforcement—wiretaps, search warrants, pen/trap orders and subpoenas. The Act has the following advantages in the War on Terror that should be upheld on constitutional challenge:

- For years, law enforcement has been able to use "roving wiretaps"[156] to investigate ordinary crimes, including drug offenses and racketeering. Because international terrorists are trained to thwart surveillance by rapidly changing locations and communication devices (cell phones), the Act authorized agents to seek court permission to use the same techniques in national security investigations to track terrorists.[157]
- To keep from tipping off suspects, the government can petition a court to approve a "delayed-notice" search warrant. A delayed-notice warrant is authorized by a judge to temporarily delay giving notice that the search has been conducted.[158] Long before the USA PATRIOT Act, the Supreme Court expressly held in *Dalia v. United States*[159] that covert entry pursuant to a judicial warrant does not violate the Fourth Amendment. Since *Dalia*, three federal appeals courts have considered the constitutionality of delayed-notice search warrants, and all three have upheld them.[160]
- The Act allows federal agents to seek a court order to obtain business records in terrorism cases. Section 215 permits the FBI director to seek records from

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[153] Mortimer B. Zuckerman, Editorial, *The Case for Surveillance,* U.S. NEWS & WORLD REPORT Sept. 3, 2007, at 84.
[154] *Id.*
[155] *Id.*
[156] A roving wiretap can be authorized by a federal judge to apply to a particular suspect, rather than a particular phone or communications device.
[157] CLE Lecture, *supra* note 150.
[158] CLE Lecture, *supra* note 150; Letter from William E. Moschella, Assistant Attorney General, to Dennis Hastert, Speaker of the House, Sept. 22, 2004.
[159] 441 U.S. 238 (1979).
[160] CLE Lecture, *supra* note 150.

> bookstores and libraries of books that a person has purchased or read, or of his or her activities on a library's computer.[161] These records were sought in criminal cases such as the investigation of the *Zodiac* gunman, where police suspected the gunman was inspired by a Scottish occult poet, and wished to learn who had checked the poet's books out of the library.[162]

Litigation has attempted to eviscerate the USA PATRIOT Act through assertions that the Act violates the Fourth Amendment's search and seizure provisions.[163] Yet, even before the Act was passed, courts had made rulings in similar cases. In *Smith v. Maryland*[164] the Court upheld the government's use of pen registers, a practice that is expanded by section 216 of the USA PATRIOT Act. Specifically, *Smith* held that there is no legitimate expectation of privacy for pen registers, and hence no Fourth Amendment concern.

However, a District Court in the Ninth Circuit recently ruled that some parts of the Act were unconstitutional. U.S. District Judge Ann Aiken ruled that FISA, as amended by the USA PATRIOT Act, now permits the President to conduct surveillance of citizens without satisfying the probable cause requirement of the Fourth Amendment.[165]

In *Mayfield v. United States*,[166] the plaintiffs alleged various civil rights violations for unlawful arrest, search, and imprisonment against four individual defendants.[167] Plaintiffs also brought a claim under the Privacy Act, alleging that the defendants began "leaking" information contained within the Department of Justice and the Federal Bureau of Investigation files to the national and international me-

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[161] *Id.* at 9; 50 U.S.C.A. § 1861.

[162] CLE Lecture, *supra* note 150; Michele Orecklin, *Checking What You Check Out,* TIME, May 12, 2003, at 34 ("Many librarians believe that the policy violates the right to privacy. . . The Justice Department believes that librarians are overreacting. 'I think there is a fundamental misunderstanding and a sense of unjustified hysteria,' says Assistant Attorney General Viet Dinh. Dinh says authorities have always been able to obtain subpoenas to search library records. For instance, a federal grand jury authorized searches in the mid-1990s to learn who had checked out books mentioned in the Unabomber's manifesto. Those subpoenas, however, were issued after officials provided a reasonable suspicion that the books were related to a committed crime.").

[163] BANKS, *supra* note 149, at 50.

[164] Smith v. Maryland, 442 U.S. 735, 746 (1979).

[165] Mayfield v. United States, 504 F. Supp. 2d 1023 (D. Or. 2007).

[166] *Id.*

[167] *Id.* at 1026.

dia regarding plaintiff Brandon Mayfield.[168] Specifically the District Court held that the USA PATRIOT Act provisions authorizing surveillance pursuant to FISA violated the Fourth Amendment by permitting the Executive Branch to conduct surveillance and searches without first proving that probable cause existed to believe that a crime had been committed.[169]

The court went on to rule that the Fourth Amendment prohibits the government from conducting intrusive surveillance unless it first obtains a warrant describing with particularity the things to be seized as well as the place to be searched.[170] The court concluded that "the indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments, and imposes a heavier responsibility on the court in its supervision of the fairness of procedures."[171]

B. Protect America Act[172]

As an adjunct to THE PATRIOT Act, Congress passed the "Protect America Act" in August, 2007 to close a critical intelligence gap.[173] It was signed into law by the President, after being passed by the Senate. The measure, introduced by Senator McConnell as S. 1927, makes a number of additions and modifications to the Foreign Intelligence Surveillance Act (FISA), as amended, 50 U.S.C. § 1801.[174]

Specifically, the Protect America Act revised FISA in four significant ways. First, the Act permits the intelligence community to effectively collect foreign intelligence on targets in foreign lands without first receiving court approval.[175] Intelligence professionals will not have to go to court in order to collect foreign intelligence on an overseas target who may be planning to attack the U.S.[176] Second, the Act requires the Attorney General to submit to the FISA court the procedures by which the government determines that electronic surveillance is directed at persons reasonably believed to be outside the

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[168] *Id.*
[169] *Id.* at 1032.
[170] *Id.* at 1023.
[171] *Id.*
[172] P.L. 110-55, the Protect America Act of 2007.
[173] The White House, *Fact Sheet: FISA Legislation Necessary to Keep Our Nation Safe*, August 6, 2007, *available at* http://www.whitehouse.gov/news/releases/2007/12/20071217-3.html.
[174] Elizabeth B. Bazan, *P.L. 110-55, The Protect America Act of 2007: Modifications to the Foreign Intelligence Surveillance Act*, Congressional Research Service, August 23, 2007, *available at* http://www.fas.org/sgp/crs/intel/RL34143.pdf.
[175] *Id.*
[176] The White House, *supra* note 173. The Act is set to expire on February 1, 2008.

