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The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making

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The cruel September 11 attacks exposed the United States' vulnerability to terrorist acts on U.S. soil, this time from foreign actors perceived as willing and capable of striking again on a similar or greater scale. The U.S. federal government responded swiftly and aggressively to these attacks. With approval from Congress[1] and the Security Council,[2] as well as the support of many nations,[3] the executive launched a military strike against the Taliban in Afghanistan for harboring al Qaeda, the group deemed responsible for the attacks. The executive also "declared" an all-out war against al Qaeda, as well as other terrorists

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[1] Days after the attacks, Congress enacted a Joint Resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) [hereinafter September 18 Joint Resolution].

[2] S.C. Res. 1368, U.N. SCOR, S/RES/1368 (2001).

[3] George W. Bush, *President Thanks World Coalition for Anti-Terrorism Efforts*, Office of the Press Secretary (Mar. 11, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/03/print/20020311-1.html.

and their supporters, by seeking to capture and prosecute them.[4] These two responses resulted in the mostly-secret detentions of hundreds captured abroad or arrested in the United States. These detention practices have become the subject of litigation in U.S. courts.[5] This Article examines the courts' "mixed" responses[6] in the recent litigation, and proposes three principles that guide, or should guide, judges' decision-making in cases that implicate national security concerns.

In Afghanistan and other countries, the U.S. military captured several hundred foreign nationals as "enemy combatants,"[7] de-

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[4] George W. Bush, *Address to a Joint Session of Congress and the American People*, Office of the Press Secretary (Sept. 20, 2001), *available at* http://news.findlaw.com/cnn/docs/gwbush/bushspeeech20010920.html. *See also* U.S. Department of Justice Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks, 10-16 (June 2003) [hereinafter OIG Report], *available at* http://www.usdoj.gov/oig/special/03-06/index.htm.

[5] My research yielded eleven lawsuits challenging various aspects of the U.S. detention practices: Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y 2002) and Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (filing "next friend" habeas corpus petitions on behalf of "enemy combatants" in U.S. prisons); Coalition of Clergy v. Bush, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2073 (2003); Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom.* Al Odoh v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (filing "next friend" habeas corpus petitions on behalf of all or a few of the detainees at Guantanamo Bay); *In re* the Application of the United States for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D.N.Y. 2002) and United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (filing motions to invalidate material witness warrants or suppress the grand jury testimony of a material witness); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) and N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003) (filing motions to enjoin closed immigration hearings); Turkmen v. Ashcroft, Class Action Complaint and Demand for Jury Trial, Civ. No. 02-() (E.D.N.Y. Apr. 17, 2002) (challenging the indefinite detention of persons ordered deported from the United States) [hereinafter *Turkmen*, Class Action Complaint and Demand for Jury Trial], *available at* http://news.findlaw.com/hdocs/terrorism/turkmenash41702cmp.pdf; Haddad v. Ashcroft, Order Granting Plaintiff's Motion for Preliminary Injunction, Civ. No. 02-70605 (E.D. MI Sept. 17, 2002) (filing motion for different immigration judge and new public bond hearing); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003) (filing motion to compel FOIA request for information about the detainees); Am. Civil Liberties Union of N.J., Inc. v. County of Hudson, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002), *cert. denied*, 803 A.2d 174 (2002) (filing motion to compel Right-to-Know Law request for information about INS detainees); and American-Arabs Anti-Discrimination Committee v. Ashcroft, 241 F. Supp. 2d 1111 (C.D. Cal. 2003) (seeking to enjoin the INS detention practices of non-immigrants of mostly Arab nations who are required to register with the INS).

[6] By "mixed," I mean that the outcomes in some cases favored the executive and in others the petitioners. *See infra* Part I.

[7] The term "enemy combatant" is not a term of art under international humanitarian law. Rather, the President appears to have expropriated the word from *Ex*

taining them in Afghanistan or in Guantanamo Bay.[8] The military also captured in Afghanistan at least one U.S. citizen, detaining him in a U.S. military prison.[9] Inside the United States, federal law enforcement, in conjunction with state and local agencies, launched a sweeping investigation into the terrorist attacks and other terrorist threats against U.S. citizens and U.S. interests. As part of this domestic so-called war on terrorism, the executive detained at least several hundred individuals for either alleged violations of various criminal or immigration laws, or as material witnesses believed to possess information relevant to terrorist activities.[10] Moreover, at least one U.S. citizen and a Qatari national who were arrested in the United States are being held in military custody as "enemy combatants."[11]

The executive has relied on federal criminal statutes to arrest some of the detainees, although most have been charged with crimes unrelated to terrorism.[12] As this Article goes to publica-

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parte Quirin, 317 U.S. 1 (1942). American Bar Association Task Force on Treatment of Enemy Combatant, *Preliminary Report* (Aug. 8, 2002) at 7-8 [hereinafter ABA Preliminary Report], *available at* http://www.abanet.org/leadership/enemy_combatants.pdf.

[8] *See infra* note 258 and accompanying text.

[9] *Hamdi*, 316 F.3d at 450. See also *infra* note 73 and accompanying text (discussing the circumstances of Hamdi's capture). The military did not treat John Walker Lindh, also a U.S. citizen captured in Afghanistan, as an "enemy combatant." On July 15, 2002, he pled guilty to supplying services to the Taliban. As part of his plea, he agreed to cooperate with investigators. He will serve twenty years in prison. *Timeline*, DETROIT NEWS, Sept. 11, 2001, at 02S.

[10] Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, Declaration of James Reynolds, No. 01-2500 (U.S. D.C. District Court) (on file with author) [hereinafter *Ctr. for Nat'l Sec. Studies*, Declaration]. *See also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960 (2002) (discussing the executive's secret detention practices after the September 11 attacks).

