

2008

Ten Questions on National Security

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Recommended Citation

Abrams, Norman; Corn, Geoffrey S.; Guiora, Amos; and Sulmasy, Glenn (2008) "Ten Questions on National Security," *William Mitchell Law Review*: Vol. 34: Iss. 5, Article 2.

Available at: <http://open.mitchellhamline.edu/wmlr/vol34/iss5/2>

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TEN QUESTIONS ON NATIONAL SECURITY

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I. DOES A TERRORISM SUSPECT WHO IS NOT A CITIZEN OF THE UNITED STATES HAVE DUE PROCESS RIGHTS IF INTERROGATED OUTSIDE THE TERRITORY OF THE UNITED STATES?

A. *Stephen Vladeck*

Yes. (If only I could stop there . . .)

First, it's worth clarifying just what this question is asking. The scope appears to include non-citizens, lawfully within the United States at the time of their detention, who are subsequently transferred overseas. In that case, I think there would be little question that the Due Process Clause *applies*, although I imagine there would be disagreement about just how much process is actually due.

The harder part of this question is for those non-citizens who have never had any substantial contact with the United States, who are picked-up, held, and interrogated outside the territorial United States. Whether this category includes the Guantanamo detainees (or whether Guantanamo is "different"), is a separate issue unto itself—albeit one arguably resolved by the majority and concurring opinions in *Rasul*.¹ For other non-citizens held elsewhere, including, most prominently, Afghanistan and Iraq, this question really has two elements: a doctrinal element—i.e., does present-day American constitutional law recognize any claim to due process on the part of such detainees; and a theoretical element—i.e., whether it does or not, *should* it.

Taking the doctrinal element first, everything turns, of course, on how one reads the Supreme Court's 1950 decision in *Johnson v. Eisentrager*.² Some, including Chief Justice Rehnquist in *United States v. Verdugo-Urquidez*,³ read *Eisentrager* for all it's worth, and contend that it categorically precludes extraterritorial due process rights for all non-citizens. Others think *Eisentrager* should be limited to its facts—to non-citizens fighting for a nation-state with which we were formally at war, who conceded their status as belligerents and contested only whether they could be tried by military commission.⁴

1. See *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring in the judgment).

2. 339 U.S. 763 (1950).

3. 494 U.S. 259, 269 (1990).

4. See, e.g., *Rasul*, 542 U.S. at 475–76 (differentiating the petitioners'

Both sides of the debate, however, tend to spend little time looking at Justice Jackson's majority opinion in *Eisenstrager* itself—and it's a fascinating read. Solicitor General Clement once referred to it as a case with "an awful lot of alternative holdings,"⁵ and that's putting it mildly. True, Jackson eventually concluded that the petitioners were not entitled to habeas corpus because they had no rights to enforce on the merits, but only after exhaustively walking through their claims. If *Eisenstrager* meant to enunciate a categorical rule, it strikes me that the actual gravamen of the petitioners' claims should have been irrelevant. Rather, as I have written elsewhere, my view of *Eisenstrager* is as a case decided more on the merits—that any possible rights the petitioners may have had simply were not violated, and so the unavailability of habeas corpus raised no possible constitutional infirmity.⁶

Of course, my view is hardly the prevailing consensus. So the hardest part of this question is the prescriptive part—*should* these detainees have due process rights? Here, I retreat to (my) first principles: if the animating purpose of the Due Process Clause is to constrain arbitrary governmental takings of life, liberty, and property, that purpose strikes me as having universal applicability. Indeed, the entire purpose of the Bill of Rights was to reject the argument often heard today in the context of non-citizens detained outside the territorial United States—that there are spheres where the federal government's powers are unbounded. So my conclusion would be that the Due Process Clause acts upon the government *anywhere* that the government acts.

To be clear, I am not suggesting that the *same* process is due to non-citizens held outside the territorial United States. What process is due, of course, depends upon the circumstances. And I, for one, would have little trouble with the idea that non-citizens captured by U.S. soldiers on a foreign battlefield in the context of active combat operations are entitled to exceedingly little process. But however minimal that process is, it must be more than nothing.

situation from the "six critical facts" presented in *Eisenstrager*).

5. Transcript of Oral Argument at 72, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), available at http://www.supremecourtus.gov/oral_arguments/argumenttranscripts/05-184.pdf.

6. See Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1527–31 (2007); Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. (forthcoming 2008) (manuscript at 29, available at <http://ssrn.com/abstract=1020265>).

B. *Geoffrey S. Corn*

No, with qualification. As a general proposition, non-resident aliens subject to U.S. control outside the territory of the United States derive no protection from the Due Process Clause of the U.S. Constitution. They may, however, benefit from analogous protections derived from international law, such as the humane treatment obligation reflected in the provisions of Common Article 3 to the Geneva Conventions. But unlike the Due Process Clause, it is unclear what type of relief would be available for such a violation of international legal obligations.

This conclusion is based on several Supreme Court decisions, including *Johnson v. Eisentrager*⁷ and *United States v. Verdugo-Urquidez*.⁸ It is also based on the longstanding doctrine of *male captus, bene detentus* reflected in the *Ker-Frisbie* doctrine. These authorities all indicate that individual constitutional protections are fundamentally linked to nationality or territoriality. They provide little authority for what would in essence be a passive, personality-based extension of constitutional rights—an application on the nationality of the actor and not the subject of the alleged violation. Accordingly, non-resident aliens with no meaningful connection to the United States who have been subjected to abduction, trial by military court, and search and seizure have been unable to effectively invoke constitutional protections to challenge their treatment at the hands of U.S. government agents.

The more difficult question is whether this presumptive inapplicability is without limit. The Supreme Court has indicated that such a limit does exist, prohibiting government actors from engaging in conduct that “shocks the conscience.” In *Rochin v. California*, the Supreme Court established this “shocks the conscience” exception to the *Ker-Frisbie* doctrine.⁹ This exception has, however, rarely been effectively invoked, and has not been extended to conduct unrelated to international abduction. Nonetheless, cases involving its invocation have focused on whether an individual was physically or mentally abused in the process of being brought to U.S. jurisdiction, suggesting that evidence of such abuse could be used to challenge the assertion of U.S. jurisdiction

7. 339 U.S. 763 (1950).

8. 494 U.S. 259 (1990).

9. 342 U.S. 165, 171–73 (1952); *see also* *United States v. Toscanino*, 500 F.2d 267, 273 (2d Cir. 1974) (discussing *Rochin*'s impact on the *Ker-Frisbie* doctrine).

over an individual in the future.

One of the most interesting examples of how difficult it is for a defendant to assert this exception in order to raise a due process challenge to the means by which he was brought into U.S. jurisdiction is the case of General Noriega.¹⁰ When brought before a U.S. court on criminal charges, the General asserted, *inter alia*, that the use of approximately 25,000 U.S. troops to invade Panama in order to abduct him was per se conscience-shocking. The trial court rejected this claim, focusing not on the technique used to secure his presence before the tribunal, but instead on his treatment once under the control of U.S. authorities.

These precedents create a good-faith basis to presume the inapplicability of the Due Process Clause to non-resident aliens detained outside the territory of the United States. But they also provide a caution to U.S. government agents that abusive treatment may result in altering this presumption.

C. *Tung Yin*

The Supreme Court has, to date, declined to answer this question, preferring to resolve the terrorism cases it has heard since 2004 on statutory interpretation grounds. In *Rasul v. Bush*,¹¹ for example, the Court held merely that Guantanamo Bay detainees were entitled to file habeas petitions pursuant to the federal habeas corpus statute—a limitation to the decision that paved the way for the Detainee Treatment Act of 2005,¹² which purported to strip most of that jurisdiction from the federal courts. It also led to the minimalist analysis in *Khalid v. Bush*, in which a district judge essentially said that he was applying *Rasul* in allowing the detainees to file their petitions, but that they had no constitutional rights and therefore their petitions were denied.¹³

Whether aliens outside the United States have due process rights depends in part on how you read *Johnson v. Eisentrager*,¹⁴ a 1950 decision involving German citizens convicted of war crimes

10. See *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992).

11. 542 U.S. 466, 484 (2004).

12. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680 (2005) (codified as amended in scattered sections of 10, 28, and 42 U.S.C.).

13. 355 F. Supp. 2d 311 (D.D.C. 2005), *vacated by* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 127 S.Ct. 1478 (2007), *reh'g granted and order vacated by* *Al Odah v. United States*, 127 S.Ct. 3067 (2007).

14. 339 U.S. 763 (1950).

and imprisoned in the U.S.-controlled portion of Germany. Like many opinions authored by Justice Robert Jackson, it is a mixture of perfectly crafted phrases and maddening ambiguity. (How exactly, for example, is one supposed to resolve power struggles between the President and Congress that fall into the “twilight zone” of the *Steel Seizure* analysis?) As the Bush administration has read it, *Eisentrager* stands for the proposition that aliens being detained outside the United States have no constitutional rights at all, and there is a strain of Justice Jackson’s opinion that supports such a reading. On the other hand, Justice Stevens’s majority opinion in *Rasul* read *Eisentrager* much more narrowly, as applying only when the aliens have already been convicted in a military tribunal (and even then, he concluded that *Eisentrager* was probably no longer good law, since the case it relied on had been overruled).¹⁵

Answering this question calls for legal maneuvering on par with Odysseus’s trip past Scylla and Charybdis. On the one hand, a conclusion that aliens outside the country have no due process rights would leave them at the mercy of the President, a position at odds with the spirit of separation of powers and checks and balances. On the other hand, a conclusion that aliens outside the United States have due process rights leaves open the possibility that in a traditional war, enemy POWs might be able to flood U.S. courts with habeas petitions. It would also be in tension, if not outright conflict, with precedents holding that aliens seeking entry into the United States are subject to Congress’s plenary powers over immigration.

I have developed in more detail elsewhere an argument that the Guantanamo detainees should in fact be entitled to due process to challenge their status as enemy combatants and, assuming confirmation of such status, their continued detention.¹⁶ Essentially, I see a difference in our obligations toward aliens who are seeking affirmative benefits from us (such as would-be immigrants) versus those who are seeking to be left alone by us (such as military detainees). Many of the legal rules denying constitutional rights to aliens located outside the United States fall into the former category, including the immigration plenary power. Recognizing this distinction, however, need not open the

15. *Rasul*, 542 U.S. at 478–79.

16. See Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351 (2006).

floodgates to lawsuits by prisoners of war during conventional armed conflicts between nations, because a properly conceived of “enemy alien disability” rule could bar from courts those citizens of nations with which the United States is at war—a conclusion that would comport with such precedents as *Eisentrager* and *Ludecke v. Watkins*.¹⁷

Thus, my conclusion is that terrorism suspects detained and interrogated outside the United States do have due process rights.

D. *Norman Abrams*

The question of whether a terrorism suspect who is not a citizen of the United States has due process rights if interrogated outside the territory of the United States can be addressed as a purely legal question. It is also suggestive, however, of practices alleged to have been carried on by U.S. agents abroad, namely, seizing a suspected terrorist and turning him over to authorities in another country where coercive methods of interrogation are applied. Accordingly, this issue has some linkage to the subject of extraordinary rendition discussed later in this series.

There are some relevant cases that are helpful in addressing the legal issues raised by this question, though they are few in number and only lower court decisions. While the question only focuses on due process rights, to complete the legal picture, it is helpful also to address the question of whether the Fifth Amendment privilege against self-incrimination, and consequently Miranda warnings, are applicable. It is also useful to make alternative factual assumptions regarding the interrogation—such as whether it was conducted by or with the participation of U.S. agents; whether coercive methods were used; and finally, whether the issue arises in the course of a criminal prosecution in a U.S. court where there is a challenge to the admissibility of statements or their fruits resulting from the interrogation.

If the interrogation was conducted by or with the participation of U.S. agents, and the suspect’s resulting statements are offered into evidence against him, the decision in *United States v. Bin Laden*,¹⁸ described by the court as a matter of first impression, stands for the proposition that the Fifth Amendment privilege against self-incrimination applies to the suspect. Accordingly, the

17. *Ludecke v. Watkins*, 335 U.S. 160 (1948).

18. 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

failure to give a suspect Miranda warnings is a basis for suppressing his custodial statements, “notwithstanding the fact that his only connections to the United States are his alleged violations of U.S. law and his subsequent U.S. prosecution.”¹⁹ In reaching this conclusion, the judge relied on the doctrine that “the extraterritorial situs of the interrogation is not dispositive since the Constitution is violated when a defendant’s compelled statement is used against him as evidence, and not when he is coerced into making it in the first place.”²⁰

The court then went on to require “principled, but realistic application of *Miranda’s* . . . warning/waiver framework,”²¹ requiring, for example, that the suspect be told he has a right to remain silent (even if he has already spoken to the foreign police), and that the U.S. agents communicate both the existence of the right to counsel and impediments to its exercise depending on the circumstances, such as the fact that no U.S. lawyer may be available, no lawyer may be provided by the foreign sovereign, and foreign law might even bar lawyers from entering the station house.

Finally, in a noteworthy footnote, the court in *Bin Laden* stated:

It bears reiteration that the issues addressed by this Opinion relate solely to the admissibility of statements in an American court. This is *not* the same question as the ability of American law enforcement or intelligence officials to obtain intelligence information from non-citizens abroad, information which may be vital to national security interests.²²

The question of whether the involuntary statements of a U.S. citizen obtained in a foreign country by foreign police are inadmissible under the Due Process Clause of the Fifth Amendment was posed in *United States v. Abu Ali*.²³ The court concluded that the statements were voluntary, but the court’s reasoning clearly accepted the proposition that the Fifth Amendment Due Process Clause was applicable.

In *United States v. Karake*,²⁴ the court reached the proposition at which the question posed above seems to have been aimed. The defendants were Rwandan nationals, members of the Liberation

19. *Id.* at 181.

20. *Id.* at 182 n.9 (citation omitted).

21. *Id.* at 185–86.

22. *Id.* at 189 n.19.

23. 395 F. Supp. 2d 338 (E.D. Va. 2005).

24. 443 F. Supp. 2d 8 (D.D.C. 2006).

Army of Rwanda, who were charged with the killings of two U.S. tourists in Uganda. The court ruled that the statements obtained by Rwandan officials were the product of coercion and involuntary and, therefore, inadmissible under the Due Process Clause of the Fifth Amendment.

In *Karake*, non-U.S. citizens interrogated by non-U.S. police in a foreign country were given the benefit of the protection of the Fifth Amendment's Due Process Clause in a U.S. courtroom. But, as the *Bin Laden* court pointed out, that protection operates when the statements are offered into evidence in a U.S. courtroom, not at the time the coerced statements are obtained.

The question posed is therefore not the same issue as the ability of U.S. intelligence agents "to obtain intelligence information from non-citizens abroad, information which may be vital to national security interests."²⁵ Query whether the government views due process as operating in that context.

E. Glenn Sulmasy and James D. Carlson

As a nation that supports and stands for universal human rights, any human being detained or interrogated should be treated with dignity and respect—regardless of whether a U.S. citizen or not.²⁶ However, for a non-U.S. citizen being interrogated outside of the United States, due process will not, does not, and should not be at the same level as that envisioned by our Constitution.

This has become problematic for many within the mainstream media. The discussions about due process are often conducted without discussion of what is meant by due process and what it entails. Is the need for due process focused upon whether or not substantive due process or procedural due process is afforded and to what extent? Also, many of the protections afforded in our own due process jurisprudence, such as the exclusionary rule, are to prevent introduction of such statements later at Article III courts. The questioning conducted on the individuals at issue here is typically not intended to be introduced in U.S. courts. The Constitution was drafted with the intent of preventing the government from interfering or overextending its authority over

25. *Bin Laden*, 132 F. Supp. 2d at 189 n.19.

26. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

those within the United States. There is some debate over whether citizenship is the key or whether just residing within the United States is sufficient, but that question is not posed here. The question is whether a non-citizen outside of the United States has due process rights. Thus, the rebuttable presumption is that no due process rights are required for non-citizens.

However, some rights need to be given to those persons being interrogated by U.S. government entities. Rights, such as the complete abstention from torture, are legally required by both U.S. domestic law and international law. The United States must be certain to not lose its identity as a leader in human rights when conducting interrogations. Thus, interrogations should be conducted in accord with Common Article 3 of the Geneva Conventions,²⁷ the Convention against Torture (CAT),²⁸ and the American ethos of promoting human dignity.