United States. [177] Third, it permits the Director of National Intelligence and the Attorney General to direct third parties (i.e. telecommunications companies) to provide the information, facilities, and assistance necessary to conduct surveillance of foreign intelligence targets located overseas.[178] Finally, the Act provides that no lawsuit may be brought against any person or business for complying with a directive to provide all information, facilities, or assistance necessary to accomplish the acquisition of foreign intelligence gathering.[179]

V: LITIGATION, ENEMY COMBATANTS AND GUANTANAMO BAY

A. Rasul v. Bush[180]

Two Australian citizens and twelve Kuwaiti citizens were captured abroad during hostilities between the United States and the Taliban.[181] Since the beginning of 2002, the U.S. military has held them at the naval base at Guantanamo Bay.[182] The prisoners brought actions contesting the legality and conditions of their confinement.[183]

The United States District Court for the District of Columbia dismissed their claims for lack of jurisdiction. Subsequently, an appeal was taken to the Supreme Court. Justice Stevens, writing for the majority, ruled that the federal habeas statute did indeed confer jurisdiction to hear challenges of aliens held at Guantanamo Bay.[184] Justice Scalia, however, filed a blistering dissent and concluded that the majority's determination that:

> [T]he habeas statute. . .extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. . .is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied. . .The Court's contention. . .is implausible in the extreme. This is an irrespon-

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[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] Rasul v. Bush, 542 U.S. 466 (2004).

[181] *Id.*

[182] The United States occupies the base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War.

[183] Rasul v. Bush, 542 U.S. 466 (2004).

[184] *Id.*

> sible overturning of settled law in a matter of extreme importance to our forces currently in the field.[185]

Scalia went on to reason that the court's departure from stare decisis will have a potentially harmful effect upon the Nation's conduction of war. If Congress had wished to change judges' habeas jurisdiction, Scalia wrote, it could have done so by intelligent revision of the statute, "instead of by today's clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees." Scalia concluded: "For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent."[186]

B. Hamdi v. Rumsfeld[187]

In 2004, Northern Alliance troops, a coalition of groups allied with the United States and opposed to the Taliban, captured Yaser Hamdi in Afghanistan and turned him over to U.S. armed forces. The military sent Hamdi to the naval station at Guantanamo Bay. Upon discovery that Hamdi was a U.S. citizen, he was transferred to a naval brig in South Carolina.[188]

Hamdi's father filed a writ of habeas corpus seeking his son's release, claiming that as an American citizen Hamdi could not be held without criminal charges, access to a tribunal or legal counsel. He based his argument on 18 U.S.C. § 4001(a), which declares, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[189]

The government did not challenge Hamdi's right to seek habeas relief; instead, it argued that he was detained lawfully as an enemy combatant under the laws of war.[190] To support its contention, the government submitted a declaration from a Defense Department official stating that Hamdi had traveled to Afghanistan in the summer of 2001, affiliated himself with a Taliban military unit, and surrendered while armed.[191]

The Supreme Court ultimately ruled that the Government could detain Hamdi as an "enemy combatant." It determined, however, that he must receive due process of law in order to challenge this des-

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[185] *Id.* at 488.
[186] *Id.*
[187] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).
[188] *See id.*
[189] *Id* at 542.
[190] *Id* at 510.
[191] *See id.* at 512–13. The Supreme Court refers to this document as the Mobbs Declaration.

ignation.[192] Most significantly, the majority made it clear that it would not consider military decisions in wartime to be outside the competence of the federal courts.[193]

This expansion of judicial review and intrusive litigation into military decisions represents unprecedented interference by the federal courts into the Executive's traditional powers. At the formal level, the decision in *Hamdi* required the Court to effectively overrule a string of judicial precedents dating back to World War II.[194] Yet, the Supreme Court did accept the political branches decision to characterize the September 11th attacks as war.[195] The Court rejected arguments characterizing terrorism solely as criminal activity and denied the notion that war could occur only against nations.[196] The Court held, "[T]he capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war."[197] The Court also ruled that the Afghanistan conflict was part of the War on Terrorism, and that enemy combatants could be detained without formal criminal charge. The Court determined that preventing a combatant's ability to return to the battlefield was a fundamental incident of war, and thus no specific congressional authorization for detention was needed.[198]

Hamdi argued that his detention was unconstitutional because it was indefinite. The Court flatly rejected this argument.[199] The Justices recognized that the United States was waging war with a new kind of enemy, one that is without a set territory or population, and with no desire to spare civilian life.[200] Accordingly, the Court held that the government could detain prisoners until the end of a conflict: "[T]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."[201] In the past, there had been no inclination towards defining a fixed detain-

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[192] *See id.* 564.

[193] Hamdi, 542 U.S. at 564.

[194] *See* Johnson v. Eisentrager, 339 U.S. 763, 781 (1950) (holding that German nationals convicted by a U.S. military commission after World War II did not have the right to the writ of habeas corpus).

[195] *See* Hamdi, 542 U.S. at 518.

[196] *See* Brief for Petitioners at 12–13, 17 n.8, Hamdi, 542 U.S. 507 No. 2-6696 (2004); Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1873 (2004) (arguing that the post-September 11 denouement constitutes a "state of emergency" rather than an outright "war").

[197] Hamdi, 542 U.S. at 518.

[198] *Id.* at 521.

[199] *Id.*

[200] *Id.* at 520.