[11] Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). The executive arrested U.S. citizen Jose Padilla, a.k.a. Abdullah Al Muhajir, in Chicago on May 8, 2002, pursuant to a material witness warrant related to grand jury proceedings. *Id.* at 569. On June 9, 2002, the President determined that Padilla was an "enemy combatant" and should be transferred to military custody. *Id.* at 571-72. The executive believes Padilla was exploring a plan to build and explode a radioactive "dirty bomb." *Id.* at 572-73. In June 2003, President Bush designated Ali S. Marri, a Qatari man, who arrived in the United States the day before the September 11 attacks, an "enemy combatant." Mike Allen & Alan Cooperman, *Bush Designates Qatari Man as an Enemy Combatant*, WASH. POST, June 29, 2003, at A3. Federal prosecutors accused Marri of being part of an al Qaeda sleeper cell. *Id.*

[12] According to the most recent information released by the Department of Justice, 134 individuals have been detained on federal criminal charges in the post-September 11 investigation; ninety-nine have been found guilty either through pleas or trials. Many of the crimes bear no relation to terrorism. Ctr. for Nat'l Security Studies v. U.S. Dep't of Justice, 331 F.3d 918, 921 (D.C. Cir. 2003). *See also* http://

tion, the executive has charged or linked five individuals with crimes related directly to September 11 or with other attempted acts of terrorism.[13] In addition, the executive has indicted approximately twenty-three individuals for their "association" with al Qaeda or the Taliban.[14] To detain material witnesses, the executive has relied on the 1984 "material witness statute."[15] As to

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news.findlaw.com/legalnews/us/terrorism/cases/index.html (listing some of the criminal and civil "terror" cases since September 11).

[13] These men are: Zacarias Moussaoui (the alleged "20th hijacker"), Richard Reid (the airline "shoe bomber"), Mohamed Abdoula (the Yemeni college student accused of arranging flight lessons for two of the hijackers) and Iman Faris (the Ohio truck driver accused of plotting to bomb a New York bridge). *Special Coverage: War on Terrorism*, *at* http://news.findlaw.com/hdocs/terrorism/usmouss71602spind.pdf (last visited Sept. 20, 2002); http://news.findlaw.com/hdocs/docs/terrorism/usreid122301cmp.pdf; http://news.findlaw.com/legalnews/us/terrorism/cases/index2.html#abdoulah; and http://news.findlaw.com/ndocs/Faris/USFaris603scf.pdf. The government of Pakistan also handed over to the United States Ramzi bin al-Shibh, believed to be a high-profile suspect in the planning of the September 11 attacks. David Johnston & David Rohde, *Terrorism Suspect Taken to U.S. Base for Interrogation*, N.Y. TIMES, Sept. 17, 2002, at A1.

[14] In addition to John Philip Walker Lindh, *supra* note 9, the executive indicted four men with operating a sleeper al Qaeda cell in Detroit. Two of the defendants were found guilty of the charges, a third was acquitted of the terror-related charges but found guilty of conspiracy related to document fraud, and a fourth was aquitted of all charges. Danny Hakim, *Man Aquitted in Terror Case Says Co-Defendents Will Be Cleared*, N.Y. Times, June 6, 2003, at A15. The executive also charged a Seattle man, James Ujaama, with conspiring to aid al Qaeda by attempting to establish a terrorist training camp in Oregon. Allan Lengel, *Skepticism of Detroit's Arab Americans Grows Some Doubt: Charges Against 4 Accused of Operating Terror Cell*, Wash. Post, Sept. 15, 2002, at A3. In addition, the executive charged six men residing in Buffalo, New York of providing "material support" to terrorists by receiving training at an al Qaeda camp in Afghanistan. Four of these defendants have plead guilty and in exchange for a lesser sentence have agreed to cooperate with the terror investigation. Associated Press, *Fourth New York Terror Suspect Pleads Guilty* (Apr. 9, 2003), *available at* http://www.miami.com/mid/miamiherald/news/nation/5593534.htm. The executive similarly charged six people from Portland, Oregon with conspiring to join al Qaeda and the Taliban regime to wage war on U.S. forces in Afghanistan after the September 11 attacks. *U.S. Charges Six with Conspiracy: Group Allegedly Tried to Join Al Qaeda*, WASH. POST, Oct. 5, 2002, at A1. Finally, the executive indicted approximately nine members of organizations alleged to be a financial front for terrorism. United States v. Sattar, Indictment, No. 02 Cr. 395 (S.D.N.Y. 2003), *available at* http://news.findlaw.com/hdocs/terrorism/ussattar040902ind.pdf (case against four members of the Islamic group); United States v. Arnaout, Indictment, No. 02 Cr. 892 (N.D. Il. 2003), *available at* http://news.findlaw.com/hdocs/docs/terrorism/usarnaout10902ind.pdf (case against Director of the Benevolence International Foundation); and Timothy L. O'Brien, *Federal Indictment Charges 8 with Operating Terrorist Network*, N.Y. TIMES, Feb. 10, 2003, *at* http://www.nytimes.com/2003/02/2D/national/20CND-INDICT.html?ex=1062907200&en=3066280f65025460&ei=5070 (discussing the arrest in Florida and Illinois of members of the Islamic group).

[15] 18 U.S.C. § 3144 (1984).

the immigration detainees in prolonged detention, the executive appears to rely on a September 20, 2001, INS regulation that allowed the former INS to detain individuals without charge for forty-eight hours or for "an additional reasonable period of time" in the event of an emergency or other extraordinary circumstance.[16] Finally, the military has relied on President Bush's Military Order of November 13, 2001,[17] and subsequent military orders,[18] to detain non–U.S. citizens in Afghanistan or in Guantanamo Bay, as well as U.S. citizens in U.S. military bases, as "enemy combatants." The executive has also cited statutory authority to execute the military detentions.[19]

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[16] 8 C.F.R. § 287.3(d) (2003). The executive's reliance on this provision has been challenged by advocates of immigration detainees because their clients are being held for prolonged periods of time rather than ordered deported, apparently in the hope that their detention will produce leads in the anti-terrorist investigation. *See* Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1189-90 (2002); *Turkmen*, Class Action Complaint and Demand for Jury Trial, *supra* note 5. Interestingly, the executive has not relied on provisions of the USA PATRIOT Act that grant the attorney general the power to detain for up to seven days non-U.S. citizens whom the attorney general has "reasonable grounds" to believe fall within the expansive immigration anti-terrorist provisions. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 412(a)(3), 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act]. Congress enacted the USA PATRIOT Act two months following the attack, responding, in part, to extraordinary political pressure from the executive. *See* A. Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373 (2002) (discussing the Anti-Terrorism Act of 2001 (ATA), the Bush administration's proposed legislation introduced to Congress just over a week after September 11). Yet, because the USA PATRIOT Act did not grant the executive the expansive immigration powers it sought, the executive has circumvented Congress' effort to impose a seven day limit by not certifying any of the detainees as a terrorist suspect. *See id.* at 386-91 (discussing the legislative history of the USA PATRIOT Act pertaining to Congress' refusal to grant the executive's request for more expansive immigration detention powers). *See also* Ashar, *supra* at 1190 (explaining that the INS has not certified any detainee as a terrorist suspect to circumvent the USA PATRIOT Act); OIG Report, *supra* note 4, at 32-71 (describing the attorney general's reliance on the regulation, rather than statutory guidelines, for immigration detentions and the delays in processing these detainees).