II. MAY A UNITED STATES CITIZEN WHO IS DESIGNATED AN ENEMY COMBATANT BE HELD IN A SECRET PRISON?

A. *Stephen Vladeck*

The first question here is whether a U.S. citizen can be held as an “enemy combatant” in any circumstance. Justice Scalia and Justice Stevens, as we know, think that the answer is “no.”²⁹ Even if they are wrong, at a bare minimum, express congressional authorization should be a necessary prerequisite.³⁰

Assuming, though, that there is such authorization, the question whether a U.S. citizen “enemy combatant” can be held in a secret prison is really two different questions: first, can it be a secret that the U.S. citizen is being held in the first place; and second, even if it cannot be secret, can the location where a U.S.

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

28. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

29. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 554–79 (2004) (Scalia, J., dissenting).

30. *See id.* at 539–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *see also* Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL’Y REV. 153, 155–157, 190–195 (2004) (arguing that express congressional authorization should be the touchstone under 18 U.S.C. § 4001(a) (2000)).

citizen is being held be kept secret? And to me, at least, such bifurcation of the question makes it exceedingly easy to answer.

To the first sub-question: No. The United States cannot secretly detain a U.S. citizen. For me, the real issue here is judicial review. If one believes, as I do, that all U.S. citizens have a right to judicial review of any extrajudicial detention (except and unless habeas corpus has been validly suspended), it is difficult to reconcile such a right with detention, the fact of which is a secret. This is not to say that courts can never review secrets. Of course, we know that's not true.³¹ But it is hard to see how a U.S. citizen whose detention is a secret would be able to get into court in the first place, let alone have a court review the substance of his claims.

Second, on the assumption that the *fact* of detention is not a secret, I have no problem with the *location* of detention being withheld from public scrutiny. As I said above, the real issue to me is whether the secrecy precludes meaningful oversight and judicial review of the detention. Although I think it would frustrate review if the fact of detention were kept secret, I am hard pressed to see how keeping the location secret would preclude a meaningful inquiry into the detention, so long as the petitioner were able to meaningfully contest the legality, and potentially the conditions, of his confinement. Indeed, we have examples to the contrary.

Take the case of John Demjanjuk, an alleged World War II concentration camp guard ("Ivan the Terrible") who was arrested and eventually extradited to Israel to stand trial for war crimes.³² While Demjanjuk was awaiting extradition, he was detained by U.S. marshals at an undisclosed location. Although his habeas petition challenging his extradition was denied on the merits, the D.C. Circuit had no problem exercising jurisdiction, analogizing his case to others where U.S. citizens held abroad challenged their detention.³³ Thus, if the facial legality of secret detention turns on the detainee's ability to meaningfully challenge that detention, as I believe it does, *Demjanjuk* suggests that the mere fact that the *location* of detention is a secret would not itself preclude judicial review.

31. See, e.g., *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1198 (9th Cir. 2007) (holding that "the very subject matter of the litigation—the Government's alleged warrantless surveillance program under the TSP—is not protected by the state secrets privilege.").

32. For a survey of the complicated procedural history, see *United States v. Demjanjuk*, 367 F.3d 623, 627–28 (6th Cir. 2004).

33. See *Demjanjuk v. Meese*, 784 F.2d 1114, 1115–16 (D.C. Cir. 1986).

B. *Geoffrey S. Corn*

No. This question implies, first, that the Executive has “designated” a U.S. citizen as an enemy combatant. Implicated by this first question is the constitutional sufficiency of the process used for such a designation, including the ability of such a citizen-detainee to confront the evidence used in the determination and to have an impartial fact finder determine the issue. A plurality of the Supreme Court in *Hamdi v. Rumsfeld* concluded that Congress had authorized the detention of citizens who qualify as enemy combatants, as that term is narrowly defined in the case.³⁴ Thus, the Court held Congress had met the restrictions of the Anti-Detention Act when it passed the Authorization for Use of Military Force (AUMF) in the aftermath of the September 11, 2001 attacks.³⁵ However, the Court identified Hamdi’s interest as “the most elemental of liberty interests—the interest in being free from physical detention by one’s own government,”³⁶ and a majority agreed that a “citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.”³⁷

Despite a citizen-detainee’s Fifth Amendment right to contest his determination as an enemy combatant, the scope of this right is unclear if he is captured and held entirely outside the jurisdiction of the United States. Both *Reid v. Covert*³⁸ and *United States v. Verdugo-Urquidez*³⁹ recognize that when the United States acts against citizens abroad, the Bill of Rights still applies. Citizens abroad may, accordingly, invoke the protection of the Fifth and Sixth Amendments, but secret detentions deprive citizens of an opportunity to challenge the legality of government action through judicial process. In addition, such secrecy disables any practical opportunity for detained citizens to petition the other branches of government for relief against unrestrained power of the Executive, or to inform the People of their government’s actions.

34. 542 U.S. 507, 517 (2004).

35. *Id.* (referring to the Anti-Detention Act, 18 U.S.C. 4001(a) (2000), and the AUMF, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001)).

36. *Id.* at 529.

37. *Id.* at 533.

38. 354 U.S. 1 (1957).

39. 494 U.S. 259 (1990).

Additionally, this question implicates the obligations of a detaining power under the laws of war. Characterizing the detainee as an enemy combatant suggests two critical predicates have been established. First, that the detainee was captured in association with an armed conflict. Second, that the detainee is not qualified for status as a prisoner of war pursuant to the Third Geneva Convention.⁴⁰ This removes the detainee from the protection of the treaty-based obligation imposed on detaining powers to provide notice to the prisoner's government "within the shortest possible period" of the existence of detention.

The inapplicability of this treaty obligation does not, however, result in the conclusion that it is permissible to hold detainees not qualified as prisoners of war in secret detention. Instead, the issue of secret detentions raises the question of whether such detentions are incompatible with the humane treatment obligation enjoyed by *all* individuals detained in association with an armed conflict. This humane treatment obligation is codified in a variety of treaty provisions (such as Common Article 3 to the four Geneva Conventions of 1949, Article 75 of Additional Protocol I, and Article 4 of Additional Protocol II).⁴¹ However, it has evolved to become widely accepted as a fundamental principle of the law of war applicable as customary international law independent of treaty-based application. Accordingly, it protects any individual who has become *hors de combat* for any reason, including as the result of capture.

Acknowledging the customary nature of the humane treatment obligation reflected in Common Article 3 leads to the key question in regard to secret detentions: is transparency of the existence of detention a component of humane treatment? It is undeniable that nothing in the text of Common Article 3, nor any other humane treatment oriented treaty provision, expressly addresses transparency of detention. However, the significance of the obligation to provide timely notification of the existence of detention for both prisoners of war and civilian detainees pursuant

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

41. *See id.* at art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4, June 8, 1977, 1125 U.N.T.S. 609.

to the Third and Fourth Geneva Conventions indicates that transparency of detention is central to the humane treatment of captives.

An even more compelling argument in support of this conclusion is based on a simple pragmatic consideration: transparency of detention is integrally connected with the physical protection of detainees. Notice of the existence of detention imposes a powerful check on the abuse or killing of detainees for the simple reason that the detaining power will ultimately have to account for such treatment. It is, therefore, no accident that allowing a prisoner of war to send a “capture card” at the inception of detention is an established right—for such correspondence assures the prisoner that the detaining power will ultimately be held to account for his status.

Secret detention eliminates this check against arbitrary detaining power treatment of detainees, and sends a powerful message to detainees that they are at the true mercy of the detaining power. Such an outcome is inconsistent with the customary treatment of individuals who have been made *hors de combat* by capture, and ultimately inconsistent with the humane treatment all detainees are entitled to expect.

C. *Tung Yin*

Based on the Supreme Court’s ruling in *Hamdi v. Rumsfeld*,⁴² it seems rather inconceivable that the executive branch could detain an American citizen in a secret prison—at least, if what one means is whether the executive branch could *unilaterally* detain a citizen secretly. In *Hamdi*, five members of the Court agreed that, pursuant to Congress’s November 18, 2001 joint resolution authorizing the use of military force, the President had the legal authority to detain a United States citizen as an enemy combatant.⁴³ Two others thought that Congress possibly could authorize detention of citizens but had not done so clearly in the

42. 542 U.S. 507 (2004).

43. *See id.* A plurality of the Court, consisting of Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Breyer resolved the question purely on the basis of interpreting the AUMF. *Id.* at 517. Justice Thomas agreed that the AUMF confirmed such authority, but indicated a belief that the President’s inherent powers as Commander in Chief provided sufficient authority by itself. *Id.* at 589 (Thomas, J., dissenting).

Authorization for Use of Military Force,⁴⁴ and two more argued that U.S. citizens could not be detained militarily absent suspension of the privilege of habeas corpus.⁴⁵

Moving beyond the power to detain, however, a majority of the Court then reached the issue of what process, if any, was due an American citizen detained as enemy combatant. Here, six members of the Court agreed that, at a minimum, a citizen would be entitled to a hearing before a neutral decision maker in which the citizen could challenge his classification as an enemy combatant, and that the citizen would be entitled to the assistance of counsel during such a hearing.⁴⁶

Given the requirements of a hearing before a neutral decision maker and entitlement to counsel, how would the President lawfully detain an American citizen in a secret prison? I suppose it is possible that the government might hold the citizen in a secret location and bring the citizen elsewhere for meetings with counsel and for the hearing. After all, *Hamdi* appeared to limit the right to counsel to the status hearing itself, and not for other purposes (such as challenging the conditions of confinement).⁴⁷ However, I take it that this is not the sort of “secret detention” being asked about, because the government would have a much harder time keeping secret its behavior toward the detainee.

Therefore, no, I do not believe that the United States can hold a U.S. citizen designated as an enemy combatant in a secret prison.

D. *Norman Abrams*

What this question highlights is how much government secrecy we encounter today and how little we really know about what the government is doing. We have no information about any U.S. citizens other than Yaser Hamdi and Jose Padilla having been designated as enemy combatants. I assume that there are no other cases, but if someone challenged that assumption, I would have to concede that I cannot be absolutely certain about the matter—because of government secrecy.

What is meant by a “secret prison”? Jose Padilla, a U.S. citizen, was designated as an enemy combatant and transferred to a navy

44. *Id.* at 539 (Souter, J. and Ginsburg, J., concurring).

45. *Id.* at 554 (Scalia, J. and Stevens, J., dissenting).

46. *Id.* at 533, 539.

47. *See id.* at 539 (“He unquestionably has the right to access to counsel in connection with the proceedings on remand.”).

brig in another state. We knew where he was located, but for years, he was not given access to the outside world—to friends, family, or counsel. Was he in a “secret prison”? I assume not, though his detention had some similar elements.

The question builds on the reports that the CIA seized individuals abroad and kept them in secret prisons, the location of which we still only suspect. As far as we know, the individuals thus seized and interrogated have since been released, transferred to other countries, or transferred to the U.S. facility at Guantanamo Bay. But because of governmental secrecy about this program, we cannot really be certain. As far as we know, no U.S. citizens have been seized abroad in this way.

As far as we know, no U.S. citizen, other than Jose Padilla, has been seized in the United States and designated as an enemy combatant and, again as far as we know, none have been held in some unknown secret prison. Suppose, however, that a U.S. citizen were seized abroad, someone like John Walker Lindh or Yaser Hamdi. Might they be taken to a secret prison as allegedly happened to some non-U.S. citizens seized abroad?

Because of governmental secrecy, such events could occur, and we might not know about them. So as a practical matter, the answer to the question is “yes,” such an event could occur if government agents were so-minded to make it happen.

But what about legal recourse? If the hypothetically-detained U.S. citizen were subsequently prosecuted, would that not present a context where the legality of the detention could be tested? Well, it would at least present a context where the detention in a secret prison could no longer be kept secret, but unless statements or evidence obtained in the course of the detention were offered into evidence, it is doubtful that the legality of the detention would be taken into account by the court.⁴⁸

Governmental secrecy cuts in two directions. It is probably perceived by the government as protective and beneficial insofar as it permits the government to conceal some of the things it is doing and prevents the public from knowing what the government is actually doing. But it also makes it possible for the public to suspect the government of doing all kinds of terrible things that in fact it may not actually be doing. And when the public begins to

48. *Cf.* *United States v. Padilla*, No. 04-60001-CR, 2007 WL 1079090 (S.D. Fla. Apr. 9, 2007).

distrust the government and to suspect it of doing bad things, that is not a good thing for the government, the public, or our democratic system of government.

E. Glenn Sulmasy and James D. Carlson

Yes, a United States citizen may be held in a secret prison, but it would require express congressional approval. One additional consideration is important: the detention of any person in a secret prison runs counter to some experts' opinions on the state of international law in this area.⁴⁹

For purposes of this response, a "secret prison" includes the detention of an individual where there is no public disclosure of a person's detention, and the person is held incommunicado.⁵⁰

49. There is active movement to ban this practice under international law. The practice is opined to be illegal under at least one international instrument: experts have declared Article 9, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR), makes this practice illegal. Working Group on Arbitrary Detention, *Report of the Chairperson of the Working Group on Arbitrary Detention: Situation of Detainees at Guantanamo Bay*, ¶ 84, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2006/120 (Feb. 5, 2006) (noting violations of ICCPR art. 9, Dec. 12, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368). The American Society of International Law adopted a resolution on March 30, 2006, stating *inter alia* that "[p]rolonged, secret, incommunicado detention of any person in the custody or control of a state is prohibited by international law." Amer. Soc'y of Int'l Law, *Resolution of March 30, 2006*, <http://www.asil.org/events/am06/resolutions.html>; see also the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), GA Res. 61/177, *opened for signature* on Feb. 6, 2007, available at <http://www2.ohchr.org/english/law/disappearance-convention.htm> (last visited Mar. 26, 2008). The prohibition of enforced disappearance into customary international law may be premature, given that nations continue the practice. See Working Group on Enforced or Involuntary Disappearance, *Report of the Working Group on Enforced or Involuntary Disappearances, delivered to Human Rights Council*, U.N. Doc. A/HRC/7/2 (Jan. 10, 2008) available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/7session/A-HRC-7-2.doc> (last visited Mar. 26, 2008) (reporting that it has investigated over 50,000 disappearance since 1980 and has received reports of over eighty disappearances from a variety of countries during 2007). Consider too that only thirteen of the thirty-four members of the Organization of American States are bound by the Inter-American Convention on the Forced Disappearance of Persons, 33 ILM 1529 (1994), available at <http://www.oas.org/juridico/English/Treaties/a-60.html> (last visited Mar. 26, 2008).

50. Of course, this infers a denial of at least some constitutional rights for a detained U.S. citizen. Note that in today's context, this would meet the definition of enforced disappearance in the ICCPED, see *supra* note 49. As of January 31, 2008, it had seventy-nine signatories and one party (Albania). For a list of signatories, see <http://www2.ohchr.org/english/bodies/ratification/16.htm> (last visited Mar. 26, 2008).

President Bush has admitted that the United States used secret prisons in the past, although not to detain U.S. citizens.⁵¹

Hamdi v. Rumsfeld demonstrates the diverse views on detention of a U.S. citizen.⁵² The controlling opinion is a four-justice plurality, joined by a two-justice concurring opinion, to vacate and remand the case back to the Circuit Court of Appeals. Considering all four opinions, all nine justices would agree that a U.S. citizen-enemy combatant could be detained if Congress suspended the writ of habeas corpus.

Another domestic legal authority on the matter, the Non-Detention Act, provides that “[n]o citizen shall be imprisoned or otherwise detained . . . except pursuant to an Act of Congress.”⁵³ Language of the six justices resulting in the *Hamdi* remand also would likely agree that congressional action comporting with the Non-Detention Act would also suffice to allow for detention of a U.S. citizen.

Notwithstanding prospective combined political branch action, the Founders anticipated the dangers of arbitrary imprisonment and highlighted the safeguard provided by the writ of habeas corpus to counter this practice. *The Federalist No. 84*, quoting Blackstone, is prescient:

To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.⁵⁴

We suggest that the United States, through the executive and legislative branches, indeed has the power to detain U.S. citizens in

51. *Bush Admits to CIA Secret Prisons*, B.B.C. NEWS, Sept. 7, 2006, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/5321606.stm> (last visited Mar. 26, 2008). President Bush has intimated that the United States no longer practices this.

52. 542 U.S. 507 (2004).

53. P.L. 92-128, 85 Stat. 347 (1971) (codified in part at 18 U.S.C. § 4001(a) (2000)).

54. The quote continues: “[a]nd as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls “the *bulwark* of the British Constitution.” THE FEDERALIST NO. 84 (Alexander Hamilton), reprinted in THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 468 (2002) (emphasis in the original).

secret prisons. Also, the Executive alone, under the Article II powers, has the authority under limited, extreme circumstances.⁵⁵ However, such actions must have the necessary conditions precedent and be reported to the citizenry as soon as practicable.