[201] *Id.*

ment period during war, until the *Hamdi* court suggested it might create one for the first time in history.[202]

The Court's decision to grant *Hamdi* due process rights is a flawed one. By introducing a lawyer to a prisoner right after capture, as the lower court judge ordered, the questioning of enemy combatants would be stalled. Suppose, for example, that civil libertarians prevail in future court hearings and enemy combatants receive a trial to test their detention. To prove that a prisoner is a member of al Qaeda, the soldiers and officers who captured and processed the prisoner would have to be recalled from battle to appear in court, and would be subjected to direct and cross examination.[203] The *Hamdi* decision is an absurd end result to both military and intelligence operations.[204]

C. Hamdan v. Rumsfeld[205]

In June 2006, the Supreme Court invalidated military commission tribunals for enemy combatants held at Guantanamo.[206] The *Hamdan* Court held that military commissions fall outside of the integrated system of military courts and procedures established by Congress, and ruled the tribunals were unconstitutional as applied to both citizens and non-citizens held at Guantanamo.[207] Congress quickly responded with the Military Commissions Act (MCA) of 2006, legislation that, essentially, overruled *Hamdan* and stripped courts of jurisdiction over military commissions.[208]

Justice Clarence Thomas, dissenting, argued that the President's decision to try Hamdan before a military commission is entitled to a heavy measure of deference.[209] In the present conflict on terror, Thomas concluded, Congress authorized the President to use all necessary force against those nations and organizations he determines planned or aided the terrorist attacks of 9/11. Thomas concluded that the capture, detention, and trial of unlawful combatants is an important incident of war, and therefore an exercise of the necessary force Congress authorized the President to use.[210] Thomas concluded that military and foreign policy judgments:

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[202] Yoo, *supra* note 25, at 147.

[203] *Id.* at 162.

[204] *Id.*

[205] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

[206] *Id.* at 2759

[207] Douglas A. Hass, *Crafting Military Commissions Post-Hamdan: The Military Commissions Act of 2006,* 82 Ind. L.J. 1101, 1101 (2007).

[208] *Id.*

[209] Hamdan, 126 S. Ct. at 2825 (Thomas, J., dissenting).

[210] *Id.* at 2824.

> [A]re and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[211]

Both *Hamdi* and *Hamdan* illustrate that de novo judicial review undermines the effectiveness of military efforts to thwart terrorists. A habeas proceeding would become the forum for recalling commanders and intelligence operatives from the field into open court, disrupting overt and covert operations, revealing successful military tactics and methods, and forcing the military to shape its activities to the demands of the litigation process. Indeed, the discovery orders of the trial judge in *Hamdi* threatened to achieve exactly these results.[212]

U.S. Senator John Cornyn (R-Texas) stated: "This habeas litigation has consumed enormous resources and disrupted the day-to-day operation of [the] Guantanamo naval base."[213] He went on to conclude:

> The. . .litigation has imperiled crucial military operations during a time of war. In some instances, habeas counsel have violated protective orders and jeopardized the security of the base by giving detainees information likely to cause unrest. Moreover, habeas counsel have frustrated interrogation critical to preventing further terrorist attacks on the United States.[214]

The Supreme Court's three decisions in *Hamdi*, *Hamdan* and *Rasul* constitute an unprecedented departure from the traditionally

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[211] Hamdi, 542 U.S. at 582-83 (Thomas, J., dissenting) (quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

[212] Hamdi, 542 U.S. at 513-14. The district court rejected the Mobbs Declaration as insufficient to justify Hamdi's detention and ordered the Government to turn over numerous materials for in camera review, including copies of all of Hamdi's statements and the notes taken from interviews with him that related to his reasons for going to Afghanistan and his activities therein; a list of all interrogators who had questioned Hamdi and their names and addresses; statements by members of the Northern Alliance regarding Hamdi's surrender and capture; a list of the dates and locations of his capture and subsequent detentions; and the names and titles of the United States Government officials who made the determinations that Hamdi was an enemy combatant and that he should be moved to a naval brig.

[213] Robin McDonald, *Is Habeas Obsolete in the Age of Terrorism?*, FULTON COUNTY DAILY REPORT, Oct. 11, 2006, *available at* www.dailyreportonline.com/sitelogin.asp?origin=newsFile10%2F11%2F2006%4011963%2Ehtml.

[214] *Id.*

limited role of the courts with respect to warfare, ignoring centuries of history and long standing judicial decisions. Both Justice Scalia and Thomas wrote that "the plurality has appointed itself the ultimate arbiter of what is quintessentially a policy and military judgment."[215] For the dissenters, the President has the power to appoint military commissions in exigent circumstances, for that determination is the kind for which the judiciary has neither the aptitude, nor responsibility. An order enjoining ongoing military commission proceedings "brings the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent."[216]

Thus, the Supreme Court has now made the legal system part of the problem, rather than part of the solution to the challenges of the War on Terrorism. Their decisions mistake war for the familiarity of the criminal justice system. What the justices have done would be unthinkable in prior military conflicts. They have chosen to directly intervene in the military decisions of the President and Congress.[217]

D. The Padilla *Case*

The Fourth Circuit's decision in the *Padilla* case warrants careful evaluation, for its detailed analysis of the issues surrounding enemy combatants versus national security demands.[218]

Judge J. Michael Luttig opened his analysis emphasizing the training which Padilla received from al Qaeda and its affiliates in Afghanistan and Pakistan. Padilla ostensibly met senior al Qaeda operations planner, Khalid Sheikh Mohammad, who directed that Padilla go to the United States and destroy apartment buildings. When he returned from international training, the FBI arrested Padilla in the Chicago O'Hare Airport before he could implement the alleged plot.[219] Padilla was transported to New York, where he was held at a civilian prison until the President designated him an "enemy combatant" and directed the Secretary of Defense to take him into military custody. Since his delivery into the custody of military authorities, Padilla has been detained at a naval brig in South Carolina.[220]

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[215] Jules Lobel, *The Commander in Chief and the Courts*, PRES. STUDIES QUARTERLY, March 2007, at 59, *available at* http://www.blackwell-synergly.com/doi/pdf/10.1111/j-1741-5705.2007.02584.x.

[216] *Id.*

[217] YOO, *supra* note 25, at xi.

[218] Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

[219] *Id.* at 388. The judge seemed to draw the factual allegations recounted in the opinion from the U.S. factual statements in the joint appendix.

[220] *Id.* at 390.