[17] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter November 13 Military Order].

[18] On June 9, 2002, for example, President George W. Bush issued an order to the Secretary of Defense setting forth the President's conclusion that Padilla is an "enemy combatant." Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 572-73 (S.D.N.Y. 2002). In summary, the basis for that conclusion included that Padilla is "closely associated with al Qaeda," engaged in "hostile and war-like acts" including "preparation for acts of international terrorism" and possesses information that would be helpful in preventing al Qaeda attacks. *Id.*

[19] The President cites three sources of authority: his powers as commander in

The executive has largely acted with the utmost secrecy in treating these detainees. Except for partial information it has disclosed because of pressure from lawsuits[20] and Congress,[21] the executive has refused to reveal the identity, national origin, place of detention, and reason for detention of most persons who are held either as immigration detainees, as material witnesses, or for violating federal crimes.[22] Among this group, the executive has ordered hundreds removed from the United States in secret immigration hearings.[23] The executive has also treated those de-

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chief, Congress' September 18 Joint Resolution, and 10 U.S.C. §§ 821, 836. RICHARD H. FALLON, ET. AL, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 52 (4th ed. 1996 and Supp. 2001). *But see infra* note 271 and accompanying text (discussing challenges to the President's claim to statutory authority).

[20] Several civil rights groups filed two lawsuits to compel the executive to release certain information about the detainees under the Freedom of Information Act (FOIA) or the New Jersey Right-to-Know Law. *See* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003); Am. Civil Liberties Union of N.J., Inc. v. County of Hudson, 799 A.2d 629, 629 (N.J. Super. Ct. App. Div. 2002).

[21] *See* 147 CONG. REC. S13923 (daily ed. Dec. 20, 2001) (statement of Sen. Feingold).

[22] *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 918. On January 11, 2002, Attorney General Ashcroft released two lists with partial information (on file with author). One of the lists contained the detainees' names, dates of detention or release, the names of the lawyers, and the criminal charges against ninety-two individuals. The criminal charges overwhelmingly dealt with using forged documents to commit financial fraud, falsifying identification and immigration documents, and other immigration crimes (e.g., refusing to leave after having been ordered deported, re-entering the country illegally, and harboring undocumented immigrants). Three individuals were charged with murder, weapon trafficking, bringing firearms and explosives into an aircraft, or pirating an aircraft. Zacarias Moussaoui appears on this list. The second list provided the nationality, date of detention, and the immigration charges against 725 individuals. The list blacked out, however, the detainees' names, where they were being detained, and, if represented by counsel, the names of their lawyers. These two lists did not contain any information about those being detained as material witnesses. In addition, Section 1001 of the USA PATRIOT Act directs the Office of the Inspector General (OIG) to receive and review claims of civil rights and civil liberties violations by department employees. USA PATRIOT Act, *supra* note 16. In April 2003, the OIG issued its first report, which was critical of the executive's treatment of immigration detainees. OIG Report, *supra* note 4. The OIG Report focused solely on the treatment of immigration detainees held in New York and New Jersey, including the charging process, the no-bond policy, and the removal and conditions of detention. *Id.* OIG Report mostly analyzed the flaws in the procedures from detention to removal or release, but it also disclosed some specifics on the actual practices, including demographics and length of detention. *Id.* at 20-21, 30, 105.

[23] Professor Cole cites that the executive has ordered removed from the United States over 700 non-U.S. citizens in such secret immigration hearings. Cole, *supra* note 10, at 961-62; *see also* Tamara Audi, *U.S. Held 600 for Secret Rulings: Immigrants Jailed for Terrorism Investigators*, DETROIT FREE PRESS, July 18, 2002, *available at* http://www.freep.com/news/mich/secret18_20020718.htm. These numbers are

tained as material witnesses as high-security inmates, denying them access to visitors, including their family and lawyers.[24] Similarly, the executive has barred the Guantanamo Bay detainees from talking with counsel or with their family members.[25] Moreover, the executive has denied two U.S. citizens and one foreign national, who are being held in military detention as "enemy combatants" inside the United States, access to all visitors, including attorneys seeking to represent them.[26] The executive has paradoxically provided more information (and greater rights) to

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likely to be much higher in light of the mass detentions that followed when certain non-immigrant, mostly Arab males reported to the former INS to register as required by regulation. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002) (to be codified at 8 C.F.R. § 264.1 CF). On November 6, 2002, the former INS ordered all male nationals of Iran, Iraq, Libya, Sudan, and Syria born on or before November 15, 1986, who were inspected and last admitted to the United States on or before September 10, 2002, and who plan to remain in the United States at least until December 16, 2002, to register before an immigration officer by December 16, 2002. 67 Fed. Reg. 67,766 (Nov. 6, 2002). A Department of Justice spokesperson has reported to the media that about 400 people who showed up to register in Southern California alone were detained, allegedly for visa problems. David Rosenzweig, *Three Groups Sue Over Arrests of Arab Men: They Seek an Injunction to Prevent Widespread Government Detentions of People Showing up to Register with the INS, as Happened Last Week*, L.A. TIMES, Dec. 25, 2002, at B3. Similar detentions have been reported in other cities, although in fewer numbers. *See, e.g.*, Barry Witt, *Six-day Ordeal for Immigrants: 13 from Bay Area Comply with New Security Program are Detained*, SAN JOSE MERCURY NEWS, Dec. 26, 2002, at 3B. Since then, the former INS issued three additional orders with respect to several other nationalities. 67 Fed. Reg. 70,525 (Nov. 22, 2002) (requiring nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen to appear for special registration); 67 Fed. Reg. 77,642 (Dec. 18, 2002) (requiring nationals of Bangladesh, Egypt, Indonesia, Jordan, and Kuwait to appear for special registration); and AG Order 2643-2000 (Jan. 16, 2003) (requiring nationals of Bangladesh, Egypt, Indonesia, Jordan, and Kuwait to appear for special registration).