III. WHAT ARE THE LIMITS TO EXECUTIVE DISCRETION FOR DECLARING OR RECOGNIZING MARTIAL LAW?

A. *Stephen Vladeck*

I have written about this precise issue in some detail before, and have suggested that the President would actually have fairly broad discretion, in an emergency situation, to recognize or declare a state of martial law.⁵⁶

The key here is the definition: What do we *mean* by “martial law”? As Chief Justice Chase explained in his concurring opinion in *Milligan*:

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while

55. To illustrate limited and extreme circumstances, consider a scenario where Congress could not meet, see *Ex parte Merryman*, 17 F. Cas. 144 (1761), or where a short term detention arose from a battlefield capture of an unlawful combatant.

56. See Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 193 (2004); see also Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 81 TEMPLE L. REV. (forthcoming 2008) (manuscript at 4648, available at <http://ssrn.com/abstract=963994>).

the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.⁵⁷

Assuming, then, that the question refers to “martial law proper,” I believe that the so-called “Insurrection Act”⁵⁸ delegates authority to the President to assert such crisis authority where, as Chase wrote, “ordinary law no longer adequately secures public safety and private rights.” It should be emphasized, though, that those circumstances are exceedingly dire, and the authority can only be exercised for as long as the exigency of the situation requires. As the Court reaffirmed in the Hawaiian martial law case, “civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.”⁵⁹

B. *Geoffrey S. Corn*

Martial law is one of the most elusive legal concepts in the realm of national security law. The uncertainty related to when martial law may be legitimately imposed is created by two primary realities. First, the Constitution provides no express authority for the imposition of martial law. Second, because martial law represents the epitome of authoritarian rule, federal courts have been historically cautious, if not reluctant, to acknowledge the legitimacy of such government power. Nonetheless, on several occasions during our history, the Supreme Court has suggested that martial law may be justified and legitimate under the right conditions of extremis. Even Justice Jackson, in his famous concurrence in the *Youngstown Sheet & Tube v. Sawyer* decision—an opinion openly hostile to the proposition that emergency creates power in government—excluded from his rejection of executive power *ex necessitate* “the very limited category” of martial law.⁶⁰

57. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 141–42 (1866) (Chase, C.J., concurring).

58. 10 U.S.C. § 333 (2000).

59. *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (quoting *Milligan*, 71 U.S. (4 Wall.) at 124–25).

60. 343 U.S. 579, 650 n.19 (1952) (Jackson, J., concurring).

The most notable Supreme Court decision touching on the question of martial law was *Ex parte Milligan*, a case in which the Court was required to rule on the propriety of subjecting a U.S. citizen (who was not a member of a hostile armed force) to the jurisdiction of a military tribunal.⁶¹ In order to resolve this issue, the Court analyzed whether the imposition of military jurisdiction over Milligan could be justified as the result of the existence of martial law. Although the Court rejected such a jurisdictional basis in that case, in so doing it provided important insight into the possible legitimacy of martial law, and the predicate conditions upon which such an assertion of government authority must rest.

On the question of legitimacy, the Court ruled by implication that had the conditions necessary to justify the imposition of martial law been present, the assertion of military jurisdiction over Milligan would have been legitimate. This was a clear indication that although not provided for in the Constitution, martial law has historically been recognized as an inherent power of the federal government.

More importantly, the Court provided an indication of the conditions that must exist in order to justify the imposition of martial law: a total breakdown of civil authority. In the context of subjecting a citizen to a criminal prosecution, this was defined as an inability for the civil courts to operate. However, the logical inference from this definition is that an imposition of martial law will only be legitimate in response to a situation that destroys or disables the ability of civil government to maintain law and order. Accordingly, imposition of martial law by a President could never be justified absent such a situation of extremis.

C. *Glenn Sulmasy and James D. Carlson*

Martial law is not mentioned in the Constitution. The tag itself is a misnomer: there is no martial “law.” It is more appropriate to term it “martial rule, for it is little else than the will of the [Executive], applie[d] to all persons”⁶² Whatever we call it, limits do exist to constrain the Executive’s ability to declare martial law. However, in the world in which the government operates today, there seems to be greater guidance for when major catastrophes occur—such as terrorist attacks, or other events

61. 71 U.S. 2 (1866).

62. See *Beckwith v. Bean*, 98 U.S. 266, 293 (1878) (Field, J., dissenting).

potentially requiring such action. As a result, it is clear there needs to be greater exploration, debate, and clear guidance on these issues.

The seminal case on “martial law” is *Ex parte Milligan*.⁶³ Milligan applied for a writ of habeas corpus after being tried and convicted before a military commission for rebellious activities in Indiana, at the time under martial law, during the Civil War. Milligan applied to the federal courts for a writ of habeas corpus; the Supreme Court ultimately agreed, ordering his release because his confinement was unlawful. The Court asserted that any declaration of martial law in Indiana was invalid, as the state was not occupied by the Confederacy: “[m]artial law cannot arise from a *threatened* invasion. The necessity [for martial law] must be actual and present; the invasion real,” such that the civil courts were “effectively” closed and civil administration “depose[d].”⁶⁴

However, martial law must be distinguished from a state of emergency declared under state or federal law. States of emergency inhere broad powers to the Executive at both levels. A 2006 amendment to the Insurrection Act expanded the circumstances that the President may employ the armed forces domestically.⁶⁵ The President may now use the armed forces to restore public order due to “natural disaster, epidemic, other serious health emergency, terrorist attack or incident” where the President determines *inter alia* that state authorities are “incapable of maintaining public order.”⁶⁶ This should raise eyebrows about use of emergency powers, particularly when one considers the urgency in response and recovery that a large-scale terror attack, i.e. a man-made disaster, may trigger. The conflation of broad *emergency* powers with the President’s *commander-in-chief* powers, where an ability to declare martial law would lie, would provide the Executive with awesome power.⁶⁷

63. 71 U.S. (4. Wall.) 2 (1866).

64. *Id.* at 127.

65. John W. Warner Defense Authorization Act for Fiscal Year 2007, P.L. 109-364, § 1076, 120 Stat. 2083, 2404 (2006) (to be codified at 10 U.S.C. § 333).

66. *Id.* § 1076(a)(1), 120 Stat. at 2404.

67. Every President since Nixon has claimed inherent commander-in-chief powers, and Congress recognized this when it passed the National Emergencies Act of 1974. *See* National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651 (2000 & Supp. IV 2004)). There, Congress expressly did not override several declared presidential emergency declarations, including the 1950 national emergency declaration on the war on the Korean peninsula, because they flowed from the President’s Article

We suggest the President, under his Article II powers, has the authority to declare martial law in limited circumstances: a rebellion or invasion is a condition precedent to a declaration, and it may involve only the affected areas. Such actions need to be used in a judicious manner and its use and basis should be reported to the Congress and the citizenry as soon as practicable.

IV. SHOULD CONGRESS PROHIBIT EXTRAORDINARY OR IRREGULAR RENDITION?

A. *Stephen Vladeck*

This question assumes that Congress has not *already* prohibited extraordinary rendition. If we define “extraordinary rendition” to mean the removal of detainees to third-party countries for the purpose of subjecting them to interrogation methods that would be illegal under U.S. law, I think there is a very good argument that such conduct is *already* prohibited by federal law (and I agree that it *should* be so proscribed).

Under Article 3 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), “[n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁶⁸ Congress has implemented the United States’ CAT obligations in section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).⁶⁹ As section 2242(a) provides:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.⁷⁰

Thus, whether or not a detainee potentially subject to

II powers. Harold C. Relyea, *National Emergency Powers*, CRS Report No. 98-505 (Aug. 30, 2007).

68. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art. 3, *adopted* Dec. 10, 1984, S. TREATY DOC. 100-20 (1988) 1465 U.N.T.S. 85.

69. Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822-2681-823 (codified at 8 U.S.C. § 1231 note).

70. *Id.* § 2242(a), 112 Stat. at 2681-822.

extraordinary rendition could himself challenge his removal,⁷¹ U.S. statutory law prohibits such a practice.

B. Geoffrey S. Corn with Dru Brenner-Beck

Yes. Current international treaties and domestic U.S. legislation, in present form, do not clearly prohibit extraordinary renditions. Congressional action is needed to clarify stated U.S. policy that the United States does not transport anyone to a country where it believes they will be tortured. “Extraordinary” or “irregular” renditions are terms “used to refer to the extrajudicial transfer of a person from one State to another, generally for the purpose of arrest, detention, and/or interrogation by the receiving State.”⁷² The U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and implementing U.S. domestic legislation prohibit the transfer of persons to countries where there are “*substantial grounds for believing*” they would face torture.⁷³ Unfortunately, both the Convention and the legislation are susceptible of limiting interpretations that arguably permit extraordinary or irregular renditions to occur.

First, neither prohibits the rendition of persons to States where they would be subject to harsh treatment, including treatment that would be prohibited if done by U.S. authorities, that does not rise to the level of “torture.” Torture, under the Convention, is seen as a particularly severe form of cruel treatment. Second, diplomatic assurances from the receiving State that the person will not be tortured can at least facially satisfy the requirements of the CAT

71. Because CAT is arguably “non-self-executing,” there is a colorable claim that it cannot be privately enforced except as provided by FARRA. For an argument to the contrary, see *Ogbudinkpa v. Ashcroft*, 342 F.3d 207, 218–20 (3d Cir. 2003). Although the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(B), 119 Stat. 231, 310 (codified at 8 U.S.C. § 1252(a)(4)), supersedes *Ogbudinkpa*’s holding with respect to non-citizens who can raise CAT claims in removal proceedings, see, e.g., *Kamara v. Att’y Gen. of U.S.*, 420 F.3d 202, 209–11 (3d Cir. 2005), the Third Circuit’s analysis of the availability of habeas relief should still apply to all other cases.

72. Michael John Garcia, *Renditions: Constraints Imposed by Laws on Torture*, CRS. No. RL 32890, CRS-1 (Oct. 12, 2007), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7695:1>.

73. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. TREATY DOC. 100-20 (1988), 1465 U.N.T.S. 85. This language has been implemented at 8 U.S.C. § 1231; 8 C.F.R. § 1208.18(a)(1).

and implementing domestic legislation since it arguably eliminates the “substantial grounds for believing” that the person would face torture. Further, it is unclear whether the CAT would prohibit rendition where the United States seizes a suspect outside the territory of the United States and directly renders them to another country, a process termed extra-territorial renditions. The State Department has asserted that the United States does not interpret CAT Article 3 protections to apply to persons outside U.S. territory. While the implementing legislation prohibits the involuntary return of any person when there are reasonable grounds for believing the person would be in danger of being subject to torture “regardless of whether the person is physically present in the United States,” the statute contains an exception instructing federal agencies to exclude from the protection of CAT-implementing regulations aliens who are reasonably believed to pose a danger to the United States, to the maximum extent such exclusions are consistent with CAT obligations.

Although the 1949 Geneva Conventions impose limitations on renditions separate from those imposed by CAT, these protections would apply only to specified categories of people, individuals qualifying for the protections of the Conventions, in armed conflict or post-conflict occupied territory. These protected categories are quite narrow in the context of the Global War on Terror, and provide limited protections against irregular renditions.

Because of the dangers that narrow or parsing interpretations of the relevant international treaties and domestic laws pose to the stated policy of the United States that we will not transfer persons to States where they will be tortured, Congress should pass legislation to clearly prohibit irregular or extraordinary rendition. The challenge, of course, will be to develop an effective definition of what is “irregular” or “extraordinary”, and what process the Executive must follow to assure compliance with the prohibition. Legislation has in fact been introduced in both the 109th and 110th Congresses to limit the authority of U.S. entities to render persons to other States. Provisions in such measures have included, *inter alia*, the requirement for the Secretary of State to report to Congress a list of States where there are substantial grounds for believing that torture or cruel, inhuman, or degrading treatment is commonly used in the detention of or interrogation of individuals, and the prohibition of any transfer to such States, subject to waiver Secretary of State in limited circumstances including continuing

access to the person by independent humanitarian organizations. While the challenge of developing an effective statutory proscription for this activity is undeniable, it is equally undeniable that the existing legal framework is too susceptible to manipulation. The credibility of the United States as a nation that rejects the abusive treatment of individuals subject to its power therefore necessitates that, at a minimum, Congress clarify the conditions that make renditions impermissible, and that the prohibition on rendition applies irrespective of where the detainee was first taken into U.S. custody.

C. *Tung Yin*

On the subject of *extraordinary* rendition, where the detainee is captured in one country and transferred extrajudicially to a second country, primarily for the purpose of interrogation, I note the observation of former CIA agent Reuel Marc Gerech: “A cardinal rule of the intelligence business . . . is to maintain control of the individuals you are debriefing or interrogating.”⁷⁴ Gerech persuasively argues that extraordinary rendition is therefore an operationally-flawed technique, even if one believes that coercive interrogation is called for in particular circumstances, because the United States gives up control of the interrogation subject to a third country.

Whether Congress should—and can—intervene to prevent the executive branch from pursuing a flawed policy, however, is a more challenging question. To a large extent, I suspect that one’s answer will depend on whether one views rendition as a tactical decision, akin to the selection of military targets, or as a policy decision, such as the prohibition on torture as codified in the torture statute. If it is the former, then Congress probably cannot intrude on the President’s prerogative.

I would argue that extraordinary rendition is sufficiently analogous to torture (if not identical) and that Congress can and should pass legislation to regulate, if not prohibit it altogether. To the extent that the President believes it necessary in a given case to resort to extraordinary rendition,⁷⁵ the action should be justified *ex*

74. See STEPHEN GREY, *GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM* 259 (2006).

75. This would be an appropriate place for an obligatory reference to the “ticking time bomb” scenarios so popular on Fox’s *24*.

post under a necessity defense.

D. Norman Abrams

With few exceptions, Congress has been reluctant to try to intervene in actions by the U.S. government outside the United States that involve the pursuit of terrorists and the prevention of terrorism. Does Congress's failure to take action on the international scene reflect its unwillingness to rein in the executive branch on issues that are perceived as serving the national interest or, rather, reflect its view that this is an area where Congress lacks the authority to limit the executive branch?

Many people believe that they know a great deal about the practice of extraordinary rendition, but very little of what is thought to be known has come from official sources, and we cannot be certain about the reliability of this unofficial information. To the extent that official sources have publicly revealed anything, it has come from the highest levels of the government, namely the President and the Secretary of State, but they have not revealed any details.

Extraordinary rendition may take different forms, and our reaction to the practice may vary with the version. Rendition is generally defined as the practice of transferring a wanted person from the country in which he is found to the country where he is wanted (for prosecution, incarceration [assuming a prior conviction], or questioning) without going through formal extradition procedures. It is usually done with the cooperation of the country in which the individual is found. For example, the individual having been arrested in one country is turned over to the agents of the other country, put on an airplane the destination of which is the agents' country.

Just what makes rendition extraordinary? And what is the United States accused of having done? In some instances, government agents are suspected of seizing individuals in a foreign country against their will and, with the cooperation of that country, transferring the individuals to the U.S. base in Guantanamo. Or in similar circumstances, transferring the seized person to another country where the individual is detained, interrogated (possibly using coercive methods, i.e., torture) and possibly tried and convicted. Or the seizure allegedly occurs without the cooperation of the first country, indeed, through acts that violate the laws of that country, and the person is subsequently transferred elsewhere,

whether to Guantanamo or to another country.

Occasionally, but not very often, the actions of the government in seizing a person abroad and transferring him to U.S. custody without going through extradition or using ordinary rendition techniques have surfaced in judicial opinions. Consider the stratagem used in bringing the defendant in *United States v. Yunis*⁷⁶ into U.S. custody, as described by the United States Court of Appeals for the District of Columbia:

Immediately after the hijacking, several United States agencies, led by the Federal Bureau of Investigation, sought to identify, locate and capture the hijackers. Government efforts after several months of investigation focused on Yunis as the probable ringleader of the five hijackers.

The FBI then recruited as a government informant Jamal Hamdan, a Lebanese acquaintance of Yunis

After the investigation had produced sufficient evidence, the FBI obtained a warrant for Yunis's arrest. Hamdan lured Yunis from Lebanon to international waters off the coast of Cyprus under the ruse of conducting a narcotics deal. On September 13, 1987, Hamdan and Yunis traveled on a small motor boat to a yacht manned by FBI agents who apprehended Yunis shortly after he boarded the yacht. From the yacht, they transferred Yunis to a United States Navy munitions ship, the *U.S.S. Butte*, which carried him to the aircraft carrier, the *U.S.S. Saratoga*. A military aircraft transported Yunis from the *U.S.S. Saratoga* to Andrews Air Force Base outside of Washington, D.C. He was subsequently arraigned in the United States District Court for the District of Columbia.⁷⁷

An instance of extraordinary rendition, or not? And, of course, the Supreme Court in *United States v. Alvarez-Machain*,⁷⁸ ruled that a person kidnapped in Mexico by U.S. agents and brought to the United States could be tried by a U.S. court. Extraordinary rendition?