Judge Luttig began his legal assessment with the idea that the AUMF reaffirmed the war principle that allowed detentions to prevent a combatant's return to the battlefield, a fundamental incident of waging war.[221] Reasoning that the AUMF enabled individuals to be designated and imprisoned as enemy combatants, the judge asserted that Padilla could be so labeled and confined as well. The judge stated that Padilla, like Hamdi, took up arms in Afghanistan against Afghan forces aligned with the United States.[222]

Padilla's lawyers argued that his military detention was "neither necessary nor appropriate" because he was amenable to criminal prosecution. Related to this argument, Padilla attempts to distinguish *Ex parte Quirin* from his case on the grounds that he has simply been detained, unlike Haupt who was charged and tried in *Quirin*. Neither the argument nor the distinction was convincing to the Court.[223] The fact that Padilla could be prosecuted through traditional criminal process did not distinguish him from Hamdi. Luttig concluded by remarking:

> We are convinced, in any event, that the availability of criminal process cannot be determinative of the power to detain, if for no other reason than that criminal prosecution may well not achieve the very purpose for which detention is authorized in the first place-the prevention of return to the field of battle. . . criminal prosecution would impede the Executive in its efforts to gather intelligence from the detainee and to restrict the detainee's communication with confederates so as to ensure that the detainee does not pose a continuing threat to national security even as he is confined. . .[224]

Thus, the Fourth Circuit upheld executive power to detain indefinitely U.S. citizens denominated "enemy combatants" in the War on Terrorism. Exemplary of this is Judge Posner's argument for weighting the balance in favor of the Executive Branch:

> Civil liberties depend on national security in a broader sense. Because they are the point of a balance between security and liberty, a decline in security causes the balance to shift against liberty. An even more basic point is that without physical security there is likely to be very little liberty.[225]

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[221] *Id.* at 391 (quoting Hamdi, 542 U.S. at 518 (plurality opinion)).

[222] Padilla, 423 F.2d at 391-92.

[223] *Id.* at 394 (citing Hamdi, 542 U.S. at 518); *Ex parte* Quirin, 317 U.S. 1 (1942).

[224] Padilla, 423 F.2d at 394-95 (citing Hamdi, 542 U.S. at 518).

[225] POSNER, *supra* note 21, at 210. This conclusion occurs after a sustained criticism of what so-called "civil libertarians" neglect, slight, and assume.

E. United States v. Moussaoui[226]

If one doubts that military commissions are the appropriate venue for suspected terrorists, one need only examine the Zacarias Moussaoui trial. The story of Moussaoui's trial and conviction demonstrates why the civilian justice system is inadequate to the task of fighting al Qaeda.[227]

Interrogation of al Qaeda leaders confirmed that Moussaoui came to the United States either to be a backup pilot for the 9/11 plot or a pilot in a second wave of attacks.[228] The Justice Department indicted Moussaoui in December of 2001 for conspiracy to commit terrorist attacks. At his trial, Moussaoui took every opportunity to grandstand. He called a defense attorney a "Judas" at his April 2006 plea hearing. He was often removed from the courtroom for interrupting proceedings, pointing to his defense counsel, who he fired, yelling: "I'm al Qaeda. They are American. They are my enemies. This trial is a circus."[229] Moussaoui also wrote to Richard Reid, the shoe bomber, who had been a member of the same mosque in London.[230]

Moussaoui openly admitted that he was a member of al Qaeda and that he wanted to kill Americans in a second wave of attacks.[231] His trial would have proceeded for years had Moussaoui not cooperated and pleaded guilty on April 22, 2005, more than three and half years after 9/11. Moreover, if Moussaoui had pressed his Sixth Amendment right to have "compulsory process for obtaining witnesses in his favor," the trial could have gone on for years.[232] In fact, the judge at one point agreed that Moussaoui's constitutional right to a fair trial required access to other enemy combatants. When the government refused to produce the witnesses, the judge sanctioned them by ruling out the death penalty.[233]

Courtroom maneuvers went on for another year as Moussaoui's lawyers appealed again, ultimately to the Supreme Court, which denied review of the case. After the Supreme court declined certiorari, Moussaoui decided to plead guilty.[234]

In May 2006, a Virginia jury sentenced Moussaoui to life in prison. The end of the trial came almost five years after his arrest

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[226] U.S. v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003).

[227] Yoo, *supra* note 25, at 210.

[228] *Id.*

[229] *Id.* at 211.

[230] *Id.*

[231] *Id.*

[232] *Id.* at 211-12.

[233] Yoo, *supra* note 25, at 211-13.

[234] *Id.* at 215.

when Moussaoui yelled, "America you lost. I won."[235] His histrionics are significant. Those who believe the Moussaoui case demonstrates that the criminal justice system, instead of a military tribunal, can try terrorists have not paid close attention. If Moussaoui had chosen to continue his litigation, as competent defense counsel would have, his case would be ongoing. Moussaoui's trial clearly shows that civilian courts, with juries, civil rights protections and the luxury of time, cannot accommodate militant, enemy combatants in wartime.

VI. ARE MILITARY TRIBUNALS CONSTITUTIONAL?

The editorial page of the *New York Times* declared, "military commissions do an end run around the Constitution. . . .and were an insult to the exquisite balancing of executive, legislative and judicial powers that the Framers incorporated into the Constitution."[236]

The viewpoint expressed in the *New York Times* of the framers intent is a mistaken one. Military commissions rest on centuries of American practice, Supreme Court precedent and the Constitution's text. The Constitution gives the President 'the business of intelligence' and the conduct of war, according to John Jay, one of the authors of *The Federalist Papers.*[237] In *Federalist No. 64* Jay explained that because Congress could not be trusted to keep secrets, the new Constitution had given the President the ability "to manage the business of intelligence as prudence may suggest." Consider this 1800 statement by John Marshall: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . .He possesses the whole Executive power. . .In this respect the President expresses constitutionally the will of the nation.[238]

More specifically, President Bush issued an Executive Order that created military commissions to try enemy combatants, "to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorists attacks."[239] The Commissions provide as fair a trial as the world has known in the context of war, and more due process safeguards than those of the International Criminal Court.[240]

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[235] *Id.* at 210.

[236] *Id.* at 205.

[237] *Exercising Congress's Constitutional Power to End War (Without in the Process Breaking the Law)*: Hearing Before the S. Comm. on Jud. (Jan. 30. 2007) (statement of Robert F. Turner, Assoc. Dic. for the Ctr. of Nat. Sec. Law at Univ. of Va.).

[238] *Id.*; 10 ANNALS OF CONG 613, *reprinted in* U.S. 5 Wheat (1820).

[239] YOO, *supra* note 25, at 206.

[240] *Id.* at 207, 277 n.8. ("Under the ICC, a prosecutor who loses a case may appeal the decision that is not possible under the military commissions. . .").