[24] *See* United States v. Awadallah, 202 F. Supp. 2d 55, 60-61 (S.D.N.Y. 2002). Material witnesses have a statutory right to appointed counsel. *In re* Class Action Application of All Material Witnesses in W. Dist. of Tex., 612 F. Supp. 940, 943 (W.D. Tex. 1985). However, restricted phone use and location transfers have impeded their contact with counsel. *See Awadallah*, 202 F. Supp. 2d at 82. *See also* Steve Fairaru & Margot Williams, *Material Witness Law Has Many in Limbo: Nearly Half Held in War on Terror Haven't Testified*, WASH. POST, Nov. 24, 2002, at A1 (reporting that at least forty-four people arrested as material witnesses, seven of whom were U.S. citizens, have been held under maximum security conditions, ranging from a few days to several months or longer, with only twenty having been brought before a grand jury).

[25] *See* Rasul v. Bush, 215 F. Supp. 2d 55, 62-64 (D.C. Cir. 2002).

[26] Hamdi v. Rumsfeld, 296 F.3d 278, 280 (4th Cir. 2002); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 565, 573-74 (S.D.N.Y. 2002); Susan Schmidt, *Qatari Man Designated an Enemy Combatant*, WASH. POST, June 24, 2003, at A1.

those charged with serious terrorist-related offenses.[27]

The executive has similarly relied on statutes, or has acted without congressional authorization, to refuse the public information about the detainees, or access to them. The Department of Justice has cited several Freedom of Information Act (FOIA)[28] provisions that exempt the government from having to disclose information about law enforcement practices, if doing so would interfere with the investigation, invade personal privacy, or endanger the safety of an individual.[29] The military has refused any access to "enemy combatants" by relying on the November 13 Military Order. This order, as well as subsequent military orders, authorize trial by military commission, without judicial review, of non-U.S. citizens (and apparently citizens)[30] whom the government suspects of international terrorism.[31] To refuse public access to the immigration hearings of "special interest" cases, the executive has relied on a directive issued by Chief Immigration Judge Michael Creppy on September 21, 2001.[32] This directive calls on all immigration judges and court administrators to "close ['special interest'] hearings to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court."[33]

In some of the lawsuits, petitioners request that the courts curtail the executive's secret detention practices by declaring that federal agencies have exceeded the scope of their authority under existing statutes and violated their rights,[34] or have acted

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[27] ABA Preliminary Report, *supra* note 7, at 22 (discussing U.S. treatment of John Walker Lindh, Zacarias Moussaoui, and Richard Reid). Lately, the executive has been considering abandoning the prosecution of Zacarias Moussaoui in federal court and trying him before a military commission, citing that Moussaoui's request to access witnesses and evidence has created insurmountable legal impediments to his prosecution. Philip Shenon & Eric Schmitt, *Threats and Responses: The 9-11 Suspect, White House Weighs Letting Military Tribunal Try Moussaoui, Officials Say*, N.Y. TIMES, Nov. 10, 2002, § 1 at 17.

[28] Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1994).

[29] *Ctr. for Nat'l Sec. Studies*, Declaration, *supra* note 10, ¶ 12 (citing exemptions 7(A), 7(C) and 7(F) of the FOIA, 5 U.S.C. § 552(b)(7)).

[30] *See supra* note 18 and accompanying text.

[31] *See infra* note 265 for definition of "enemy combatant" under the November 13 Military Order.

[32] Memorandum from Chief Immigration Judge Michael Creppy to all immigration judges and court administrators for cases requiring special procedures (Sept. 21, 2001) (on file with author).

[33] *Id.* The directive does not explain the standards for deciding which cases are subject to secret proceedings.

[34] *In re* the Application of the United States for a Material Witness Warrant, 213

without congressional authorization to do so.[35] Other lawsuits challenge the executive's secret practices by alleging that these violate the public's right to know what "their government is up to"[36] under the FOIA and the First Amendment.[37] The executive, for its part, has denied exceeding its statutory authority when congressional authorization exists.[38] In the absence of congressional authorization (or if courts find none), the executive has also claimed inherent powers to act unilaterally under the President's power as commander in chief,[39] or pursuant to the

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F. Supp. 2d 287 (S.D.N.Y. 2002); United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (seeking the courts to hold that 18 U.S.C § 3144 does not authorize material witness warrants for grand jury testimony and that a different reading would violate the 4th Amendment); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 595-96 (S.D.N.Y. 2002) (alleging that Padilla's confinement violates 18 U.S.C. § 4001(a) and the USA PATRIOT Act); *Turkmen*, Class Action Complaint and Demand for Jury Trial, *supra* note 5 (alleging that the INS practice of retaining in custody those ordered removed or who agreed to voluntary departure for purposes of a criminal investigation violate 8 U.S.C. § 1231(a)(1) (ninety-day removal period) and 8 U.S.C. § 1229(a)(2) (120-day period for voluntary departure) and, inter alia, the 4th, 5th, and 6th Amendments).

[35] Rasul v. Bush, Petition for Writ of Habeas Corpus (D.D.C. Feb. 19, 2002) (alleging that the November 13 Military Order violates, inter alia, the War Powers Clause and the 5th and 14th Amendments), *available at* http://news.findlaw.com/hdocs/docs/terrorism/rasulbush021902pet.pdf; Padilla v. Bush, Amended Petition for Writ of Habeas Corpus, Civ. No. 02-4445 (S.D.N.Y. June 19, 2002) (alleging that President Bush's Order declaring Jose Padilla an "enemy combatant" and directing Donald Rumsfeld to detain him indefinitely for interrogation without access to counsel or the courts violates the 4th, 5th, and 6th Amendments and Article I (Suspension of the Writ) of the United States Constitution), *available at* http://news.findlaw.com/hdocs/docs/padilla/padillabush61902apet.pdf.

[36] U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773 (1989) (internal citations omitted).

[37] Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 920 (D.C. Cir. 2003) (alleging that the DOJ's refusal to disclose the information requested violated the FOIA and the First Amendment); N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (alleging that Chief Immigration Judge Michael Creppy's order to close "special interest" immigration hearings violates the First Amendment).

[38] Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, Memorandum in Support of Defendant's Motion for Summary Judgment, Civ. No. 01-2500, at 2-3 (on file with author) (arguing that the executive's non-disclosure of the information requested is consistent with the FOIA); *Awadallah*, 202 F. Supp. 2d at 62 ("The prosecution, however, claims that its power to detain material witnesses in connection with a grand jury investigation is authorized by section 3144. . . .").