Congressional efforts to obtain information from the executive branch and to investigate the practice of extraordinary rendition have thus far been largely frustrated. Possibly, with a new

76. 867 F.2d 617 (D.C. Cir. 1989).

77. *Id.* at 618–19.

78. 504 U.S. 655 (1992).

administration after the upcoming election, we shall learn more about the practice.

But the idea of legislating regarding the practice, whatever forms are deemed unacceptable, is an idea fraught with complexity. The Bush administration invokes all the possible bases for executive branch authority in support of its anti-terrorist efforts: the fact that we are at war; the President's role as Commander in Chief; the foreign affairs power; and the President's inherent executive authority, and responsibility for national security. Any effort to restrict its ability in this area would be likely to create a major constitutional confrontation. Whether a future administration will take a different position remains to be seen.

But again, first things first: Congress should attempt to investigate, not legislate. Decisions about legislation can come later, once Congress has before it information about the kinds of extraordinary rendition practices that have really been utilized.

E. Amos Guiora

Rendition violates the 1984 Convention against Torture (CAT)⁷⁹ which unequivocally states that a detainee held by one country may not be turned over to another country if there is a reasonable belief that the receiving country will torture the detainee. The significance of the Convention is clear: the nation holding a detainee is responsible for that individual's welfare until his release and may not "use" another nation's interrogation services for purposes of torture. In other words, the Convention prevents (or at least seeks to prevent) circumvention of relevant domestic legislation preventing torture.

In the aftermath of 9/11, the United States "turned over" detainees to a variety of nations known to torture (according to various media reports the "receiving" nations included, among others, Egypt, Morocco, Indonesia, and Jordan). While a misbegotten belief that "by all means necessary" justified such an approach, the policy violated both the international Convention and U.S. law (the Convention was ratified by the Senate).

It is important to state what rendition is: it facilitates a "bypass" of legislation preventing torture. That is, the detainee is turned

79. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. 100-20 (1988), 1465 U.N.T.S. 85.

over to the intelligence service of another country known to engage in torture. Rendition, crudely stated, is the outsourcing of torture.

In a recent article published in the *Harvard Human Rights Journal*, David Weissbrodt and Amy Bergquist wrote:

The Committee against Torture has published two findings that are particularly relevant to the practice of extraordinary rendition. In *Khan v. Canada*, the Committee determined that by transferring a person to a country that was not a party to the Convention against Torture, Canada violated Article 3, both because the transfer would subject the person to a danger of torture, and because the transfer would make it impossible for the person to apply for protection under the Convention against Torture. In *Agiza v. Sweden*, the Committee against Torture determined that Sweden's use of extraordinary rendition in December 2001 violated Article 3. With U.S. assistance, the government of Sweden seized Egyptian asylee Ahmed Agiza and transported him to Egypt. The Committee found that "it was known, or should have been known, to [Sweden]'s authorities at the time of [Agiza]'s removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons." The Committee also determined that "an inability to contest an expulsion decision before an independent authority . . . [is] relevant to a finding of a violation of article 3" because it violates "the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention." The Committee rejected Sweden's argument that it had obtained assurances from the government of Egypt to ensure that Agiza would not be ill-treated. A recent report by the Special Rapporteur on torture confirms that extraordinary rendition violates Article 3 of the Convention against Torture.⁸⁰

F. *Glenn Sulmasy and James D. Carlson*

Extraordinary or irregular rendition has occurred throughout the 20th century. In particular, these governmental national security actions have occurred since the beginning of the Cold War.

80. David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 143–44 (2006) (footnotes omitted).

The difference today in such actions, abhorrent to most (if not all) Americans, is that the twenty-four hour media coverage has made an otherwise unaware public and citizenry now painfully aware that these actions do, and often must, occur in order to protect the nation. One need look no further than the recent controversy of Central Intelligence Agency (CIA) planes carrying detainees which stopped on islands controlled by the United Kingdom to refuel. The CIA Director had to personally apologize to the British Government for these actions—even though stops were simply to refuel and absolutely no interrogation took place on British soil. The media covered this throughout the world.

To a large degree, the question is not so much whether Congress can interfere in this area largely envisioned to be carried out by the executive branch, but rather the extent of Congress's oversight role for such operations if, and when, they do occur. Constitutionally, such actions fall within the role of the executive branch in carrying out national security operations and cannot be prohibited by the legislative branch. This is even truer in the age of international terror and in our current armed conflict against al Qaeda. The need for information and the interests in keeping such actions out of the public view are of even greater priority. The need for secrecy, dispatch, and rapid response is all the greater in the current world struggle against international terror. Congress interference in what is clearly an executive function is counter-productive to achieving victory.

Thus, although Congress does not have the authority to prohibit extraordinary or irregular rendition, they should be kept informed of such actions and be updated periodically. The Senate and House Intelligence Committees, in closed, classified briefings, should be kept abreast every six months of the status of any renditions to ensure the Executive is not abusing his constitutional authority or using such power in an arbitrary or capricious manner.

V. DOES CONGRESS HAVE THE POWER TO PASS END DATES FOR THE WAR IN IRAQ OR WOULD THAT UNCONSTITUTIONALLY ENCROACH ON THE EXECUTIVE'S COMMANDER-IN-CHIEF POWERS?

A. *Stephen Vladeck*

No one doubts that Congress has the power to *start* a war. And Congress, in a 2002 statute, provided statutory authority for the war

in Iraq.⁸¹ Thus, I do not think there is any limitation on Congress's power to repeal the 2002 authorization, assuming (for the sake of argument) either that the President signs such a measure or that Congress overrides a veto. To me, placing "end dates" on the offensive use of troops in Iraq is the same as repealing the use of force authorization. I am hard pressed to see how, if Congress can do the latter, it cannot do the former.⁸²

Instead, the question to me is not whether Congress *can* enact such measures, but whether such measures would be judicially enforceable in the face of countervailing Article II arguments. In *Hamdan v. Rumsfeld*, the Supreme Court held that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."⁸³ If the same logic applied here, then I think such limits *would* be judicially enforceable, notwithstanding arguments that such limits infringe upon the President's constitutional authority as Commander in Chief.⁸⁴

On this issue, there is much to learn from the Vietnam-era precedents, especially with respect to the use of military appropriations to support operations in and over Cambodia. As just one example, Congress in 1973 enacted a measure providing that,

[n]otwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia."⁸⁵

Although there was substantial (and ultimately unsuccessful) litigation over whether this provision (the Fulbright Amendment)

81. See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501.

82. Cf. *United States ex rel. Jaeger v. Carusi*, 342 U.S. 347, 348 (1952) (per curiam) (recognizing an Act of Congress as formally ending World War II against Germany).

83. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006).

84. See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (recounting, in great detail, the scope of such power).

85. Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134. See generally Thomas F. Eagleton, *The August 15 Compromise and the War Powers of Congress*, 52 ST. LOUIS U. L.J. 225 (2007).

or a host of others precluded bombing operations in Cambodia prior to August 15,⁸⁶ there was no question as to its effectiveness *as of* that date.

Nor is the Vietnam experience unique. As Professors Bradley and Goldsmith acknowledge, Congress has in other circumstances placed express temporal limits on delegated military authority. Of course, these examples do not themselves answer the question. But practice suggests that Congress has done so before, and academic arguments, such as those offered by Professors Barron and Lederman, suggest that Congress could do so again.

B. Geoffrey S. Corn

The answer to this question may depend on the form of the legislation. Assuming the legislation took the form of a restriction on appropriations, there seems to be solid authority for the binding nature of such a restriction. Indeed, this is precisely the method used by Congress in 1973 to force a termination of all military operations in Southeast Asia, a law signed by President Nixon after a compromise on the termination date and subsequently implemented by him. Congress has also used its fiscal power to limit the type of forces authorized to be used in military operations against Serbia in 1999 when it prohibited the introduction of ground forces into that conflict, and to place an end date on the presence of U.S. forces in Lebanon in 1983.

Use of an appropriations limitation would require sufficient support to overcome presidential opposition in the form of a veto. However, once enacted, there is virtually no basis for a President to flagrantly defy such a limitation. It is, however, arguable that the President's inherent power to defend U.S. forces could justify limited deviations from such a restriction in the event the President concluded that compliance would endanger U.S. forces during the withdrawal process. This would in turn require the President to divert funds from other statutory sources, which would create a genuine risk of violating the Anti-Deficiency Act.⁸⁷

Whether Congress could impose such a restriction through a non-fiscally related statute is less certain, although seemingly

86. See, e.g., *Holtzman v. Schlesinger*, 361 F. Supp. 553, 565–66 (E.D.N.Y. Jul. 25, 1973), *rev'd*, 484 F.2d 1307 (2d Cir. 1973) (holding that in the absence of congressional authorization, the President and the military personnel under his direction would be enjoined from engaging in combat operations in Cambodia).

87. 31 U.S.C. §§ 1341(a)(1)(A)–(B) (2000).

academic (because the support required for such a statute would also permit Congress to use its fiscal powers to impose a complimentary restriction). Several early Supreme Court decisions related to the Quasi-War with France suggest that the power to initiate war implies the power to place limits on the scope of war once authorized. In these cases, the President found no support for ordering transgressions of these limits based on his judgment that the tactical situation justified such transgression. Instead, the Court clearly indicated that because Congress has the power to authorize war, limits contained in such authorizations are binding on all departments of the government. Thus, although subsequent congressional practice has been to rely on appropriations power to impose such limits, there is no reason to conclude that a statute demanding termination of hostilities would have any less effect.

C. Tung Yin

Congress unquestionably has the authority to repeal the November 18, 2001 Authorization for Use of Military Force (AUMF), which is simply a piece of legislation despite being titled a “joint resolution.” Passing legislation that sets an “end date” in the future is functionally equivalent to repealing the AUMF at that same future date. The state of war between the United States and Germany during World War II did not officially and technically end with the peace treaty signed by the parties, but, rather, persisted until the early 1950s, when Congress ended the state of war by statute.

The more interesting question is whether such congressional action would obligate the President to withdraw U.S. troops from Iraq. The lines in this debate have been drawn clearly. On one side lie scholars such as Harold Koh, Louis Fisher, and John Hart Ely, who argue that the Declare War Clause gives Congress the power to commit the nation to war. Presumably then, Congress’s determination to end the state of war—or, in today’s parlance, to withdraw the AUMF—would require the President to cease using the armed forces in Iraq. On the other side lie scholars such as John Yoo, who contend that Congress’s primary control over the use of the armed forces is not through the Declare War Clause, but rather the power of the purse: “Congress undoubtedly possessed the power to prevent or end the wars in Iraq, Afghanistan, and

Kosovo; it simply chose not to use it.”⁸⁸ These scholars would likely argue that, notwithstanding any congressionally-mandated end dates to the Iraq war, the President would remain free to keep troops in Iraq for so long as Congress is willing to appropriate funds for such purposes.

An important part of Yoo’s thesis is that failure of political will is distinct from structural failure. So long as Congress could have, but chose not to, stop the President from engaging in military (mis)adventures, it cannot complain that it has not authorized those actions. In other words, Yoo seeks to maintain and highlight accountability by each of the political branches, rather than allowing one to act passive-aggressively, as Congress does by simply not voting to declare war (or to authorize military action). In this regard, it is important to keep in mind that legislation that sets an end date to the Iraq war (or repeal of the AUMF) requires an affirmative act by Congress. Therefore, I would argue that such congressional action, especially if successfully overriding a presidential veto, should be viewed as obligating the President to comply.

D. Glenn Sulmasy and James D. Carlson

Congress does not have the power to pass end dates for the Commander in Chief and to do so would be catastrophic not only for the current war in Iraq but for future administrations’ ability to carry out their duties as Commander in Chief. Congress had its opportunity to object to the Iraq war when its members overwhelmingly voted to authorize military action against Iraq in 2003. This does not imply that Congress remains powerless today. Constitutionally, it can cut off all funding for the war effort and thereby achieve its objective while remaining within the confines of its constitutional role. The best means to analyze, without hyperbole or politics, the roles of the executive and legislative branches regarding warfare and foreign affairs roles is to review the original intent of the Constitution.

The Founders clearly intended for the foreign affairs power to be vested in the Commander in Chief. The legislature was understood to be ill-equipped for battlefield decision-making and war-fighting. Its role was intended to be limited to determining the

88. JOHN C. YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 159 (2005).

jus ad bellum, or declaration of war—thus ensuring the citizenry supported the need for armed conflict. But once the action is granted, Congress's role is relegated to simply controlling the “purse strings.” The need for flexibility in the Executive, so eloquently penned by Alexander Hamilton in the Federalist Papers, is even more important today as the enemies we fight have extraordinary technological capabilities, often do not wear uniforms, and engage in civilian atrocity as doctrine.

The foreign affairs power—particularly war-fighting—has been, was, and remains quintessentially the province of the executive branch. The history of executive power in the area of foreign affairs, and military operations in particular, is abundant with examples of the Founders' intent. Their intent, partially in response to the Articles of Confederation failures, placed the commander-in-chief powers clearly within Article II of the Constitution.

One way to discern the Founders' intent on foreign affairs is through the lens of the meaning of executive power at the time of the Constitution's creation. The 18th century meaning of the term “executive power” clearly included the foreign affairs power as well as the power to execute the laws within the domestic United States. Thus, the Founders, aware of the failures of the Articles of Confederation in foreign affairs, military affairs, and the execution of laws, sought to remedy these problems with vesting such power in the Presidency.

Some scholars passionately look to the pre-revolutionary period, and the revolutionary period itself, to assert the Founders were rejecting the Crown and intended the Legislature to be the strongest branch. In some areas this is true—particularly with regard to domestic affairs. However, these critics, such as Louis Fisher or Harold Koh,⁸⁹ rely upon the strength of the legislatures during this period as indicia that the Founders wanted the Legislature to be co-equal, or in many ways superior, to the Executive in the foreign affairs realm. Simply, they are missing the point. The legislatures, the Continental Congress together with the state legislatures, for the most part were *functioning as the executive branch* during this period. There was really no executive branch in existence. Thus, prior to the Constitution, the executive powers in

89. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFRAIR* (1990).

foreign affairs were clearly vested in the legislatures. Even the great Chief Justice John Marshall later described, “The confederation was, essentially, a league; and congress was a corps of ambassadors to be recalled at the will of their masters.”⁹⁰ However, the failures of this framework led the leading thinkers of the day to reject this notion and create an executive branch for the roles of both Commander in Chief and the director of all foreign affairs. The Constitution, as enacted, rejected the theories that the United States could function efficiently without an Executive.

Scholars often look to Alexander Hamilton for guidance in this area. He is well-known to have sought an aggressive executive branch to meet the needs of foreign affairs and warfare. However, as Professor Michael Ramsey has noted, even the liberal champion, Thomas Jefferson, saw the need to have an energetic Executive. Jefferson stated, “[The Constitution] has declared the Executive powers shall be vested in the President The transaction of business with foreign nations is Executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate.”⁹¹ Although not a framer per se, it is important to note a leading anti-federalist of the period of the nascent United States also agreed with this notion—thus helping better argue and articulate the original meaning and intent of the Framers during this period. It is logical to extend the assertion that, if Hamilton and Jefferson (arch enemies politically, socially, and personally) agreed on this—it was reasonably understood to be the intent of the Framers.

The Framers also looked long and hard at certain state governments during the revolutionary period to discern how best to create a strong Executive. New York was the state Hamilton and the others were influenced by and relied upon most in drafting the Constitution. Governor Clinton maintained a strong Executive throughout the 1770s and 1780s. It was looked upon as the most stable colony during this era. Of importance, the New York Constitution, adopted in 1777, vested the Governor with the position of “general and Commander in Chief of all the militia, and

90. John Marshall, *A Friend of the Constitution* (July 9, 1819), reprinted in 21 STAN. L. REV. 456, 488 (1969).

91. Thomas Jefferson, *Opinion on the Question Whether the Senate has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions* (April 24, 1790), reprinted in 3 WRITINGS OF THOMAS JEFFERSON 1516 (Andrew Lipscomb et al. eds., 1905).

admiral of the navy of [the] State.”⁹² Clinton exercised his unilateral and unitary power by sending the troops to reinforce General Gates’s efforts against the British. He let the legislature know of his actions at a later date. The strength of the New York Constitution and government strongly influenced New Hampshire, Connecticut, and Massachusetts when they created their own state constitutions as well.