"Enemy combatant" is a general category that subsumes two sub-categories: lawful and unlawful combatants.[241] Lawful combatants receive prisoner of war (POW) status and the protections of the Third Geneva Convention.[242] Unlawful combatants do not receive POW status and do not receive the full protections of the Geneva Convention.[243] The President has determined that al Qaeda members are unlawful combatants because (among other reasons) they are members of a non-state actor, terrorist group.[244] He additionally determined that the Taliban detainees are unlawful combatants because they do not satisfy the criteria for POW status set out in Article 4 of the Third Geneva Convention.[245]

"The military is far more capable of determining who an enemy combatant is than a federal judge," Senator Lindsey Graham concluded before his vote to enact the Military Commissions Act.[246] "We have replaced a system where the judges of this country can take over military decisions and allow judges to review military decisions, once made, for legal sufficiency."[247] Graham concluded:

> We have rejected the idea as a Congress of allowing the courts to run the war when it comes to defining who an enemy combatant is . . .It is not destroying the writ of habeas corpus. It is having a rational, balanced approach to where the judges can play a meaningful role in time of war and not play a role they are not equipped to play.[248]

Andrew C. McCarthy, the former federal prosecutor who convicted Sheik Omar Abdel Rahman for the Word Trade Center bombing in 1993, has argued that the detainees at Guantanamo have no right to habeas.[249] McCarthy said that Congress, not the courts, should decide how to deal with foreign terrorist suspects—as it has in the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, both passed in response to Supreme Court rulings.[250] McCarthy argues that the Military Commissions Act does not actually suspend

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[241] *See Ex parte* Quirin, 317 U.S. 1, 1 (1942).
[242] *Id.*
[243] Memorandum from William J. Haynes II, General Counsel of the Dept. of Defense, to Members of the ASIL-CDR Roundtable (Dec. 12, 2002), *available at* http://www.cfr.org/publication/5312./enemy_combatants.html.
[244] *Id.*
[245] *Id.*
[246] McDonald, *supra* note 213.
[247] *Id.*
[248] *Id.*
[249] Meredith Hobbs, *Lawyers Debate Rights vs. Security,* FULTON COUNTY DAILY REPORT, March 27, 2007, *available at* http://dailyreportonline.com (search "Lawyers Debate Rights vs. Security" in "Search Site").
[250] *Id.*

habeas because noncitizens have never had the right to habeas under U.S. law.[251] He added that a provision in the Detainee Treatment Act that allows prisoners to ask the U.S. Court of Appeals for the D.C. Circuit to review the tribunals' rulings effectively constitutes habeas corpus.[252] It is "reasonable to think they are dangerous or they would not have been held," said McCarthy, adding that twenty of the detainees who have been released have been recaptured on the battlefield.[253]

Civil libertarians have portrayed military commissions as some sort of Frankenstein creation of the President.[254] Nothing could be further from the truth. Military commissions are the customary form of justice for enemy prisoners who violate the laws of war.[255] They have also served as courts of justice during occupations and in times of martial law. American generals have used military commissions in virtually every significant war from the Revolutionary War through World War II.[256]

Finally, military tribunals are imminently more secure from a terrorist attack. Civil trials make inviting targets for al Qaeda.[257] These trials also tend to be in major cities, such as New York, Washington and Miami, compounding loss of life if they were targeted for attack. Currently, military tribunals are conducted at Guantanamo Bay, a well-defended military compound far from major American population centers.[258]

A. Ex Parte Quirin[259]

Under Article I, Section 8 powers, Congress has the authority to provide for the creation of military commissions,[260] and can also authorize the President to create such commissions. The Supreme Court recognized the latter alternative when it upheld the President's power to establish military commissions in the World War II cases of *Ex parte Quirin* and *In Re Yamashita.*[261] In fact, the current President's order establishing military tribunals closely parallels President

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[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] Yoo, *supra* note 25, at 220.
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.* at 219.
[259] *Ex parte* Quirin, 317 U.S. 1 (1942) (per curium); *Ex parte* Quirin, 317 U.S. 1 (1942).
[260] U.S. CONST. art.1, § 8.
[261] *See Ex parte* Quirin, 317 U.S. 1 (1942) (per curium); *Ex parte* Quirin, 317 U.S. 1 (1942); *In Re* Yamashita, 327 U.S. 1, 11 (1946).

Franklin D. Roosevelt's proclamations pertaining to the Nazi saboteur incident in the summer of 1942.[262]

In mid-June of 1942, eight German soldiers, after receiving extensive training in the techniques of sabotage, were transported by submarine to the east coast of the United States, four coming ashore on Long Island and four in Florida.[263] They landed secretly at night and buried their uniforms, along with explosives intended for use in the destruction of various war facilities.[264] However, two of the saboteurs had second thoughts and provided the FBI with information about the ill-conceived plot.[265] Before the end of June, all eight of the saboteurs were incarcerated.[266]

President Roosevelt issued two military orders: the first of which provided that enemies entering this country were subject to the laws of war and the jurisdiction of military tribunals.[267] The order further provided that "such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or have any such remedy or proceeding sought in their behalf, in the courts of the United States, or of its States. . ."[268] In the second order, Roosevelt set up a military tribunal for trial of the Nazi saboteurs, relying on his authority as "President and as Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, and more particularly the Thirty-Eighth Article of War." [269]

The saboteurs were provided with defense counsel, who petitioned for habeas release.[270] The District Court denied the petitioners applications for habeas corpus.[271] The Supreme Court justices, who were scattered throughout the country during their summer recess, heard oral arguments, rendered a brief per curiam decision in *Ex Parte Quirin* and denied the defendants' habeas corpus petition.[272] The Court concluded that the "alleged offenses . . . could be tried by a military commission, that the commission was lawfully constituted, and that the petitioners were lawfully held for trial."[273] The military trial

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[262] Stephens, *supra* note 19 at 74.

[263] *Id.; see also Ex parte* Quirin, 317 U.S. at 21.

[264] Stephens, *supra* note 19, at 74; *see also Ex parte* Quirin, 317 U.S. at 21.

[265] Stephens, *supra* note 19, at 74.

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *See id.* at 75.

[271] *See* Stephens, *supra* note 19, at 75; *see also Ex parte* Quirin, 317 U.S. 1 (1942).

[272] *See* Stephens, *supra* note 19, at 75; *See also, Ex parte* Quirin, 317 U.S. 1 (1942).