[39] Padilla v. Bush, Motion to Dismiss Amended Petition for Writ of Habeas Corpus, Civ. No. 02-4445, at 3-4 (S.D.N.Y. June 26, 2002) (arguing that Padilla's detention as an "enemy combatant" is consistent with the laws of war during an ongoing armed conflict), *available at* http://news.findlaw.com/hdocs/docs/padilla/padillabush62602gmot.pdf; Hamdi v. Rumsfeld, Respondents' Motion to Stay Magistrate Judge's May 20, 2002 Order Regarding Access and Memorandum in Support,

"government's plenary power over immigration."[40] The government's pleadings also admonish the courts not to intervene improperly into the actions of the executive when it is acting in a time of urgent need to protect national security.[41]

These cases impose two difficult tasks on the judiciary. First, they require judges to consider the appropriate balance between competing interests of secrecy and openness on issues of national security, as well as between flexible law enforcement practices for collective security and the rights of individuals affected by such practices. Second, judges must also consider the judiciary's appropriate scope of review regarding the executive's response to threats to national security. This issue is of particular relevance when the executive purports to secretly detain, question, deport, or even prosecute either in excess of—or without—congressional authorization, and without judicial review.[42]

In the past, judicial deference has broadly insulated the executive from accountability in matters of national security, at least

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Civ. No. 2:02CV348 (E.D. Va. May 23, 2002) (arguing that the President ordered Hamdi's detention as commander in chief in the context of ongoing combat operations against the al Qaeda terrorist network and remaining members of the Taliban in Afghanistan), *available at* http://news.findlaw.com/hdocs/docs/hamdi/hamdirum52302gmot.pdf; Rasul v. Bush, 215 F. Supp. 2d 55, 56 (D.C.C. 2002) (describing the executive's characterization of Guantanamo Bay detainees as "people who are seized during the course of combative activities," and that, therefore, "the scope of [their] rights are for the military and political branches to determine. . . .")

[40] *Detroit Free Press*, 303 F.3d at 685 (defending Chief Immigration Judge Michael Creppy's directive to close all special interest immigration hearings by arguing that the executive's power over immigration is plenary).

[41] Ashcroft v. N. Jersey Media Group, Inc., Government's Reply in Support of Application for a Stay Pending Appeal to the United States Court of Appeals for the Third Circuit, Civ. No. A-99, at 3 (S. Ct. June 2002) (arguing, inter alia, that the district court's order to open immigration hearings to the public is "a drastic incursion into the responsibilities of the Branch of the Government responsible for protecting the national security"), *available at* http://news.findlaw.com/hdocs/docs/terrorism/ashnjmg602grplysty.pdf.

[42] The judiciary also faces equally difficult questions when the executive acts with statutory authorization to infringe on civil liberties in the name of national security. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (upholding the Espionage Act convictions during WWI); Korematsu v. United States, 323 U.S. 214 (1944) (upholding Japanese internment during WWII). The USA PATRIOT Act has similarly raised significant concerns among civil liberty groups. *See* Ronald Weich, *Upsetting Checks and Balances: Congressional Hostility Toward the Courts in Times of Crisis*, ACLU, *at* http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9810&c=111&Type=s (Nov. 1, 2001). It is likely that this law will also be challenged in court. This Article, however, focuses only on those cases that challenge the executive's detention practices since September 11, due in substantial part to the executive's lack or abuse of congressional authority.

when Congress has remained silent, but also when deferring to the executive's expansive interpretation of statutes.[43] In fact, although many challenge the constitutional propriety of such decisions,[44] in at least some cases the U.S. Supreme Court has strongly suggested that the executive enjoys a degree of constitutionally-based discretion to act in matters of national security.[45]

There are also, however, important historical examples when judges have called into question the executive's claims to inherent national security powers;[46] or, at a minimum, have curbed the executive's discretion by refusing judicial remedies[47] or by reviewing its actions.[48] This varied judicial precedent on national security cases has resulted in some ambiguity about whether there are inherent executive national security powers, and, if so, what are their nature and scope.[49]

At first glance, the degree of judicial deference paid to the executive in the post-September 11 litigation can also be characterized as "mixed." Courts generally have demonstrated greater willingness to defer to the executive on matters that implicate the treatment of "enemy combatants." However, some courts have

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[43] *See*, *e.g.*, HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990); Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349 (1986); James R. Ferguson, *Government Secrecy After the Cold War: The Role of Congress*, 34 B.C. L. REV. 451 (1993); Matthew N. Kaplan, *Who Will Guard the Guardians? Independent Counsel, State Secrets, and Judicial Review,* 18 NOVA L. REV. 1787 (1994); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

[44] Many constitutional scholars have concluded that the founders intended national security to be a shared power among the three branches of government, subject to the system of institutional checks and balances. *See*, *e.g.*, KOH, *supra* note 43, at 69.

[45] *See*, *e.g.*, Envtl. Prot. Agency v. Mink, 410 U.S. 73, 83 (1973); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); United States v. Curtis-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

[46] *See*, *e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (holding that while the United States civil courts were still functioning, the president could not declare martial law).

[47] United States v. N.Y. Times Co., 403 U.S. 713 (1971) (refusing an injunction to enjoin the press from publishing government documents on the Vietnam War).

[48] *See*, *e.g.*, Steven J. Bucklin, *To Preserve These Rights: The Constitution and National Emergencies*, 47 S.D. L. REV. 85, 88-89 (2002). President Lincoln's biggest problem when he attempted to enforce the Enrollment Act of 1863, the nation's first draft, came from state and federal judges who issued writs to individuals seeking to avoid military service. *Id.*

[49] *See* Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 8 (2000).

been more willing to restrict the executive's discretion in regard to detainees with more attenuated connections to terrorism.

This Article attempts to clarify some of the ambiguity that has resulted from the different outcomes to date in the post-September 11 litigation. Specifically, this Article examines important factual and legal distinctions in the national security cases that have (or should have) influenced the courts' determination of the nature and scope of inherent executive powers in matters of national security. These distinctions reflect the inherent tension in the judiciary's attempt to balance the executive's pragmatic need to act expeditiously and decisively in times of national crisis against the constitutional requirements of institutional checks and balances, which include the judiciary's role of protecting individual rights.