The Framers took the New York example to heart when drafting the Federal Constitution in Philadelphia. They created an independent, unitary executive empowered with strong war powers—certainly including the area of foreign affairs. They were also strongly influenced by the enlightened thinkers of the day. Although popular culture often refers to Locke as the most influential, in reality, Montesquieu and Blackstone were by far the most widely-read and influential political writers in America during the Founding period. Madison described Blackstone’s *Commentaries on the Laws of England* as “a book which is in every man’s hand” and described Montesquieu as “[t]he oracle who is always consulted and cited on the subject” of separation of powers.⁹³ Both Blackstone and Montesquieu defined the executive powers to include foreign affairs. This area of foreign affairs, and most importantly carrying out warfare operations, was vested in the Executive to ensure speed, flexibility, and dispatch.

For example, Montesquieu wrote, “[The Executive] makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.”⁹⁴ In military affairs, Montesquieu argued that the Executive should possess exclusive control over the army. He wrote, “[o]nce an army is established, it ought not to depend immediately on the legislative, but on the executive power; and this from the very nature of the thing, its business consisting more in action than in deliberation.”⁹⁵ Again, the Legislature retained the power of the purse as it does today and the ability to terminate the authorization of the army. In the days of the standing army this was significant and could be analogized today to authorizations to conduct military operations.

92. N.Y. CONST. of 1777, art. XVIII.

93. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1382 (John P. Kaminski et al. eds., 1993); THE FEDERALIST NO. 47, at 267 (James Madison), *reprinted in* THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS (2002).

94. BARON MONTESQUIEU, 1 THE SPIRIT OF THE LAWS 162-63 (Thomas Nugent trans., 1914) (1748).

95. *Id.* at 173.

Similarly, Blackstone in his *Commentaries on the Laws of England* declared the conduct of foreign affairs as a quintessentially executive function. He defended the Crown's authority in this area by declaring, "the king has also the sole prerogative of making war and peace It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war."⁹⁶ Certainly appropriate guidance for our nation today as we continue to fight al Qaeda in Iraq as part of the U.S. surge. He further declared the King to be the "generalissimo, or the first in military command, within the kingdom."⁹⁷

These offer glimpses into the most influential thinkers of the era and give us a real concept of the thinking of our Founding Fathers as they debated how to create the executive branch.

Additionally, executive power needs to be viewed from a functional perspective. George Washington, as the nation's first President, clearly understood his role as Chief Executive. Having overseen the entire Convention, upon taking office he immediately assumed the duties of Commander in Chief and leader in foreign affairs. Without any statutory authority, he exercised the foreign affairs functions that were not specifically mentioned in the Constitution—things like control and removal of diplomats, foreign communications, and formation of foreign policy. These were powers all previously exercised by the Congress during the Articles period and the new Congress certainly appeared to understand these powers had now shifted to the Presidency. Thus, *de facto*, it appears understood by the new government, the authority for foreign affairs—and warfare—had become the sole province of the Executive. Washington himself established this precedent.

Hamilton, addressing Washington's Proclamation of Neutrality, noted this was simply part of the traditional executive power over foreign affairs—not granted to any other branch of government—vested in Article II, Section 1.⁹⁸ His arguments, as we well know, carried the day. But it should be made clear these were not isolated proclamations by the genius Hamilton—other prominent leaders of the 1790s, including Madison, Jay, Ellsworth,

96. WILLIAM BLACKSTONE, 1 COMMENTARIES *257.

97. *Id.* at *262.

98. Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in XV THE PAPERS OF ALEXANDER HAMILTON* 33 (Harold C. Syrett ed., 1969).

John Marshall and President Washington, similarly described foreign affairs powers as executive in nature.

Thus, the extreme of foreign affairs, warfare operations, were clearly intended to be embodied within the executive branch. Once warfare begins, there is little room for having debate on issues of life and death for our men, and now women, in the armed forces. Blackstone, Montesquieu, the Federalist Papers, affirmations by the leaders of the day, as well as the conduct of the first President himself leaves little room to doubt the Founders' intentions in this arena. Again, this is not to say Congress has no role whatsoever. That is not the case. They have the power to declare war, and during combat operations, the right to refuse to fund the operations. However, interfering with ongoing battles and setting timetables for the Commander in Chief do not appear grounded in the intentions of the Framers, and we would assert, most of the public today agrees. Interestingly, the grounding of the strength of the Executive occurred well before we limited the term of a President to a maximum of eight years. Thus, again, any sense of an imperial presidency, or other references to tyrannical government appear hyperbolic.

The President is the Commander in Chief—whether Democrat, Republican, or Green party. The need for quick action in this arena requires a unitary response, not the deliberative bodies of the government opining on what and how to conduct warfare.

VI. AT WHAT POINT WOULD A PREEMPTIVE ATTACK ON IRAN BE CONSISTENT WITH INTERNATIONAL LAW?

A. *Stephen Vladeck*

Of all of the ten questions, this is the one I am perhaps the least qualified to answer. Assuming that international law would only authorize a “preemptive” attack on Iran as an exercise of “self-defense” (and I recognize that there are some scholars who do not believe that international law even authorizes *that much*),⁹⁹ my own view is that preemption would only be legal as a last resort—at the

99. See, e.g., W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 526 (2006) (suggesting that preemptive self-defense is inconsistent with the requirements of Charter Article 51).

point at which an attack on the United States (whether with conventional or nuclear weapons) seems *imminent*—not just likely—and there are no other possible remedies for avoiding such a conflict. Admittedly, this is a relatively loose standard, and would depend upon information to which only the national security apparatus would have access.

Fortunately, I think the significance of this question has been heavily undermined by the November 2007 National Intelligence Estimate on Iran, which concluded that Iran halted its nuclear weapons program in 2003, and has not attempted to restart it since.¹⁰⁰ Although one could imagine a scenario wherein the United States might engage in preemptive self-defense to prevent an attack with conventional weapons, my own view is that the absence of a nuclear threat should militate against preemption in most cases.

B. *Tung Yin*

A 2007 U.S. intelligence report concluding that Iran had ceased work on its nuclear weapons program back in 2003 suggests that the answer to this question is, “Not now.”¹⁰¹ The rule from international law is easily stated: preemptive military action can be justified as self-defense if the need is “instant, overwhelming, and leav[es] no choice of means and no moment for deliberation.”¹⁰² However, this standard is increasingly difficult to apply in the modern world of nuclear weapons, where the difference between capacity to inflict catastrophic damage and infliction of catastrophic damage may be minutes.

It may be a tempting, therefore, to argue that the United States should be entitled to use military force to prevent a nation it

100. See Mark Mazzetti, *U.S. Says Iran Ended Atomic Work*, N.Y. TIMES, Dec. 3, 2007, at A1.

101. NATIONAL INTELLIGENCE ESTIMATE, IRAN: NUCLEAR INTENTIONS AND CAPABILITIES (Nov. 2007), http://www.iht.com/pdfs/america/20071203_release.pdf. But see Gregory E. Maggs, *How the United States Might Justify a Preemptive Strike on a Rogue Nation's Nuclear Weapon Development Facilities Under the U.N. Charter*, 57 SYRACUSE L. REV. 465, 466 (2007) (arguing that Iran is “engaging in conventional armed attacks” against the U.S. and its allies, justifying use of military force in self-defense).

102. This is the famous *Caroline* rule, as stated in Letter from Daniel Webster, Secretary of State, to Lord Ashburton (Aug. 6, 1842), reprinted in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 217, at 412 (1906) (internal quotation marks omitted).

perceives as “rogue” (such as Iran) to prevent it from successfully developing nuclear weapons. However, if we delve a little more deeply into matters, we might note that possession of a nuclear device is not synonymous with the capability of using such a device against another country, for the nuclear device still has to be delivered to the target. As of this writing, Iran does not possess a delivery vehicle capable of reaching the United States. Presumably, any intercontinental ballistic delivery system would have to be tested, and such tests could not escape international notice.¹⁰³

In short, I think that we are presently far from being able to justify a preemptive strike on Iran under current international law.¹⁰⁴

C. *Amos Guiora*

Existing international law does not provide sufficiently clear guidelines to state decision makers regarding when to take preemptive¹⁰⁵ or anticipatory¹⁰⁶ action. The *Caroline* doctrine and

103. There may be a non-trivial possibility that Iran would work with terrorist groups such as Hezbollah to smuggle a portable nuclear device into the United States, but this would almost certainly be a radiological (i.e., “dirty”) bomb, rather than an atomic device. In any event, I think it would be difficult to argue that such possibility triggers the anticipatory self-defense doctrine.

104. Whether international law continues to regulate the conduct of nations in today’s world is a different matter that I leave open for another time.

105. Preemptive self-defense allows for reaction when a serious threat to national security exists. This interpretation expands the notion of imminence. This articulation of self-defense was adopted in THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 1316 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>. For additional discussion, see CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 133 (2d ed. 2004); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT’L L. 525 (2006); Abraham D. Sofaer, *On the Necessity of Preemption*, 14 EUR. J. INT’L L. 209 (2003); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563 (2003); Michael Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY. STANDARD, Jan. 28, 2002, at 24.

106. Anticipatory self-defense allows for reaction when an attack is imminent. The U.N. Security Council supports this interpretation of self-defense. High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, ¶ 188, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf>; see also D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 18889 (Frederick A. Praeger 1958); ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 230-36 (1986); YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 182 (2d ed. 1994); RICHARD ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 100-103 (Air University Press 1989); Jutta Brunne•e & Stephen J. Toope, *The Use of Force: International Law After Iraq*, 53 INT’L & COMP. L.Q. 785 (2004); Oscar

U.N. Article 51 are insufficient in determining when the nation may act preemptively.

While international law grants states the right to protect themselves, the question is when that right becomes “operational.” That is, does the state have to await attack or can it act on the basis of intelligence? The answer is that preemptive action is lawful, *provided* the actor has cause to act. How “cause” is defined is critical to the discussion. If cause is to be loosely defined, then the state is liable to act in a paradigm best described as “literally unlimited.”

Customary international law permits a state to respond to a threat and infringe on the territorial sovereignty of another nation when four criteria are met: 1) it is acting in self defense; 2) the attack is substantial and military (i.e., not an “isolated armed incident”); 3) the offending nation is complicit, unwilling, or unable to prevent further attacks; 4) the attack is widespread and imminent.¹⁰⁷ States, in order to adequately defend themselves, must be able to be proactive rather than acting solely responsively. In other words, the State must have the right to act preemptively.

The question that must be answered—both from a legal and a policy perspective—is what tools determine whether the window of opportunity regarding Iran’s nuclear weapons program is “about to close.” Active self-defense would appear to be the most effective tool; that is, rather than wait for the actual armed attack to “occur” (Article 51), the state must be able to act anticipatorily (*Caroline*). That, however, begs the question regarding *when* anticipatory action is permissible.

The development of a new body of international law providing legal justification for anticipatory self-defense must be consistent with existing principles and obligations including proportionality, military necessity, collateral damage, and exhaustion or unavailability of a peaceful alternative. The two concepts—active self-defense and the four fundamental principles listed above—are not in conflict; rather, they are critical to formulating international

Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT’L L. 559 (1999).

107. See generally Frank A. Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CASE W. RES. J. INT’L L. 1 (2002); Malvina Halberstam, *The U.S. Right to Use Force in Response to the Attacks on the Pentagon and the World Trade Center*, 11 CARDOZO J. INT’L & COMP. L. 851, 852–55 (2004); Elizabeth A. Palmer, *Democratic Intervention: U.S. Involvement in Small Wars*, 22 PENN ST. INT’L L. REV. 313, 338 (2003).

law's response to modern "warfare" which is very different from traditional, previous ones.

While existing international law grants states a fundamental right to self-defense, the existing limitations do not provide sufficiently clear guidelines regarding *when* a state may act. In other words, there are insufficient actionable guidelines for modern-day armed conflict.

In the Iranian paradigm, the recommended legal and policy approach suggests the following model: if decision makers are convinced that the available intelligence meets a four-part test (reliable, viable, valid, and corroborated) and economic and political sanctions have "run their course," then action is acceptable provided that the four part international law test (military necessity, collateral damage, proportionality, and alternatives) is met. Thus, if decision makers have reached the conclusion based on available intelligence information that the window of opportunity is "about to close" and that all non-military means have been exhausted, then a military strike is legally justifiable according to international law.

D. Glenn Sulmasy and James D. Carlson

Iran in the 21st century offers a glimpse of why, and how, the accepted norms and rules for self-defense have changed. Again, this is something the next President and her national security team will have to be prepared to answer with clarity on the afternoon of January 20, 2009—if not sooner.

The current situation is extremely dangerous. Mahmoud Ahmadinejad is an irrational state actor in an unstable nation, actively in pursuit of nuclear weapons, operating within an already volatile region. The *jus ad bellum* issues surrounding any invasion of Iran are numerous and display the inadequacies and antiquities of the *Caroline* doctrine. Striking Iran, and still complying with international law, would be a difficult task. Article 51 of the U.N. Charter still provides the authority to respond to actions against the United States or her interests. But as technology has increased, and the ability to strike on a moment's notice has become almost widespread, the lawful ability to respond to potential attacks has indeed shifted. But at what point is such action acceptable and in accordance with international law?

There are generally two camps—one in favor of preemptive attacks and one against such action viewing it as a violation of

international law. A third way, offered by Professor Yoram Dinstein, seems the best path to follow. Interceptive self-defense seems the best means to approach the Iran situation. Thus, the United States should not wait until “the missiles are on the launching pads” before reacting to any threat from Iran. On the other hand, the United States should also not attack when there is no clear intent of imminency.

Thus, under international law and applying Professor Dinstein’s model, we could only strike Iran when there is clear intent of action against the United States, her allies, or interests. Indicia of such clear intent would be: mobilization; intercepts of communications regarding air strikes or intent of attack; repeated violations of U.N. sanctions and the creation of nuclear weaponry; violations of the territorial sovereignty of nations within the region; attacks on nations within the region; or simply overt attacks on U.S. interests overseas such as firing upon U.S. vessels, kidnapping of U.S. service members, murders of U.S. citizens, or attacks on the Embassy. Although not nearly all inclusive, this provides (in this short space), some clear actions upon which the United States could strike at Iran without violating international law.

VII. WHAT ADDITIONAL CHANGES ARE NECESSARY TO BRING FISA INTO THE 21ST CENTURY?

A. *Stephen Vladeck*

The debate over the need to “modernize” the Foreign Intelligence Surveillance Act (FISA) has been greatly aided by a white paper prepared by David Kris,¹⁰⁸ who supervised the government’s use of FISA as Associate Deputy Attorney General from 2000 to 2003. The crux of Kris’s argument for modernization focuses on technological innovations since the statute was written in 1978, and the increasing anachronism of statutory distinctions based upon physical location. His paper bears reading in full, and I wouldn’t dare try to encapsulate his recommendations in the limited space provided here.

On the whole, I can’t say that I disagree with Kris’s analysis.

108. See David S. Kris, *Modernizing the Foreign Intelligence Surveillance Act* (Joint Project of the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution, Working Paper, 2007), available at http://www.brookings.edu/papers/2007/1115_nationalsecurity_kris.aspx.

Starting from the assumption that FISA as enacted was constitutional; modernizing FISA *should* be based upon adapting its underlying principles to current technology. My only hesitation, and one to which Kris alludes in his paper but does not fully explore, is whether the physical distinctions that Kris would largely eliminate in order to keep up with technology are of constitutional significance. If one believes, as I do, that there are any number of applications through which FISA brushes up against (and perhaps even violates) the Fourth Amendment, then even the most prudent and expedient revisions to the statute must be carefully scrutinized, lest the drift toward increasing flexibility weaken fundamental and well-established constitutional constraints.

Take the “significant purpose” debate, for example. As has been explained in detail elsewhere, prior to September 11, FISA had been interpreted to authorize FISA warrants only where the “primary purpose” of the investigation was to gather foreign intelligence information.¹⁰⁹ In section 218 of the USA PATRIOT Act of 2001,¹¹⁰ Congress substantially relaxed that requirement, providing that the government need only show that the gathering of foreign intelligence information is a “significant purpose” of the investigation. But there is at least some argument that the “primary purpose” requirement is constitutionally grounded, a question on which lower courts have divided.¹¹¹ In other words, there is an important question whether FISA, as enacted, already authorizes warrantless surveillance up to the constitutional limit.