[273] Stephens, *supra* note 19, at 75; *see also Ex parte* Quirin, 317 U.S. at 2.

proceeded, the defendants were convicted, and in early August 1942, six of the eight defendants were executed.[274]

Because of the important issues raised in *Ex parte Quirin*, on October 29, 1942 the Supreme Court issued a separate, more elaborating opinion.[275] Writing for eight members of the Court, Justice Frank Murphy not participating, Chief Justice Harlan Fiske Stone distinguished this decision from the Court's famous Civil War era ruling in *Ex parte Milligan*.[276]

In *Quirin*, Justice Stone concluded that by entering the United States armed with explosives intended for the destruction of war industries, these enemy combatants became unlawful belligerents subject to trial and punishment.[277] Having found that the petitioners were properly charged, the Supreme Court asserted that Roosevelt was authorized to order their trials by a military commission.[278]

B. Military Commissions Act

The Military Commissions Act, signed by President Bush in October 2006, stripped federal courts of jurisdiction to hear the habeas petitions of noncitizens detained at Guantanamo.[279] The law was a rebuke to the Supreme Court's ruling in *Hamdan*.

Section 7 of the MCA is entitled "Habeas Corpus Matters" and amends prior habeas rules to read:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[280]

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[274] *See* Stephens, *supra* note 19, at 75.

[275] *Id.*; *see also Ex parte* Quirin, 317 U.S. 1 (1942).

[276] *Id.*; *see Ex parte* Milligan, 71 U.S. 2 (1866). Military commissions were frequently used to try both military personnel and civilians during the Civil War. For the most part, the authority of these commissions was upheld. However, in *Ex parte* Milligan, decided a year after the end of the war, the Supreme Court held that the military trial of a civilian on charges of disloyalty outside the theater of military operations, while the civil courts remained open, violated the defendant's Fifth and Sixth Amendment rights. "The Supreme Court held that martial law could not "be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."

[277] *See* Stephens, *supra* note 19, at 75; *Ex parte* Quirin, 317 U.S. at 37.

[278] Stephens, *supra* note 19, at 75; *see Ex parte* Quirin, 317 U.S. at 38.

[279] Military Comissions Act of 2006, Pub. L. No. 109-399 (codified as amended in scattered sections of 10 U.S.C.A. and 28 U.S.C.A.)

[280] 28 U.S.C.A. § 2241 (2006). Senator Cornyn noted that "[O]nce . . . section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA]

Before the MCA was enacted, Senator Saxby Chambliss (R-Ga.) commented that, "[t]his is just one right that we don't have to give them," he said, referring to Guantanamo detainees.[281] Chambliss added that the bill, once it becomes law, will cleanly sweep away at least 452 pending habeas lawsuits filed on behalf of Guantanamo Bay detainees, specifically noting: "[o]ur intention is that this [bill] would wipe those out.[282] Holding hearings for every detainee in an ongoing war would consume the federal government. Just imagine what it would do to our system."[283] Chambliss concluded that U.S. constitutional protections do not extend to non-citizens living in the United States who "[do] not have a substantial connection to the United States" [284]

Senator Lindsey Graham (R-S.C.) agreed: "[n]ever in the history of the law of armed conflict," Graham told the Senate, "has a military prisoner, an enemy combatant, been granted access to any court system, federal or otherwise, to have a federal judge come in and start running the prison."[285] Graham's proposal, the MCA Act of 2006, in essence, suspended habeas corpus for only the third time in American history, following Presidents Abraham Lincoln and Franklin D. Roosevelt. [286]

VII. PENDING SUPREME COURT CASES: BOUMEDIENE V. BUSH AND AL-ODAH V. UNITED STATES

The Supreme Court has drawn intense scrutiny by agreeing, for a third time, to weigh in on the ongoing battle between the President and writs of habeas corpus.[287] On June 29, 2007, the Supreme Court granted certiorari in two consolidated cases: *Boumediene v. Bush* and *Al-Odah v. United States.*[288]

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last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the [CSRT] hearings." Boumediene v. Bush, 476 F. 3d 981, 986 (2007).

[281] McDonald, *supra* note 50, at 4.

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] Novak, *supra* note 3.

[286] *Id.*

[287] Posting of Boumediene v. Bush to On the Docket, Blog of Medill School of Journalism, Northwestern University, *available at* http://docket.medill.northwestern.edu/archives/004556.php.

[288] Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195); Al-Odah v. United States, 321 F.3d 1134 (D.C.C. 2003), *rev'd sub norm* Rasul v. Bush, 542 U.S. 446 (2004), cert. granted, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1196).

In 2002, Lakhdar Boumediene and five other Algerians were captured by Bosnian police when U.S. intelligence officers suspected their involvement in a plot to attack the U.S. embassy.[289] The prisoners were classified as enemy combatants and detained at Guantanamo.[290] Boumediene filed a petition for a writ of habeas corpus, alleging violations of the Constitution's Due Process Clause and international law.[291]

In the *Boumediene* cases, two cases involving seven detainees, the district court judge, Judge Leon, granted the government's motion and dismissed the cases in their entirety.[292] He granted the government's motion to dismiss on the ground that Boumediene, as an alien detained at an overseas military base, had no right to a habeas petition.[293] Similarly, the *Al Odah* cases (Nos. 05-5064, 05-5095 through 05-5116) consist of eleven cases involving fifty-six detainees.[294] In the *Al Odah* cases, Judge Green denied the government's motion to dismiss the claims arising from alleged violations of the Fifth Amendment's Due Process Clause and the Third Geneva Convention, but dismissed all other claims.[295] The government appealed and the detainees cross-appealed.

On February 20, 2007, the D.C. Circuit Court of Appeals, essentially, dismissed these cases for lack of jurisdiction.[296] The court framed the central legal issue as follows: Do federal courts have jurisdiction over writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba?[297] In answering the question the court observed that each of petitioners' pending habeas cases related to the detention of an 'alien' after September 11, 2001. The court concluded that the Military Commissions Act (MCA) applies to those cases and eliminates federal jurisdiction over the petitions.[298] The court specifically held that the MCA Act of 2006 "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of

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[289] Novak, *supra* note 3.

[290] *See id.*

[291] *See id.*

[292] *See* Khalid v. Bush, 355 F.Supp.2d 311 (D.D.C. 2005); Boumediene, 476 F.3d at 984.