Three factual or legal distinctions have (or should have) guided the outcomes in the post-September 11 litigation. First, the extent to which courts have considered the executive's actions to implicate greater concerns with national security than domestic affairs has influenced the scope of the judicial deference granted to the executive. This national security/domestic affairs dichotomy, which the U.S. Supreme Court adopted in *Curtiss-Wright*[50] and implicitly affirmed in *Youngstown*,[51] remains "good law."[52] This precedent holds that the executive's national security inherent powers are correspondingly greater to the extent that its actions affect national security affairs (*Curtiss-Wright*), and correspondingly less to the extent that its actions affect domestic affairs (*Youngstown*).[53] Thus, when deciding cases in which the president claims inherent national security powers, courts must first attempt the difficult determination of whether the President's acts have a greater effect on national security—i.e., war powers[54]—than they do on domestic affairs.[55]

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[50] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315 (1936) ("That there are differences between [external and internal affairs], and that these differences are fundamental, may not be doubted.").

[51] Brownell, *supra* note 49, at 49-53 (discussing the several times Justice Jackson referred in his *Youngstown* concurrence to the difference between national security and domestic powers).

[52] *See infra* Part II.A.

[53] *Id.*

[54] National security refers to both war and foreign affairs powers. KOH, *supra* note 43, at 262 n.23. The term was not officially coined until the cold war when Congress enacted the National Security Act of 1947. *Id.* at 74. The only quasi-official definition of the term was prepared for a dictionary used by the joint chiefs

The cases arising since September 11 are no exception. The relevance of the national security/domestic affairs dichotomy has arisen principally with respect to the executive's so-called domestic war on terrorism. This becomes evident, at least in some cases, when contrasting the judiciary's degree of deference to the executive in cases that involve those detained as "enemy combatants" with the degree of deference in cases concerning other detainees. This "mixed" judicial response to the executive reflects some courts' justified skepticism that, unlike the arrest of persons more directly linked to the Taliban regime or al Qaeda, the executive's sweeping detention practices in the United States could constitute national security affairs.

Second, in the past courts have not deferred to the executive, even in cases that implicate national security, when the executive is exercising a power the Constitution reserves for Congress. In the post-September 11 litigation, this issue has arisen regarding the executive's decision to preclude or limit those detained as "enemy combatants" from pursuing habeas petitions, and to proscribe federal court jurisdiction over the military tribunals.[56] To date, most courts have either foreclosed the detainees' practical ability (even if not their legal right) to access the courts by permitting the executive to erect "barriers" that preclude their opportunities for any judicial review or have significantly limited the scope of judicial review by prescribing standards deferential to the executive.[57] To do so, courts have deferred to the executive's claims of inherent national security powers and/or to statutory authority to deny petitioners jurisdiction or to grant the executive broad powers.[58] In doing so, courts have dismissed or overlooked significant separation of powers concerns in their holdings, at least when judicial review has been completely pre-

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of staff, which read "a military or defense advantage over any foreign nation or group of nations, or . . . a favorable foreign relations position, or . . . a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert." *Id.* at 262 n.23 (citing Richard Barnet, *Rethinking National Strategy*, NEW YORKER, Mar. 21, 1988, at 107). Thus, although *Curtiss-Wright* distinguished between external and internal affairs, national security may refer to government acts inside the United States, so long as these are related to war powers or foreign affairs.

[55] Brownell, *supra* note 49, at 103; Edgar & Schmidt, *supra* note 43, at 352.

[56] *See infra* Part II.B.

[57] *Id.*

[58] *Id.*

cluded or significantly obstructed.[59]

Finally, in some post-September 11 cases, courts have heeded the petitioners' Bill of Rights challenges, particularly those seeking to curtail the executive's secret practices. Yet, in the past, courts have not always denied the executive's inherent powers in national affairs, even when its actions have resulted in violations of the Bill of Rights.[60] Instead, courts have simply ignored important Bill of Rights considerations and deferred to the executive's exercise of national security powers,[61] although this deference has not been universal.[62] Based on this, at first glance, case law precedents appear inconsistent. However, there are general principles that reconcile, in part, these different results. First, sometimes courts draw an important distinction between substantive and procedural individual rights, when deferring to the political branches on political questions, including those pertaining to national security.[63] In the post-September 11 cases, courts have drawn this distinction principally as to the executive's plenary powers in immigration law.[64] Second, courts have

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[59] *Id.*

[60] Brownell, *supra* note 49, at 88-92 (explaining that while some federal court cases espouse the view that when individual rights are implicated in matters of national affairs the more balanced *Youngstown* review applies, this view is not consistent with some important U.S. Supreme Court precedents).

[61] *Id.* at 91 (citing United States v. Pink, 315 U.S. 203 (1942), United States v. Belmont, 301 U.S. 324 (1937), and Dames & Moore v. Reagan, 453 U.S. 654 (1981), in which the Court ignored the Fifth Amendment taking issues in favor of inherent executive powers in foreign affairs).

[62] *Id.* at 89 (citing Kent v. Dulles, 357 U.S. 116 (1958) (involving the right to travel), and N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (involving the First Amendment right against prior restraint)).

[63] *See, e.g.*, *Ex parte* Endo, 323 U.S. 283 (1944). Decided the same day as *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court upheld the executive's right to detain Endo, but only until it determined her lack of loyalty. *Ex parte* Endo, 323 U.S. at 302. Unfortunately, the Court did not order Endo's release until two and one-half years after her initial petition for writ, and one day after the internment order had been revoked. Bucklin, *supra* note 48, at 93.

[64] In the post-September 11 litigation, the Eastern District Court of Michigan distinguished between substantive and procedural rights when it held that Rabih Haddad had a due process right to an open immigration bond hearing. Haddad v. Ashcroft, 221 F. Supp. 2d 799 (E.D. Mich. 2002) (granting plaintiff's motion for preliminary injunction). The distinction also came up in the Sixth Circuit decision to order the opening of immigration hearings to the public. Detroit Free Press v. Ashcroft, 303 F.3d 681, 687-93 (6th Cir. 2002). The Sixth Circuit distinguished *Kleindienst v. Mandel*, 408 U.S. 753 (1973), in which the Supreme Court held that the public could not assert a First Amendment right to alter substantive immigration policy (i.e., declaring the exclusion of "communist" unconstitutional). *Detroit Free Press*, 303 F.3d at 687. To do so, the Sixth Circuit held that an order to open up the

sometimes enjoined the executive from keeping government secrets in order to safeguard the public's right to know what "their government is up to."[65] Courts, however, have generally granted the executive wide discretion to keep secrets where the executive asserts that the information sought constitutes national security secrets.[66] Yet, even when the executive asserts a national security interest, courts have sometimes limited executive discretion when judges perceive a countervailing public interest to hold the executive accountable to the rule of law.[67] In the post-September 11 litigation context, courts' "mixed" degrees of deference to the executive's refusal to release the requested information about the detainees, or to open immigration hearings to the public, has largely depended on whether the courts perceived the executive's law and immigration enforcement practices as necessary to protect national security.[68]

In Part I, this Article discusses the opinions issued to date in the post-September 11 litigation cases that pertain to detainees. Part II examines these opinions in light of the three suggested principles that have guided (or should have guided) the courts' rulings in these cases. None of the opinions discussed are final, and some are being considered on appeal at the time of this Article's publication. Some cases may reach the Supreme Court and even be reversed. However, many of the issues confronted by the courts will remain, and the principles suggested in this Article will (or should) continue to guide judges' decision-making.