The devil, of course, is in the details. My point is not to suggest any one individual revision that might raise constitutional concerns, but rather that we must *generally* be careful, even as we “modernize” FISA, not to take lightly constitutional debates that prompted the statute’s careful drafting in the first place.

109. See, e.g., Nola K. Breglio, Note, *Leaving FISA Behind: The Need To Return to Warrantless Foreign Intelligence Surveillance*, 113 YALE L.J. 179, 186 (2003) (“[T]he executive should be excused from securing a warrant only when the surveillance is conducted primarily for foreign intelligence reasons.” (quoting *United States v. Truong Dinh Hung*, 629 F.2d 908, 912–13 (4th Cir. 1980) (internal quotation marks omitted))).

110. *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism* (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291.

111. *Compare, e.g., Mayfield v. United States*, 504 F. Supp. 2d 1023, 1042–43 (D. Or. 2007) (holding that the “significant purpose” amendment is unconstitutional), *with In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) (reaching a contrary conclusion).

B. Tung Yin

One key issue that needs to be clarified is the extent to which FISA's surveillance warrant requirement applies to electronic surveillance conducted purely by computers without any observation by humans. In other words, is it legal for computer programs to "prescreen" phone calls and e-mails involving Americans in the United States, with the overwhelming majority of such calls and e-mails never examined by human beings? One could argue that the government complies with the Foreign Intelligence Surveillance Act¹¹² (in spirit, if not letter) when it then seeks a FISA warrant to review those few phone calls and e-mails identified by the computers as potentially relevant to anti-terrorism investigations.

C. Amos Guiora

I propose expanding FISA's primary purpose beyond its current limited focus of issuing wire-tapping warrants. The primary impetus for the proposal is to minimize operational mistakes resulting from either faulty intelligence or a misreading of available intelligence. The essence of the proposal is requiring the executive branch to submit to the FISA Court intelligence *prior* to undertaking a specific counterterrorism operation.

This process results in institutional checks on the Executive. While the proposal suggests a curtailing of executive power, in essence it is philosophically akin to the FISA Court's issuance of a wire-tapping warrant in response to an executive-branch request. The proposed model suggests expanding the FISA Court's purview to reviewing intelligence information relevant to operational counterterrorism. However, a recommended standard for analyzing the reliability and sufficiency of the information is dependent on the adoption of a modified version of the "right to confront."

Such a test seemingly limits the state's right to self-defense. In essence what is suggested is a balancing test. The balancing would enable the state to act operationally *earlier* than today, but only *after* subjecting the intelligence information to strict scrutiny by the FISA Court.

Unlike the criminal law paradigm which is comprised of

112. 50 U.S.C. §§ 1801–1863 (2000 & Supp. IV 2004).

“checks and balances,” operational counterterrorism predicated on intelligence information presently is not subject to institutionalized criteria or independent analysis. The proposed “strict scrutiny” standard reflects a balanced approach regarding operational counterterrorism: *act earlier but with greater certainty*.

The logistics of this proposal are far less daunting than they initially appear. The court before whom the Executive would submit the evidence is the FISA Court.¹¹³ Presently, FISA Court judges weigh the reliability of intelligence information in determining whether to grant government ex parte requests for wire-tapping warrants. While this is admittedly an imperfect solution, the proposal establishes judicial approval prior to the Executive’s undertaking a counterterrorism operation predicated solely on intelligence information.

The standard the court would adopt in determining the information’s reliability is the same applied in the traditional criminal law paradigm. The intelligence must be reliable, material, and probative. While the model is different—a defense attorney cannot question state witnesses—the court will assume a dual role. In this dual role capacity, the court will examine (actually, in theory cross-examine) the representative of the intelligence community and subsequently rule as to the information’s admissibility.

While some may suggest that the FISA Court is largely an exercise in “rubber-stamp[ing],”¹¹⁴ the proposal’s purpose is to require the government to present the available information to an independent judiciary as a precursor to engaging in operational counterterrorism. In ruling on the information’s “admissibility,” the court would be authorized to order the government to provide additional intelligence prior to “signing off” on the request.¹¹⁵

113. *Id.* §§ 1801–1829. The Foreign Intelligence Surveillance Court, created under FISA, is composed of seven federal district court judges from across the United States; the judges are appointed by the Chief Justice of the Supreme Court. See Anne Bell, *Foreign Intelligence Surveillance*, THE ONLINE NEWSHOUR, PBS, Mar. 1, 2006, http://www.pbs.org/newshour/indepth_coverage/terrorism/homeland/fisa.html.

114. See Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 81, 95 (2003); James E. Meason, *The Foreign Intelligence Surveillance Act: Time for Reappraisal*, 24 INT’L LAW. 1043, 1052 (1990).

115. How much intelligence and what intelligence will be “enough”? This question was considered, but the answer is that the exact amount is unquantifiable. This paper does not propose to quantify the amount of intelligence that will be enough for the FISA court to sign off on, because there is

Though the proposal explicitly calls for changing the nature of the relationship between the executive and the judicial branches of the government, it would serve to minimize intelligence-based mistakes in operational counterterrorism. Is the court's decision enforceable? Can the Executive ignore the FISA Court's ruling? To ensure enforcement, a President that acts in contravention to the FISA Court's ruling could be liable for committing a crime—and possibly an impeachable offense.

D. Glenn Sulmasy and James D. Carlson

The Foreign Intelligence Surveillance Act (FISA) was drafted in 1978. It is clearly outdated. As this is being written, Congress is embroiled in a debate about the temporary legislation known as the Protect America Act of 2007 (PAA) enacted in August just prior to the summer recess. The intention of the legislation, strongly and emotionally pleaded for by leading members of the intelligence community, including Mike McConnell, was to update FISA to meet gaps and loopholes contained within the original legislation drafted in 1978. Unfortunately, as the House has taken up a review of the temporary legislation, politics is rearing its ugly head into the arena of national security.

While the PAA has only been in effect for three months, it has permitted the United States to temporarily close an intelligence gap by enabling intelligence professionals to collect, without a court order, foreign intelligence on targets located overseas. These are known as so called "foreign to foreign contacts." The collection in question has no impact on the U.S. citizen or her constitutional rights. This legislation is focused on the foreign to foreign communications only. The technology of cell phones, computers, the internet, and other such means of communication were not (and could not have been) in the minds of the drafters of the original FISA back in the late 1970s. The internationalization of technology now often requires such communications to be "routed" through a site located here in the United States. Thus, this was creating many issues and exposing the United States to not being able to obtain all the information necessary to protect the United States. The PAA of 2007 helped remedy this confusion. Unless reauthorized by Congress, however, the authority provided in the PAA will expire February 2008. Thus, Congress needs to

no practical answer to that question.

avoid bickering and politics, and rise above partisanship to do three things with the current legislation before them: 1) make the PAA permanent; 2) provide protection from private lawsuits against companies alleged to have assisted the government in the aftermath of the September 11 attacks on the homeland; and 3) ensure U.S. citizens constitutional rights are maintained.

Unfortunately, the current version of the House legislation, although proactively updating some of the foreign intelligence collection laws, accomplishes none of the three key requirements listed above. Therefore, there needs to be greater debate on this issue within both Chambers attentive to the national security ramifications of not updating FISA—particularly in making the legislation permanent and in supporting those companies who acted in “good faith” in responding to needs of the United States and its demands immediately following 9/11. FISA and PAA, in the war on al Qaeda, are critical tools in waging this armed conflict. Without question, they are more important now than in the past. Such foreign intelligence gathering is actually a “tactic” in fighting al Qaeda and its network. The al Qaeda warrior is not from one country, but roughly fifty different nations, wears no uniform, and flouts the laws of war. Al Qaeda are hybrid warriors—part international criminal and part jihadist. Thus, in the current armed conflict, reliance on intelligence and detection of cells before they become operational is more important than in past conflicts. The ability to prevent attacks on the United States is directly linked to providing the tools necessary to our intelligence professionals operating overseas.

Updating FISA should also include the creation of permanent judges for FISA courts. Judges learned in the niche practice of intelligence law, military law, and the law of armed conflict need to be making decisions on FISA applications and appeals. The war we are engaged in is dependent on strong intelligence operations and the need for judges to be specialists in this area will become of greater importance for the foreseeable future. This is a war, and judges only versed in traditional law enforcement regimes and requirements are likely to be overly restrictive when applying requests for intercepts when the nation is on a wartime footing. Creating a special court with special judges will help FISA modernize and be more of an effective national security tool than currently exists.

Modernizing FISA is not a political issue; it is a national

security issue. Although even we disagree on some elements of the PAA, both sides need to work together to provide the tools necessary for the government to conduct these operations while still ensuring U.S. citizens' constitutional rights and human rights are maintained.

VIII. SHOULD CONGRESS PASS A STATUTE THAT, BY ACTING AS A SHIELD FROM SUBPOENAS, WOULD ALLOW JOURNALISTS TO PROTECT THEIR SOURCES?

A. *Stephen Vladeck*

I find myself somewhat conflicted on arguments for a federal journalist shield law. I generally support proposals for such a measure, albeit with some important caveats. Every state, except Hawaii and Wyoming, either has a shield law or recognizes a common law privilege for reporters against disclosing the identity of confidential sources. And there are incredibly strong policy reasons to support a similar shield for reporters from federal subpoenas, lest confidential sources lose faith in the ability of reporters to protect their identity.

One argument that is often raised in response is that a federal shield law would jeopardize national security, as it would make it that much harder for the government to investigate (and successfully prosecute) those who illegally leak classified national security information. Thus, whatever interest the public has in a press capable of protecting confidential sources, that interest is easily outweighed by the government's interest in keeping its secrets secret.

My own view is that this concern is mostly overblown. Federal shield proposals such as the Free Flow of Information Act of 2007 contain exceptions where the reporter is an eyewitness to, or participant in, a crime; or if there is an imminent threat to life or national security.¹¹⁶ In the context of classified national security information, both exceptions are present.

First, it will not take much convincing to conclude that the disclosure of classified national security information creates an imminent threat to national security. Second, and more importantly, the Espionage Act of 1917 (along with a host of other

116. S. 2035, 110th Cong. §§ 3, 5 (2007).

statutes surveyed in substantial detail elsewhere), proscribes the disclosure of classified national security information to anyone “not entitled to receive it.”¹¹⁷ Thus, whether or not the *reporter* is violating the Espionage Act by receiving such classified information, the reporter is, at a minimum, witnessing a crime—the disclosure by the government official.

In short, so long as such a law took account of those cases where I would be less inclined to allow reporters to protect the identity of their confidential sources, then I think Congress *should* enact a federal journalist shield law.

B. *Tung Yin*

As a threshold matter, the question does not indicate whether the shield would be absolute or qualified; by qualified, I mean that the privilege could be overcome in certain circumstances. Since the currently-proposed shield laws are qualified, I shall confine my discussion accordingly. I will note that an absolute shield would be very difficult to justify, for it would create, as the Supreme Court noted, “a system that would be unaccountable to the public, would pose a threat to the citizen’s justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates.”¹¹⁸

On the other hand, the Valerie Plame scandal, in which a former CIA undercover operative had her cover “blown” by a leak to political journalist Robert Novak, suggests that even the mass media itself is not of unanimous thought about the desirability of a shield law. At the beginning of the disclosure of Plame’s identity, the mainstream press fully supported the idea of a government investigation into the leak. It was only when special prosecutor Patrick Fitzgerald subpoenaed reporters Judith Miller and Matt Cooper to reveal their sources, that the press began to have second thoughts.¹¹⁹

The basic argument for some sort of shield law makes sense to me: journalists are in the business of gathering information and

117. See generally Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973) (surveying the statutory framework of the Act).

118. *Branzburg v. Hayes*, 408 U.S. 665, 697 (1972).

119. Perhaps the mainstream press relished the thought of a government investigation of Novak, a conservative journalist and columnist.

disseminating that information; sometimes the information is in the hands of a person who does not want to be identified as the source of the news story; and thus, absent some ability to assure the source that the reporter will not cavalierly “burn” him or her, the information may remain hidden from the public. Many states have been persuaded to adopt their own shield laws that require the party seeking to pierce the privilege to demonstrate that alternative avenues of seeking the information have failed and that the information protected by the privilege is important to the litigation at hand.

Still, I wonder how effective a qualified shield law can be. While it would express a norm of protecting journalists from being forced to disclose their sources—itsself a valuable accomplishment—I would expect intense litigation in high-profile or sensitive cases, and it is quite possible that “national security” would often, if not nearly always, serve as a trump card to overcome the privilege.¹²⁰

C. *Glenn Sulmasy and James D. Carlson*

Congress should not, in matters of national security, legislate a shield from subpoenas. The protection of sources is of primary concern in day-to-day operations but the balance necessarily shifts toward the government in times of armed conflict or in areas dealing with national security. To do otherwise seems absurd. As Judge Posner has said, adherence to the Constitution is not a suicide pact.¹²¹ Matters of national security must always be distinguished from traditional law enforcement or other matters. Thus, although ingrained in our socio-political culture to promote freedom of the press as a means to check against the abuses of government, the negative effects of those who leak sensitive information, particularly if such laws are enacted, would severely

120. Some would argue that the “state secrets doctrine” has metastasized into a similar kind of “the government always wins” trump card. See, e.g., Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931 (2007); Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 *TEMP. L. REV.* (forthcoming 2008) (manuscript at 25, available at http://works.bepress.com/jeremy_telman/3/). Cf. Robert Chesney, *State Secrets and the Limits of National Security Litigation*, 75 *GEO. WASH. L. REV.* 1249, 1301 (2007) (concluding that the Bush administration has not overused the state secrets doctrine compared to prior administrations).

121. RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

impact the ability of the government to fulfill its core, primary function: to protect the citizenry.

Having said that, thirty-one states now have a reporter-source shield laws in effect. The federal government does not.¹²² Journalists have been called to testify about their sources with increased frequency.¹²³ In 2005, Judith Miller spent 85 days in jail for contempt for refusing to reveal her source in the Valerie Plame leak investigation; she remained in jail until her source released her from keeping his identity secret. By the time of publication of this piece, author James Risen will have decided how to handle a grand jury subpoena to testify in early February about his source for material in his book *State of War*, wherein he details CIA foul-ups related to its activities towards Iran.¹²⁴ A more exhaustive list of similar attempts to get reporters to reveal their sources would fill many more pages.

The journalist's choice is between divulging their source, which will most certainly affect (that is, shut down) future access to confidential sources, and maintaining confidentiality of the source, which at worst will help consummate an illegal act for material unlawfully leaked (as in the leak that provided Risen his material), potentially landing the reporter in jail for contempt.

The media was exceedingly important to the Founding Fathers, who saw a free press as the watchdog against a tyrannical government.¹²⁵ They would have never envisioned the excesses of the twenty-four hour media coverage of the 21st century. Today, the media is hailed in some circles for uncovering purported government excesses in its prosecution of the war on al Qaeda. However, it is now clear that some of the published information came from a source who unlawfully leaked it. This sets the stage for a worst case scenario: is the decision for an informant to leak information contrary to the law; the decision for a reporter to write

122. Anastasia Heeger, *Securing a Journalist's Testimonial Privilege in the International Criminal Court*, 6 SAN DIEGO INT'L L.J. 209, 230 (2005).

123. Leslie Siegel *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469, 469 (2006).

124. Philip Shenon, *Times Reporter Subpoenaed Over Source for Book*, N.Y. TIMES, Feb. 1, 2008, at A17.

125. An often cited example is Thomas Jefferson's statement, "If it were left to me to decide whether we should have a government without a free press or a free press without a government, I would prefer the latter." Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *reprinted in* 6 THE WRITINGS OF THOMAS JEFFERSON 57 (Andrew Lipscomb et al. eds., 1905).

on it; and the inability for a government to figure out any other way to seal the leak. Ultimately, it comes down to self-censorship.

Although necessary in some areas, a shield law should not be enacted to protect media sources in national security cases. The status quo is the best balance to ensure a free press that does not trump the homeland's security.

IX. DOES THE *JOSE PADILLA* CASE PROVE THAT THE CIVILIAN CRIMINAL JUSTICE SYSTEM CAN EFFECTIVELY HANDLE TERRORISM CASES?

A. *Stephen Vladeck*

As subjectively biased as my answers to the other questions may be, my answer to this question is *objectively* biased, given that I worked on the *Padilla* litigation at various points. That being said, I'm not sure *Padilla* is all that helpful either in proving that the civilian criminal justice system *can* effectively handle "terrorism" cases, or, perhaps more importantly, that it cannot. On the one hand, the government obtained a conviction against one of the higher-profile terrorism suspects arrested since September 11. And assuming the sentence stands on appeal, it will be well over a decade before *Padilla* goes free.