[293] Novak, *supra* note 3.

[294] Boumediene, 476 F.3d at 984.

[295] *Id.* at 984 (citing *In re* Guantanamo Detainees Cases, 355 F. Supp. 2d 443 (D.D.C. 2005)).

[296] *Id* at 995.

[297] *Id.* at 984.

[298] *See generally* Boumediene, 476 F.3d 981 (D.C. Cir. 2007).

the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."[299]

More importantly, perhaps, the court reasoned that the Constitution does not confer rights on aliens without property or presence within the United States.[300] The court went on to hold that the MCA statute does not violate the Suspension Clause of the Constitution, as the Suspension Clause protects the writ of habeas corpus "as it existed in 1789," and the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government.[301] The court held that, as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights under the Suspension Clause.[302] The court observed that in *Eisentrager*, the Supreme Court "rejected the proposition 'that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses.'" [303]

Finally, the court addressed the detainee's argument that federal courts retain common law jurisdiction over habeas petitions, quoting *Ex parte Bollman*: "Jurisdiction of the lower federal courts is. . .limited to those subjects encompassed within a statutory grant of jurisdiction."[304] Moreover, the observations about the idea of common law habeas in *Rasul* referred to the practice in England, not the United States.[305] The court concluded that even if there were such a thing as common law jurisdiction in the federal courts, section 7 of the MCA quite clearly eliminates all jurisdiction to hear or consider an application for a writ of habeas corpus by a detainee, whatever the source of that jurisdiction.[306]

The cases were appealed to the Supreme Court, and oral arguments were heard on December 5, 2007.[307] A potentially landmark decision is pending.

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[299] *Id.* at 986.

[300] *Id.* at 990.

[301] U.S. CONST. art. 1, § 9, cl. 2; Boumediene, 476 F.3d at 1000.

[302] *See generally* Boumediene, 476 F.3d at 981.

[303] *Id.* at 991 (*quoting* Johnson v. Eisentrager, 339 U.S. 763, 783 (1950)).

[304] *Ex parte* Bollman, 8 U.S. 75, 95 (1807).

[305] Boumediene, 476 F.3d at 988 n.5.

[306] *Id.* (citing Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982)).

[307] Oyez.org, Supreme Court Media, Boumediene v. Bush, Oral Arguments, *available at* http://www.oyez.org/cases/2000-2009/2007/2007_06_1195/argument/.

A. Boudemine v. Bush and Al-Odah v. United States: Oral Argument

Consider the following exchange between Justice Scalia and Mr. Waxman, who represented some of the detainees at Guantanamo:

> JUSTICE SCALIA: Your assertion here is that there is a common law constitutional right of habeas corpus that does not depend upon any statute. Do you have a single case in the 220 years of our country or, for that matter, in the five centuries of the English empire in which habeas was granted to an alien in a territory that was not under the sovereign control of either the United States or England?
>
> MR. WAXMAN: The answer to that is a resounding yes.
>
> JUSTICE SCALIA: What are they?. . . [Y]ou are appealing to a common law right that somehow found its way into our constitution without, as far as I can discern, a single case in which the writ ever to a non-citizen.[308]

Further in the argument, the President's position on enemy combatants was summed up by the Solicitor General Clement:

> Since this Court's decision in *Rasul*, Petitioners' status has been reviewed by a tribunal modeled on Army Regulation 190-8, and Congress has passed two statutes addressing Petitioners' rights. Petitioners now have access to the Article III courts and have a right to judicial review in the D.C. Circuit. That review encompasses preponderance claims, claims that the military did not follow their own regulations, and statutory and constitutional claims. . . So they are given a right to a personal representative, which is not something that Army Regulation 190-8 provides. They are specifically provided for the ability to submit documentary evidence. . . And Congress here has spoken. . . The political branch has spoken. They have struck a balance. They've given these detainees better rights and access to administrative and judicial review.[309]

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[308] Transcript of Oral Argument at 11-12, Boumediene v. Bush, 128 S. Ct. 1694 (2008) (No. 06-1195), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1195.pdf.

[309] *Id.* at 32-33.

Scalia noted later in the oral argument that, "Counsel, we had 400,000 German prisoners in this country during World War II. And not. . . a single habeas petition filed."[310]

VIII. CONCLUSION

A. *"What Would Jack Bauer Do?"*[311]

Jack Bauer does not exist, and "24" is made-for-TV entertainment, but his toxic tactics against suspected terrorists have focused a festering debate on what legal rights suspected terrorists have in our judicial or military system.[312]

There is no doubt that the attacks of September 11th constituted acts of war.[313] The attacks possessed the intensity and scale of war.[314] They involved at least one prime military target, the Pentagon, and they came on the heels of a decade of brutal attacks by al Qaeda on U.S. military and civilian targets.[315] War implicates legal powers and rules that are not available during times of peace.[316] Among other things, the 9/11 attack should give the President the extraordinary authority to detain enemy combatants at least until hostilities cease.[317]

Thus, the President should be emancipated from frivolous litigation. The intelligence community should have the speed and agility to protect our nation without the fear of needing to create extra judicial protections for foreign terrorists.[318] If we are to stay ahead of extremists determined to attack the United States, the President must be able to effectively obtain information gained through laws such as the USA PATRIOT Act and The Protect America Act.[319]

Legalists in cases like *Padilla* and *Hamdi*, who claim that the military can only detain uniformed members of armed forces captured

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[310] *High Court Warily Weighs Long Gitmo Detentions,* ST. PETERSBURG TIMES, Dec. 6, 2007, at A5.; Transcript of Oral Argument at 18, *Boumediene*, 128 S. Ct. 1694 (2008) (No. 06-1195), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1195.pdf.

[311] Patrick J. Buchanan, *What Would Jack Bauer Do?*, HumanEvents.com, Jan. 22, 2006, http://www.humanevents.com/article.php?id=11777&keywords=%5C%22GUANTANAMO%5C%22

[312] *Id.*

[313] William J. Haynes II, *Memorandum to Council on Foreign Relations, Members of the ASIL-CFR Roundtable*, Subject: Enemy Combatants, Dec. 12, 2002, *available at* http://www.cfr.org/publication/5312/enemy_combatants.html

[314] *Id.*

[315] *Id.*

[316] *Id.*

[317] *Id.*

[318] Mike McConnell, *Editorial*, ST.PETERSBURG TIMES, Dec. 11, 2007, at A11.