I

To date, the federal courts' degree of deference to the executive's so-called war on terrorism can be characterized as "mixed." The executive's clearer victories pertain to its treatment of those deemed "enemy combatants."[69] Courts are split on whether the executive's detention and treatment of material witnesses is con-

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immigration hearings altered only a procedural immigration law since the public could not alter the outcome of the hearing. *Id.* at 687-93. Because these distinctions are made principally as to the executive's plenary powers in immigration, not national security, they are not examined in this Article.

[65] U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773 (1989).

[66] *See infra* Part II.C.

[67] *Id.*

[68] *See infra* Parts I.C and II.C.

[69] *See infra* Part I.A.

sistent with statutory authority.[70] Finally, courts have imposed different degrees of judicial oversight on the executive's refusal of information to the public about the detainees, or access to immigration hearings. Courts have either fully accepted the executive's request for secrecy, or have compelled the government to provide access or information to the public by subjecting the executive's unsubstantiated or blanket assertions about the need for secrecy to stricter judicial review.[71]

A. "Enemy Combatants"

The courts' rulings on the habeas corpus petitions filed on behalf of those detained as "enemy combatants" have been quite favorable to the executive. The executive's first victories have been in the treatment of Hamdi and Padilla, the two U.S. citizens held in military detention as "enemy combatants," despite some setbacks in *Padilla ex rel. Newman v. Bush*.[72]

In *Hamdi v. Rumsfeld*, a Fourth Circuit panel reversed and remanded a district court's June 11 order that Hamdi, a U.S. citizen captured in Afghanistan and detained in a U.S. military prison, "must be allowed to meet with his attorney because of fundamental justice provided in the Constitution."[73] The military denied Hamdi access to a public defender that Hamdi's father retained to represent him, alleging that such access would compromise the government's anti-terrorism investigation.[74] In

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[70] *See infra* Part I.B.

[71] *See infra* Part I.C.

[72] *See infra* notes 105-22 and accompanying text.

[73] Hamdi v. Rumsfeld, 296 F.3d 278, 280 (4th Cir. 2002). Hamdi first surrendered to the Northern Alliance forces that were acting in conjunction with American forces in Afghanistan, although the circumstances of his surrender and detention are unclear. Hamdi v. Rumsfeld, Order Directing Government to Provide More Information, Civ. No. 2:02cv439, at 2-3 (E.D. Va. Aug. 16, 2002) [hereinafter *Hamdi*, Aug. 16 Order], *available at* http://news.findlaw.com/hdocs/docs/hamdi/hamdirums81602ord.pdf.

[74] *Hamdi*, 296 F.3d at 282. Specifically, the executive alleged that "[t]he moment that counsel is inserted between captured, hostile combatants and military authorities engaged in intelligence gathering, the relationship of trust and dependency between detainees and the military that is key to such intelligence-gathering efforts may be destroyed, and critical life-saving intelligence may be lost." Hamdi v. Rumsfeld, Emergency Motion for Temporary Stay Pending Consideration of Motion for Stay Pending Appeal, Civ. No. 2:02cv439, at 3 (4th Cir. June 13, 2002), *available at* http://news.findlaw.com/hdocs/docs/hamdi/hamdirums61302estay.pdf. Moreover, the executive alleged that "members of the al Qaeda network and its supporters are trained to pass concealed messages through unwitting intermediaries such as attorneys." *Id.*

reversing the order, the Fourth Circuit criticized the district court for not considering what effect petitioner's unmonitored access to counsel might have upon the executive's ongoing gathering of intelligence.[75] In contrast, the Fourth Circuit did not mention the need to balance any effect of Hamdi's incommunicado detention on his rights to judicial review. Upon remand to the district court, the Fourth Circuit exhorted the district court to defer to the executive on the military designation and treatment of "enemy combatants." In doing so, the Fourth Circuit offered two distinct rationales. First, the Fourth Circuit concluded that the President enacted the November 13 Military Order pursuant to his inherent powers in matters of national security.[76] Second, the Fourth Circuit stated, without citing a specific statute, that Congress authorized these military detentions.[77]

On remand, with further instructions from the Fourth Circuit, the district court considered solely the question of whether a two-page declaration from Michael H. Mobbs (Mobbs Declaration), a Defense Department special adviser, standing alone, was sufficient justification for a person born in the United States to be considered an "enemy combatant."[78] The district court understood the consequences of allowing the executive's determination of Hamdi's status as an "enemy combatant" to also mean judicial deference to the executive's incommunicado detention of Hamdi to date.[79] Perhaps because the district court treated these

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[75] *Hamdi*, 296 F.3d at 282.

[76] *Id.* at 281 ("The order arises in the context of foreign relations and national security, where a court's deference to the political branches of our national government is considerable. It is the President who wields 'delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power that does not require as a basis for its exercise an act of Congress.'") (quoting and citing United States v. Curtiss-Wright Exp. Corp., 299 U.S 304, 320 (1936)). The panel also cites to *Ex parte Quirin*, 317 U.S. 1, 25 (1942), for the proposition that "the Court stated in no uncertain terms that the President's wartime detention decision are to be accorded great deference from the courts." *Hamdi*, 296 F.3d at 282. In citing *Ex parte Quirin*, the panel does not acknowledge the case's more fact-bound reading of approving such tribunals only when predicated on congressional authorization. *See* FALLON, *supra* note 19, at 49. *See also infra* note 260-62 and accompanying text.

[77] *Hamdi*, 296 F.3d at 281 ("And where as here the President does act with statutory authorization from Congress, there is all the more reason for deference.") (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 & n.2 (1952)). *But see infra* note 270 and accompanying text (discussing challenges to the President's claim to statutory authority).

[78] *Hamdi*, Aug. 16 Order, *supra* note 73, at 4-5, 8.