On the other hand, the crimes for which he was indicted and convicted pale in comparison to the plots in which the government claims he participated. One of three things is true: either the government had evidence connecting *Padilla* to the more serious allegations, but could not use it because it was 1) too sensitive; 2) inadmissible; or 3) it did not have such evidence. We just can't know the answer to that question, but I'm bothered much more by 1) than I am by 2) or 3). Rules precluding the admission of coerced or hearsay testimony exist for a reason—such testimony tends to be *unreliable*. And so the only real reason why *Padilla* might prove that the civilian criminal justice system *can't* handle these cases is if the most serious evidence in the government's possession was too sensitive to be disclosed to the jury. To me, though, that *possibility* is not enough to justify calls for departing from the traditional civilian criminal process.

The harder issue raised by the *Padilla* case is the government's midstream change-in-tactics from military detention to civilian criminal prosecution, and the concomitant question of whether *Padilla* should (and will) ever have an opportunity to meaningfully

contest the legality of his detention separate from his conviction. Here, I am in complete agreement with Judge Luttig:

For, as the government surely must understand, although the various facts it has asserted are not necessarily inconsistent or without basis, its actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake—an impression we would have thought the government could ill afford to leave extant. They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time, that the President possesses the authority to detain enemy combatants who enter into this country for the purpose of attacking America and its citizens from within, can, in the end, yield to expediency with little or no cost to its conduct of the war against terror—an impression we would have thought the government likewise could ill afford to leave extant.¹²⁶

Finally, I think the better test for the civilian criminal justice system's ability to handle high-profile terrorism cases is the *Moussaoui* trial. I recently had the pleasure of helping to organize a conference on proposals for a new national security court at which the presiding judge in the *Moussaoui* trial, the Honorable Leonie Brinkema, gave the keynote address. Judge Brinkema spoke to her experience with the case, and her fervent belief that the civilian judicial system is capable of handling terrorism trials. Her remarks are available online,¹²⁷ and are worth listening to; she's in a far better position to answer this question than I am.

B. Geoffrey S. Corn

It certainly did not undermine this proposition. *Padilla* and other terrorism prosecutions have been effective in not only adjudicating allegations of terror, but also in rebutting the assertion that the nature of the contemporary terrorist threat created a compelling need for the use of military commissions or that there is an imperative need for a new court devoted to terrorism or national security related cases. Ironically, the

126. *Padilla v. Hanft*, 432 F.3d 582, 587 (4th Cir. 2005) (mem.).

127. See Remarks of the Hon. Leonie Brinkema at American University Washington College of Law (Feb. 1, 2008), available at <http://www.wcl.american.edu/podcast/podcast.cfm?uri=http://www.wcl.american.edu/podcast/audio/20080201WCLTAD.mp3>.

argument for efficiency seems to have been turned on its head as the result of the effective application of federal criminal law to alleged terrorists. While cases such as Padilla's do require a substantial amount of time and resources, the only military commission case to proceed to judgment was the result of a plea agreement of questionable credibility (David Hicks did plead guilty following the resurrection of the military commissions by operation of the Military Commission Act,¹²⁸ but it seemed clear he chose to forego putting the government to the test only because it provided him an immediate ticket back to Australia).

The key to this question is the word "effectively." In the context of terrorism prosecutions, "effectively" must be defined not only in terms of prosecutorial efficiency, but also in terms of legitimacy of the process. In this regard, cases like Padilla's demonstrate that effective terrorist prosecutions can be conducted without depriving defendants of substantive and procedural rights historically associated with legitimate criminal process. They also prove that the complexity of these cases does not necessitate a specialized tribunal to deal with them.

There are, of course, concerns with relying on the civilian courts to deal with such cases. One such concern is related to the legal complexity resulting from the intersection of domestic criminal and international law. The characterization of the struggle against transnational terrorism as an "armed conflict" invariably implicates rights and obligations derived from the laws of war. The *Padilla* case, and that of his co-defendant Hassoun, as with other such cases, raised concerns about whether this intersection is effectively understood by the civilian judiciary and can be effectively digested by civilian jurors. However, one clear advantage of the civilian criminal process is that convicted defendants have a full opportunity to raise alleged errors on appeal. Furthermore, as the body of jurisprudence related to these cases continues to grow, these issues will be extensively vetted and accordingly better understood by both the federal judiciary and the attorneys involved.

C. *Tung Yin*

One case cannot *prove* that the criminal justice system can

128. Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

handle terrorism cases effectively, because it may be the next case that highlights the critical defects in the system. We should no more judge the ability of the civilian criminal justice system to process al Qaeda suspects based on one case than we would judge the fairness of military tribunals based on one (hypothetically) successful prosecution.¹²⁹

That said, even if we could judge the criminal justice system based on one case, I would not think that the *Padilla* case would be the one to use. It is questionable what this case actually proves. Is it that the government is capable of convicting terrorism defendants in federal court without having the proceedings degenerate into a spectacle, as happened in the *Moussaoui* case? Is it that terrorism defendants can receive a fair trial?

In the end, I am skeptical that the *Padilla* trial proves much of anything. It is impossible to know how much the jury was affected, either directly or subconsciously, by the government's prior claims that Padilla returned to the United States in May 2002 intending to build a radiological ("dirty") bomb to explode in a major city. It is impossible to know how much Padilla's ability to help conduct his own defense was impaired by his years of detention in a military brig and the incessant interrogation.

Indeed, to demonstrate further pessimism, I am not even sure that successful criminal convictions in cases such as the Lackawanna Six and the Portland Cell necessarily prove that the civilian criminal justice system can handle terrorism cases effectively. As I have examined elsewhere,¹³⁰ there are reasons to wonder about the validity of the guilty pleas in those cases.

D. Norman Abrams

Does the "*Jose Padilla* case" refer to the prosecution, trial, and conviction of Padilla in the U.S. district court in Florida for terrorism-related offenses, or does it also include the entire long sequence of events relating to Padilla, a sequence that I have elsewhere described as "The Saga of Jose Padilla"?¹³¹

129. Of course, we can judge a system based on one failure, so perhaps the question should really be asking whether the Zacarias Moussaoui trial proves that the criminal justice system *cannot* handle al Qaeda suspects. See A. John Radsan, *The Moussaoui Case: The Mess from Minnesota*, 31 WM. MITCHELL L. REV. 1417 (2005).

130. See Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 BYU L. REV. 1255 (2006).

131. NORMAN ABRAMS, *ANTI-TERRORISM AND CRIMINAL ENFORCEMENT* (3d ed.,

If “case” refers to the Florida prosecution of Padilla, then the question is directed to the relatively simple issue of whether a successful civilian criminal prosecution of a person charged with terrorist offenses demonstrates that the civilian criminal justice system is adequately equipped to handle terrorism cases. No single case, not even necessarily a group of successful criminal prosecutions of this type, can constitute proof that the civilian criminal justice system can effectively handle terrorism cases. Indeed, the Padilla prosecution is a poor example to cite in support of that proposition since: 1) it was based on facts investigated by the government prior to Padilla’s detention as an enemy combatant; and 2) the case did not include many of the issues that make civilian criminal terrorism prosecutions difficult for prosecutors. Compare, for example, the case of *United States v. Moussaoui*,¹³² which is a poster case for the difficulty of prosecuting a terrorism case in a civilian court, because of the special and unusual classified information issues that arose in that case.

If the original question refers to the entire saga of Padilla, then answering the question is more complicated. Padilla was originally arrested as a material witness. He was later declared an enemy combatant and moved to military custody, and then detained and interrogated for a very lengthy period. In the meantime, he sought habeas corpus review; his original lawsuit went to the Supreme Court which ruled that he had sued the wrong person in the wrong court. Padilla’s attorneys began again. He won in the district court; the government appealed to the circuit court of appeals, which ruled in its favor. Padilla then sought certiorari review in the Supreme Court. Before the Court could rule on his petition, the government transferred Padilla to civilian custody and added him as defendant to an indictment in the United States District Court for the Southern District of Florida.

The transfer of Padilla back to civilian custody was widely interpreted as reflecting the government’s concern that it would lose before the high court. In fact there is a simpler, more likely explanation for the transfer of Padilla back to civilian custody for prosecution. If the government had continued to detain Padilla in military custody, it would have been committed to indefinitely

forthcoming 2008).

132. 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

detaining him without prosecution, or releasing him, since military prosecution was not an option under the existing Presidential Military Order. Prosecution before a military commission under the Order was restricted to non-citizens, and Padilla, of course, was a U.S. citizen.

Moreover, the government's chances before the Supreme Court looked somewhat better since the court of appeals had concluded, based on new information submitted by the government, that Padilla's detention fell within the principle established in *Hamdi v. Rumsfeld*,¹³³ namely that he had been in combatant status on or near the battlefield.

Eventually, if the government wished to prosecute him, it would necessarily have had to transfer him back to civilian custody. And the government undoubtedly preferred to take that step before Supreme Court review of the case rather than after. Why so? The government had essentially nullified the effect of the Supreme Court decision in the prior *Hamdi* decision by settling the matter and releasing him after it had *won* the right to continue his detention. The government should have been concerned by the Court's distress over the sequence of events in *Hamdi*. Had it proceeded with Supreme Court review in *Padilla* and *then afterwards* switched Padilla to civilian custody for prosecution, the Court might well have reacted strongly. Better to make the transfer before rather than after Supreme Court review.

To return to the original question, the *Padilla* case does not demonstrate that the civilian criminal justice system can effectively handle terrorism cases. It does, however, highlight the fact that the present military system for dealing with terrorists makes no provision for trying persons like Padilla, that is, U.S. citizens accused of terrorist crimes. *And* unless alternative processes are to be developed, whether military or otherwise, the prosecution of U.S. citizens will necessarily continue to take place in the civilian criminal justice system—whether or not that system can effectively handle terrorism cases.

E. Amos Guiora

The trial of Zacarias Moussaoui—held out by some as an example justifying the effectiveness of Article III courts for terrorists—highlights the many problems attendant with trying

133. 542 U.S. 507 (2004).

suspected terrorists in an Article III court. Moussaoui, often referred to as “the 20th hijacker,” was suspected of training with al Qaeda in preparation for the 9/11 attacks and later pled guilty to six counts of conspiracy. While initially denying involvement, he ultimately confessed that he was supposed to fly a fifth plane into the White House. Grandstanding throughout the process, Moussaoui largely turned the trial into a farce. The court—particularly when Moussaoui chose to represent himself—was largely unequipped to respond to or prevent his antics, which significantly affected public perception of the judicial process.

Furthermore, Moussaoui’s trial raised Sixth Amendment compulsory due process concerns.¹³⁴ Preparing his defense, Moussaoui asked for access to “alleged terrorist ringleader Ramzi bin al-Shibh”¹³⁵ who, at the time, was in federal custody, because Moussaoui believed bin al-Shibh could provide exculpatory evidence. The government, however, argued that giving Moussaoui access to bin al-Shibh would compromise national security.¹³⁶

The court, however, agreed with Moussaoui, “holding that the Sixth Amendment right to compulsory process is not outweighed by claims that the government’s intelligence-gathering efforts would be undermined.”¹³⁷ Moussaoui “would be given access to, and could present to the jury, a compilation of summaries of reports of bin Al-Shibh’s statements taken by the government.”¹³⁸ The court’s decision highlights the ongoing conflicts between a suspected terrorist defendant’s rights and the government’s security concerns.

The fundamental deficiencies with using Article III courts in a terrorist context are inherent. First, much of the evidence available against suspected terrorists is predicated on intelligence information. Article III courts, however, must abide by certain constitutional rights, including the Sixth Amendment right to confront one’s accuser. This right places an explicit limitation on the prosecution. It deprives the prosecutor of the ability to go forth with *all* available (and confidential) intelligence information, since the defendant would not be able to confront it.

134. See Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795, 835–37 (2004) (discussing some of the Sixth Amendment issues raised by the *Moussaoui* case).

135. *Id.* at 835.

136. *Id.*

137. *Id.* at 835–36.

138. *Id.* at 837.

In addition, a defendant in an Article III court has a right to trial by a “jury of his peers.”¹³⁹ Put simply: if Osama bin Laden were detained today and brought before a court of law, would it be possible to find a “jury of his peers”? Would it be possible to find twelve members of the community willing to sit in judgment of the most wanted terrorist on the planet?

While an instinctual, reflexive, revenge-based answer is “yes,” closer scrutiny suggests that fears of retribution from bin Laden supporters would drive the overwhelming majority of potential jurors literally “underground.” Two principal staples of Article III courts are, in essence, incompatible with terrorism-related trials: the right to confront one’s accusers and trial by a jury of one’s peers.

Others raise similar concerns. For example, Jack Goldsmith and Neal Katyal suggest that criminal prosecutions are “not always feasible.”¹⁴⁰ For instance, “[s]ome alleged terrorists have not committed overt crimes and can be tried only on a conspiracy theory that comes close to criminalizing group membership.”¹⁴¹ Also, the standard of proof for evidence collected in Afghanistan “might not meet every jot and tittle of American criminal law.”¹⁴² Goldsmith and Katyal argue that instead, Congress should “establish a comprehensive system of preventive detention that is overseen by a national security court composed of federal judges with life tenure.”¹⁴³

Domestic terror courts address the principal issues associated with Article III courts. By enabling the government to introduce available intelligence information, domestic terror courts create a forum for the government to present its case in full. Does this affect the rights of the defendant? In full candor, the answer is yes. But, the proposed court will protect the defendant by ensuring that the court will not automatically accept the introduced intelligence into the record.

139. See *Carter v. Jury Comm’n*, 396 U.S. 320, 330 (1970) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)) (defining “peers” as “equals of the person whose rights it is selected or summoned to determine . . . of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds”).

140. Jack L. Goldsmith & Neal Katyal, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19.

141. *Id.*

142. *Id.*

143. *Id.*

That is, the government will have to show that the intelligence information is *valid, viable, relevant, and corroborated*. Strict scrutiny that balances the legitimate rights of the individual with the equally legitimate national security rights of the state is one of the significant advantages of the proposed domestic court.

Under my proposal, intelligence information would be presented in camera by the prosecutor and a representative of the intelligence services who would be subject to rigorous cross-examination by the court. The judges who would sit on the domestic terror court would be trained in understanding intelligence information. In addition, the bench would be expected to fulfill a “double role”—that of fact finder and defense counsel alike. As the latter will be barred from attending the hearings when intelligence information is submitted, the domestic terror court *would have to* proactively engage the prosecutor. The burden on the court would be enormously significant because the defendant, who would not be present, would not have counsel representing him with respect to the submission of intelligence information into the record.

This is a major stumbling block regarding domestic terror courts. Based on my experience sitting as a judge in administrative detention hearings where the only evidence relevant to the detainee was intelligence information, the burden on the judge is significant. However, it is the *only* manner in which intelligence information can be submitted. In analyzing terrorism-related cases, it is critical that the role of intelligence information be fully understood: it is all but impossible to conduct a terrorism-related case without it.

That is, without making intelligence information available, no court can fully understand or appreciate the role a particular defendant has played in a terrorist cell. Without that information, a court cannot understand the inner workings of a terrorist cell, its goals, missions, and motivations. Without that information, a court will be, in essence, groping in the dark.

Some in favor of Article III courts suggest that:

The difficulties involved in using classified evidence in terrorism prosecutions do not provide compelling support for an argument that the criminal justice system should be abandoned in terrorism cases; these difficulties are entirely self-imposed If the government determines that it is more important to national security that a piece of information remain secret than to prosecute the

terrorist, it can simply choose not to use that information or not to charge that terrorist until some unclassified evidence of his guilt can be presented. If the government determines that it is more important to national security to prosecute the terrorist than to keep the information in question secret—perhaps to prevent him from carrying out a terrorist attack—it can simply declassify the information and use it as evidence against him.¹⁴⁴

While this argument is true—the government can choose whether or not to prosecute a terrorist based on whether they want to disclose intelligence information or not—it is inherently limiting. The government is caught in an all-or-nothing situation; either it keeps intelligence information secret, or it prosecutes terrorists. This highlights both the importance of intelligence information (essential in order to try terrorists) and the Article III courts' inability to properly account for its importance. Domestic terror courts, on the other hand, allow the government both to maintain the secrecy of intelligence information *and* to try suspected terrorists. As George Washington wrote in 1777:

The necessity of procuring good Intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it, they are generally defeated, however well planned and promising a favourable issue.¹⁴⁵

F. *Glenn Sulmasy and James D. Carlson*

Jose Padilla and other similar cases, such as the *Moussaoui* case, actually highlight the need for a new court system rather than simply continuing to jam a square peg in a round hole.¹⁴⁶ At first

144. Michael German, *Trying Enemy Combatants in Civilian Courts*, 75 GEO. WASH. L. REV. 1421, 1426–27 (2007).

145. Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 811 (2007) (quoting Letter from George Washington to Col. Elias Dayton (July 26, 1777), in 8 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 479 (John C. Fitzpatrick ed., 1931)) (internal quotation marks omitted).