[319] *Id.*

in battle, are blind to the realities of the post-9/11 world. This flawed legal reasoning ties our military's hands precisely because radical jihadists target civilians on our own soil, and issues a further invitation to al Qaeda to stop fighting conventional battles: no more Tora Boras—just more World Trade Centers.[320]

Seven years without a terrorist attack has given critics the opportunity to challenge the need for preventive detention, targeted killing, the USA PATRIOT Act, coercive interrogation, and military tribunals. Yet, because of these legally aggressive tactics, the American public has not seen the deaths these tactics have prevented. Nonetheless, al Qaeda is a threat because it attacks in disguise and targets civilians. Bin Laden himself declared in 1998: "[w]e do not have to differentiate between military or civilian. As far as we are concerned, they are all targets."[321] It is perplexing that civil libertarian absolutists would grant al Qaeda criminal justice protections, effectively rewarding terrorists for violating every law of war ever devised.

The notion of gifting habeas rights to captured terrorists speaks to the shocking disconnect between those who acknowledge that we are at war, and those in the judiciary who imagine we are dealing with petty criminals.

Advocates of civil liberties litigation argue that we must create unprecedented legal rights in the name of preserving fair play.[322] Nations do not prevail in war because of their sense of Due Process. The War on Terrorism is unique: we face an uncommonly merciless foe. It has been more than seven years since we were attacked, and we continue to judicially dither over the status of terrorists.[323] These men are prisoners taken in a time of war.[324] The fact that the war may extend beyond their lifetimes is the bad fortune of those captured.[325]

The judicial process, intended to protect the privacy and civil liberties of Americans, has been judicially manipulated. Courts are ill-equipped to second guess the President's determination that national security considerations require limited judicial review.[326] The expansive interpretation of the Suspension Clause being pressed by some

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[320] Yoo, *supra* note 25, at 147.

[321] THE 9/11 COMMISSION REPORT, *supra* note 16, at 40.

[322] *See* Christopher Plante, *Al Qaeda Membership Has its Privileges*, HumanEvents.com, May 11, 2007, http://www.humanevents.com/article.php?id=20665.

[323] *See id.*

[324] *Id.*

[325] *Id.*

[326] Brief of Retired Generals and Admirals et at. as Amici Curiae in Support of Respondents at 15, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195) (Oct. 9, 2007).

lawyers is inconsistent with the courts' historical deference to the elected branches of government on foreign policy issues.[327]

The federal judiciary is a slow, deliberate body whose ability to process information is more limited than the political branches.[328] Although the presumption of innocence is fundamental in the criminal context, in a war in which our enemy targets civilians as a primary military strategy, we cannot afford to confer on radical terrorists the same rights we grant ordinary criminals or even military adversaries in a traditional conflict.[329] The conduct of war—a core component of which is the handling of enemy prisoners—is a fundamental political responsibility, not a legal one. [330]

B. 'National Security Court'

Since the criminal justice system is not suited to the realities of this new kind of war, this article supports the constitution of a new type of court, "the national security court."[331] Although it is the author's position that alien combatants do not have full and complete constitutional rights, that does not mean they fall into a legal black hole.[332] Using traditional courts to combat international terrorism does not work as a national security strategy. This article advocates establishing a new, national security court to deal with suspected terrorists.[333]

The national security court would be modeled on the existing Foreign Intelligence Surveillance Act court, but with broader oversight than electronic surveillance.[334] This secret court would be the venue to make decisions on what to do with suspected terrorists.[335] Although the prisoners at Guantanamo fall outside of the established regime of law,[336] that does not mean they lack fundamental rights. But those rights should be consistent with military success. A new court tailored to handle suspected terrorists in a parallel legal system could alleviate

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[327] *See id.* at 9.

[328] Jules Lobel, *The Commander in Chief and the Courts,* 37.1 PRES. STUDIES Q. 49, 62, Mar. 2007.

[329] Linda Chavez, *U.S. Terrorist Policy Vindicated,* HumanEvents.com, Nov. 16, 2005, http://www.humanevents.com/article.php?id=10322&keywords=TERRORIST.

[330] *See generally id.*

[331] *See* Meredith Hobbs, *Lawyers Debate Rights vs. Security,* FULTON COUNTY DAILY REP., Mar. 27, 2007, at 3.

[332] *Id.*

[333] *See id.*

[334] *Id.*

[335] *Id.*

[336] *Id.*

this problem, and obviate needless litigation in criminal or civil courts.[337]

The national security court would be the historic compromise between protecting a nation's secrets, its ability to conduct war, and Due Process for the accused. It would be flexible enough to respect the needs of wartime and bring more expertise than a civilian court. In sum, this national security court is the appropriate venue for these types of trials.

In the final analysis, the President, in times of war, cannot be constrained by the fear of chilling litigation. In fact, the fear of litigation restricts the conduct of war and makes it more difficult to protect the American people.[338] The President has been strangled by law.[339] This fear of litigation presents a conflict for any President between the dread of another attack, and the countervailing hesitation of violating electronic surveillance law.[340]

Al Qaeda is still dangerous. It is resilient, ideologically driven, and draws comfort from the well of anti-Americanism that exists in the Middle East. We must take aggressive legal action to defeat al Qaeda, while adapting the rules of war to address the enemies of the twenty-first century. Perhaps, Andrew McCarthy, the former federal prosecutor, summed the stakes up succinctly when he concluded: "[i]t is more important for the U.S. to win the war on terrorism than it is for any enemy combatant to get justice."[341]

As Americans committed to constitutional law, we are conflicted. While we believe in constitutional rights, human rights, and Miranda warnings, we also believe in winning our wars. For without victory in the War on Terror, constitutional freedom may not survive.[342]

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[337] Hobbs, *supra* note 331, at 3.

[338] *See* Barone, *supra* note 11, at 1 (referencing arguments made in JACK GOLDSMITH, THE TERROR PRESIDENCY (W. W. Norton 2007)).

[339] Barone, *supra* note 11, at 1 (quoting JACK GOLDSMITH, THE TERROR PRESIDENCY (W. W. Norton 2007)).

[340] *Id.*

[341] Hobbs, *supra* note 249, at 4.

[342] Buchanan, *supra* note 311.