146. Recent events further demonstrate the limitations of using the civilian courts by accused international terrorists. Padilla sued various members of the U.S. Government for memoranda drafted and legal advice given. See Adam Litptak, *Padilla Sues Former U.S. Lawyer Over Detention*, N.Y. TIMES, Jan. 5, 2008, at A9 (reporting that Padilla is filing suit against John Yoo, author of the so-called

glance, some see the benefit of the using the existing Article III federal court system without the need for an additional court. Clearly, if possible and practicable, this would be the best case scenario. However, there are many concerns with simply using the civilian system (analogously, the purely military system did not, and cannot function in the current environment).

Examples of problems associated with using the existing system include: 1) obtaining unbiased juries to hear a given international terror case—regardless of venue; 2) evidentiary concerns from those captured on the battlefield in Afghanistan; 3) Fourth and Fifth Amendment issues associated with the exclusionary rule—unlikely warrants will be issued overseas, or in a battle zone; 4) the introduction of classified material; 5) clearance issues for myriad defense counsel; 6) the inadvertent disclosure of classified evidence—including the names of nations working alongside the United States to capture or fight al Qaeda; 7) concerns over the right to pro se counsel as evidenced in the *Moussaoui* case; 8) application of the *Brady* rule and providing exculpatory evidence; 9) courts being used as propaganda tools for al Qaeda (their training manuals tell them to do just that); 10) potential for ten federal cases being tried in ten different circuits and the inconsistencies stemming from such otherwise normal use of the courts; 11) the “slippery slope” of accommodating or relaxing certain rules in the federal courts could begin to “bleed” over into other standard criminal practices (bad for the overall U.S. justice system); 12) the documented need for additional and lifelong judge protective details during and after hearing a case; and 13) many existing federal judges need enormous training to gain knowledge of intelligence law and operations as well as military law. Interestingly, both the *Moussaoui* and *Padilla* cases were, and are still being, used as propaganda tools for al Qaeda. Although their current litigation is clearly frivolous and will be thrown out of court, the propaganda victory of such actions against members of the U.S. Government cannot be overstated.

Again, these (and other potential) weaknesses of using the

“torture memo”). *Moussaoui*, a French citizen who plead guilty and is serving time, now claims his constitutional rights were violated. See Adam Litpak, *The Right to Counsel, in the Right Situations*, N.Y. TIMES, Feb. 26, 2008, at A11 (discussing *Moussaoui*’s claim that his right to counsel was violated when the trial court ruled he must have a lawyer with security clearance and limited the information that attorney could pass to *Moussaoui*).

federal system highlight the need for a new specialized court system dedicated to national security purposes.

X. WHAT IS THE MOST IMPORTANT ISSUE IN NATIONAL SECURITY LAW TODAY?

A. *Stephen Vladeck*

To me, the most important issue in national security law today is the question of where we go from here. Regardless of what happens this coming November, the Twentieth and Twenty-Second Amendments together guarantee that, at 12:01 p.m. on Tuesday, January 20, 2009, there will be a new President. For better or for worse, that President will have his or her own ideas about how best to simultaneously protect national security and civil liberties, and will have our collective experience with the past seven years to build on, however good or bad that experience happens to have been.

With that in mind, there is an assumption that pervades much of the writing (and even more of the public discourse) relating to national security law today—that the balance between national security and civil liberties inevitably reduces to a zero-sum game, and the only difference between our national leaders (and our political parties) is where they would place the fulcrum of the scale. As a result, all national security policy initiatives are seemingly cast in binary political—and partisan—terms. Those who support a measure to strengthen our security must not care about individual rights. Those who oppose it must be weak, and must not have the best interests of the United States at heart.

My own suspicion is that, especially in the area of national security law, this divisiveness is dangerously counterproductive and stands in the way of genuine, principled reform. Reasonable people can and should disagree about the best way to protect the country from all threats, man-made or natural, foreign or domestic. But my fear is that, under current conditions, neither side thinks the other has anything useful to add to the conversation. So as we look to the future and to the “most important issue” in national security law today, I think the answer is figuring out how we move forward together in protecting *both* the security of the nation *and*

the freedoms that make securing the nation worthwhile.¹⁴⁷ And whether or not “war is too serious a business to be left to the generals,” I have little doubt that national security is too serious a business to be left to partisan politics.

B. Geoffrey S. Corn

The most important issue in national security law today is the relationship between national security law and national security policy. U.S. national security policy will succeed only if policy is responsive to law, and not vice versa. To paraphrase Justice Frankfurter from the *Steel Seizure* case, the existence of emergency does not, *ipso facto*, produce power in government; and power in the federal government to respond to emergency does not, *ipso facto*, produce power in the executive branch.¹⁴⁸ However, most observers would now agree that this was exactly the philosophy that dominated executive-branch decision making in the aftermath of the terror attacks of September 11.

This distorted view of the role of law in the development and execution of national security policy was pervasive at the highest levels of the executive branch. With issues ranging from the legal basis for Operation Iraqi Freedom, to the status and treatment of individuals captured by the armed forces during the military component of the self-proclaimed Global War on Terror, to the development of a process for the use of military commissions, to the use of national intelligence assets to conduct domestic surveillance, law had become a slave to policy. This not only undermined the legitimacy of these critical national security policy decisions—a number of which were subsequently invalidated because of defective legal foundations—but it damaged morale of the thousands of legal advisors serving throughout the executive branch. These lawyers—some relatively inexperienced, others with long and distinguished careers in government service—had always understood their ultimate role to be that of ensuring the policymakers they advised adjusted their decisions to the dictates of law. However, the message sent through the dubious legal opinions emanating from the senior levels of the executive branch undermined this fundamental tenet of ethical responsibility and

147. See *United States v. Robel*, 389 U.S. 258, 264 (1967).

148. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 593–614 (1952) (Frankfurter, J., concurring).

suggested that the “new” role of legal advisors was to interpret law in a way that accommodated policy objectives.

This is not to suggest that legal advisors should pride themselves on being “naysayers.” Indeed, the tradition of the government legal advisor is quite the opposite. These lawyers have historically taken great pride in their ability to assist policymakers in identifying legally sound courses of action to achieve established policy objectives. But good faith application of controlling legal authority has always been the “first principle” of such an approach to advising policymakers, and such alternate courses of action have ultimately been responsive to the unyielding commitment to ensure policy is adjusted to comply with law, not that law is adjusted to facilitate policy. Nor is this a suggestion that all existing legal constraints on policy are always logically and pragmatically sound. But the response to such impediments must always be to seek modifications in the law, not manipulation, marginalization, or circumvention.

The fallout from this distortion of the relationship between law and policy has been profound. Key legal opinions have been withdrawn; key legal advisors have been discredited; senior career legal advisors—such as the Judge Advocate Generals of the military services—have stood in unison against their politically-appointed counterparts to challenge and undo prior legal decisions and associated executive branch policy decisions. But perhaps most pernicious has been the uncertainty this approach has injected into the operational decision-making realm.

Another significant, although more subtle, negative consequence of this distortion was how the dubious legal analysis flowing from the executive branch produced a loss of congressional confidence and a resulting backlash in the form of legislating operational standards. This was most apparent with regard to the treatment of detainees, leading to the passage of the Detainee Treatment Act.¹⁴⁹ Setting aside the question of whether the Act actually achieved the asserted objectives of Congress, the mere fact that Congress felt compelled to legislate in an area historically entrusted to executive discretion reveals the extent of the loss of confidence resulting from executive overreaching. These legislative rebukes have not been limited to detainee treatment, but

149. Detainee Treatment Act (DTA) of 2005, Pub. L. No. 109-148, Title X, 119 Stat. 2680, 2739.

have extended to several other key areas of the Bush national security policy. All of this reveals a truly unfortunate executive branch deviation from the tradition of interpreting and applying law in a manner consistent with its underlying purpose, and not in a manner designed to “get to yes.”

As the Supreme Court observed in *United States v. Robel* in 1968, “[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which make the defense of the nation worthwhile.”¹⁵⁰ The first bulwark against such subversion is preserving the traditional understanding of the relationship between law and policy. Fidelity to this “first principle” of the role of a government legal advisor must begin at the highest levels of government. Without such an understanding, legitimacy in the realm of national security will invariably be the first casualty.

C. *Tung Yin*

From a structural perspective, I would say that the most important issue in national security law (and national security policy) today is the unfortunate mindset that focuses on addressing problems of the past, rather than the future. This mindset manifests itself, for example, in the crime/war debate about the appropriate approach to dealing with al Qaeda, with one side generally preferring to use pre-9/11 terrorism prosecutions as the model, and with the other side using World War II as the model. I do not mean to suggest that we should simply tear up the Constitution, or that national security should always trump civil liberties in the balancing act, but rather that reflexive pre-9/11 thinking, by either side, may be counterproductive.

D. *Norman Abrams*

The most important issue in national security law today is how to fight terrorism without compromising the basic values of a free society. But this formulation of the issue is too general to be meaningful. The issue of striking the right balance between the anti-terrorism effort and civil liberties needs context. Somewhat narrower but still arguably too broad a formulation would focus on executive authority: what are the limits on the President’s authority

150. 389 U.S. 258, 264 (1967).

to fight terrorism?

There are also other specific matters of serious concern that might be considered for the title of the most important issue—for example, the treatment and trials of the men detained in Guantanamo, the extraordinary rendition of persons seized abroad, the use of extreme methods of interrogation, or issues of NSA eavesdropping. But these topics, while important, are too narrow and focused to qualify for the “most important” title.

My candidate for the most important issue today in national security law is the question of whether we should adopt special rules, and if so, what kind, for dealing with persons suspected of serious terrorism activity who are arrested in the United States.

Post 9/11, the Administration adopted a “we-are-at-war” basis for treating individuals seized on the battlefield in Afghanistan and elsewhere in the world, and used a similar basis for seizing Jose Padilla and Ali Saleh Kahlah al-Marri in the United States. But the idea of putting persons arrested for terrorism activity in the United States into military custody violates our traditions. If we reject the military option, we are left with a choice: continuing to handle serious terrorism cases arising in the United States in our normal civilian criminal processes, or trying to develop a system of special rules for dealing with such cases that meets constitutional norms while improving our ability to fight terrorism. Developing such a system poses a special challenge.

Why is this question so important? Because how it is answered will determine not only the level at which the battle against terrorism can be fought for the indefinite future, but also whether we can conduct that fight without compromising the basic values of our free society.

E. Amos Guiora

In the American paradigm, the most important issue in national security law is how do we “move forward” post-Bush administration. Put another way, how do we restore what I call two-sided vigilance: vigilance against those who seek to randomly attack and kill innocent civilians and vigilance against an unfettered Executive.

Let me begin with the latter. Six and a half years after 9/11 the “scorecard” regarding respect for the rule of law is troubling. The litany of the Bush administration’s fundamental legal and policy flaws have been discussed at length: the articulation and

implementation of a torture-based interrogation regime, rendition of detainees to nations whose torture practices were well known to American decision makers, indefinite detention of detainees, lack of independent judicial review, and denial of habeas corpus are but the most obvious examples.

Hand in hand with these is what I suggest has been a largely silent Congress, one that initially enabled the Administration to conduct the so-called and misnamed “War on Terror” devoid of congressional oversight. The Republican Congress granted President Bush “carte blanche” in the aftermath of 9/11. The results are the examples above.

Similarly, the Supreme Court (in the spirit of the late Chief Justice Rehnquist’s philosophy that “in times of armed conflict the Court must be reticent”) has—in large part—not been a forceful nor timely practitioner of active judicial review of the Executive. While *Hamdan*¹⁵¹ is perhaps this generation’s *Youngstown*,¹⁵² it is also important to recall that the Court only (finally?) announced its decision in July 2006. That is, for almost five years, thousands of individuals *suspected* of involvement in terrorism were held in a largely rights-less regime before the Supreme Court decided that the military commissions were fundamentally flawed.

Balancing legitimate national security considerations with equally legitimate civil rights considerations is the essence of civil, democratic regimes. A philosophy premised on “by all means necessary” ensures an institutionalized imbalance that may well result in “round up the usual suspects” and “guilt by association.” That is the danger that results from a failure to be vigilant *both* with respect to a very real threat from terrorism and the danger that results from an unfettered Executive. Justice Jackson’s ageless words of wisdom in *Youngstown* must be the “guiding light” by which the next Administration, the Congress, the Court, the media, and the public respond to the never-ending terrorism threat.

F. *Glenn Sulmasy and James D. Carlson*

The critical issue in national security law of the 21st century is that the West, led by the United States, needs to update its efforts in fighting international terrorism. As such, we offer four steps to turn the tide against al Qaeda and the rising threat of international

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

152. *Youngstown Sheet & Tube Co. v. Sawyer*, 243 U.S. 579 (1952).

terrorism.

Our public discourse about the “War on Terror” has become stale and mired in hyperbole. The nation needs to forge a new path in the armed conflict against al Qaeda. Six years into the international armed conflict, the public debate is void of any fresh ideas about how to move the country forward in the conflict of our generation.

This lack of vision in the public debate is readily apparent as the 2008 presidential race unfolds. We are deluged with debates, commercials, and solicitations about minor issues, but there have been no new ideas introduced to win the “War on Terror.” In fact, it rarely is discussed.

A new doctrine needs to be embraced by both policymakers and the candidates. Reviewing, studying, and presenting new ideas is not a partisan issue; but rather one that we, as a nation that promotes human rights, must fully support. Our standing among friends and foes alike has been tarnished. A new doctrine, with four major components, is needed. They are:

- 1) Change the name of the war;
- 2) Morph the military commissions into a permanent national security court;
- 3) Lead an international call for a convention to review the Geneva Conventions to determine if, and how, the conventions might be updated to meet the needs of handling the detainees captured in the war; and
- 4) Make the recent FISA reforms permanent while striking the right balance for the Terrorist Surveillance Program.

First, call the war what it is—a war against al Qaeda. From a strategic level, this name change will help focus our efforts. We can win a war against al Qaeda. It gives a face to the entity we fight. It gives us the chance to defeat this enemy and to declare victory at some point. As it now stands, the nebulous “War on Terror” sounds all too similar to the “war on poverty” and the “war on drugs,” neither of which are “winnable.”

Tactically, changing the name of the conflict will permit decision makers in Washington to sharpen their efforts to provide adequate resources. Legally, this titular change affords a more concrete jurisprudential foundation to detain, interrogate, and adjudicate crimes against the international terrorists. The ambiguities as to the status of the detainees, as compared to traditional POWs, remain a sore point with our allies. This will

help remove some of the cynicism, both domestically and internationally, about who we are detaining and will detain in the future.

Second, create a standing terrorist court: the President, the Secretary of Defense, and the Secretary of State all have declared their desire to close Guantanamo Bay as a detention center. In fact, all three leading Presidential candidates have also declared their desire to close the Guantanamo Bay detention center. The key, then, is to determine what judicial system can best handle these unique cases. A natural maturation from the Military Commissions Act would be a hybrid court—a mix of both the military commissions and the Article III federal courts. The war itself is unique—it requires a mixture of both a law enforcement response as well as a military response. These are hybrid warriors in a hybrid war—thus, there is a need for a new hybrid court to better detain, interrogate, and adjudicate their cases.

Third, lead the call for an international conference to review the Geneva Conventions: this is a global conflict, and as such, we need to have consensus from our global partners on to how to proceed. The United States should determine if a new protocol might be necessary to identify and handle the al Qaeda international terrorists as they are different from both traditional warriors and terrorists seeking national revolution or other domestic political changes.

Finally, update the Foreign Intelligence Surveillance Act (FISA): few disagree that there needs to be some intelligence collection program conducting surveillance overseas. However, controversy has arisen when some of these “intercepts” include U.S. citizens. FISA was drafted in 1978—before computers, cell phones, and other electronic means of communication. During the fall session of the Congress, clear guidelines need to be created for FISA and the reforms legislated last session need to be made permanent. In doing so, however, we must balance our constitutional and human rights obligations with our legitimate national security needs.

These four cornerstones of a new strategy are critical to moving the debate forward and to fighting the war. Instead of battling over what already has occurred, we need to be debating what to do in the future as al Qaeda plans its next major attack upon the U.S. homeland. These issues are the most critical in national security law today.