[79] The district court framed the question to be decided as follows: "[T]he sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing*

two issues as related, it resolved that, even if the court must ultimately defer to the executive's classification of "enemy combatants," its evaluation of the executive's process for classifying Hamdi an "enemy combatant" must allow for a meaningful judicial review to protect Hamdi's due process rights under the Constitution.[80] To do so, the district court developed a standard of judicial review that examined both the executive's procedures for determining Hamdi's status and the constitutionality of the executive's treatment of Hamdi to date.[81] The district court then held that the Mobbs Declaration fell short of even these minimal criteria of judicial review.[82] Specifically, the district court found that the Declaration failed to address Mobbs' authority to make declarations about Hamdi's classification and to specify the procedures Mobbs employed for such a review and, therefore, was insufficient to determine whether Hamdi's classification violated the Fifth Amendment.[83] The district court considered, moreover, that were it to accept the Mobbs Declaration as sufficient evidence to decide Hamdi's fate, it would be acting as little more than a rubber-stamp.[84] Therefore, the district court ordered the government to turn over, among other things, copies of Hamdi's statements, the names and addresses of all interrogators who questioned Hamdi, and statements by members of the Northern Alliance regarding Hamdi's capture.[85]

On January 8, 2003, the Fourth Circuit once again reversed the district court and held that the Mobbs Declaration was a sufficient basis upon which to conclude that the commander in chief

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alone, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil." *Id.* at 5.

[80] *Id.* at 8.

[81] Specifically, the court developed a judicial standard of review that, at minimum, should determine whether the military's classification of Hamdi was determined pursuant to appropriate authority; whether the screening criteria used to make and maintain his classification was consistent with Fifth Amendment due process requirements; on what basis the government had determined that Hamdi's continued detention without charges and without access to counsel serves national security; and whether the Geneva Treaty or the Joint Services Regulations required a different process. *Id.* at 9.

[82] *Id.*

[83] *Id.* at 9-11. Throughout the Order, the district court posed several questions unanswered by the Mobbs Declaration, including what level of "affiliation" is necessary to warrant "enemy combatant" status or whether and why Hamdi was engaged in combat. *Id.* at 11-12.

[84] *Id.* at 14.

[85] Hamdi v. Rumsfeld, 316 F.3d 450, 462 (4th Cir. 2003).

constitutionally detained Hamdi pursuant to his war powers.[86] The Fourth Circuit criticized the district court's "pick it apart" "piece by piece" treatment of the Mobbs Declaration,[87] declaring it a judicial interference with the allocation of war powers the Constitution solely grants to the political branches.[88] An inherent part of warfare, the Fourth Circuit declared, is the detention and capture of "enemy combatants," which is necessary to prevent "enemy combatants" from rejoining the enemy and to alleviate the administrative burden of prosecutions.[89]

The Fourth Circuit suggested some limits to judicial deference to executive decisions made in time of war, including that the detention of U.S. citizens must be subject to habeas corpus review.[90] However, in application the Fourth Circuit limited this review to a deferential examination of purely legal questions about Hamdi's detention, while refusing to conduct any factual inquiry into the circumstances of Hamdi's capture. On the legal questions, the Fourth Circuit dismissed petitioner's challenge that Hamdi's detention violated 18 U.S.C. § 4001(a) because it was conducted without an act of Congress.[91] Rather, it held that Congress granted the President the authority to detain Hamdi when it authorized the use of force in Afghanistan through the September 18 Joint Resolution.[92] The Fourth Circuit reasoned that the "use of all necessary and appropriate force" language of the Joint Resolution must "include[ ] the capture and detention of any and all hostile forces arrayed against our troops."[93] The Fourth Circuit also dismissed that Article 5 of the Geneva Convention required a determination of Hamdi's status as an enemy

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[86] *Id.* at 459.

[87] *Id.* at 462.

[88] *Id.* at 462-64 (referring to congressional powers under Article I, Section 8 of the U.S. Constitution to "'provide for the common Defence and general Welfare of the United States. . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support armies . . . [and] To provide and maintain a navy'" and to executive powers under Article II, Section 2 declaring "'[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States'") (quoting U.S. CONST. art. I, § 8 and art. II, § 2).

[89] *Id.* at 465.

[90] *Id.* at 464-65.

[91] *Id.* at 467. "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C.A. § 4001(a) (West 2003).

[92] *Hamdi*, 316 F.3d at 467.

[93] *Id.*

belligerent "by a competent tribunal"[94] by declaring that the Geneva Convention is not self-executing.[95] The Fourth Circuit highlighted the language in other general provisions of the Geneva Convention calling for diplomatic resolution to disputes,[96] while dismissing the relevance of the more specific language of Article 5.[97] Further, the Fourth Circuit rejected, without much analysis, that 28 U.S.C. § 2241 created enforceable private right petitions for violations to the Geneva Convention.[98]

Further, the Fourth Circuit did not conduct a factual review to determine the circumstances of Hamdi's capture in Afghanistan. Rather, the Fourth Circuit declared that "because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country . . . any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch."[99] The Fourth Circuit decided that the district court's attempt to learn the nature and scope of Hamdi's activities in Afghanistan would not only bring an Article III court into conflict with the warmaking powers of Articles I and II, but may compromise sensitive intelligence or result in a logistical nightmare.[100] Further, the Fourth Circuit rejected that the habeas corpus review requires a factual determination of Hamdi's status as an "enemy combatant" once it is established that the executive has a legal basis for the detention.[101] In fact, the Fourth Circuit even rejected the executive's position that a

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[94] *Id.* at 468. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

[95] *Hamdi*, 316 F.3d at 468.

[96] *Id.* (discussing Article 11 of the Geneva Convention which instructs states to "arrange a 'meeting of the representatives . . . with a view of settling the disagreement,'" and Article 132 which states that "'any alleged violation of the Convention' is to be resolved by a joint transnational effort 'in a manner to be decided between the interested Parties'") (quoting Geneva Convention, *supra* note 94, at art. 11, 132).

[97] The Fourth Circuit, for example, states that "competent tribunal" may not mean an Article III court. *Id.* at 469.

[98] 28 U.S.C. § 2241, which confers on courts the power to grant the writ, reads, in part, "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . He is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2241(b)(3) (West 2003). The Fourth Circuit simply concludes, however, that it would make little practical sense for § 2241 to create a right to action, since "we would have thereby imposed on the United States a mechanism of enforceability that might not find an analogue in any other nation." *Hamdi*, 316 F.3d at 469.

[99] *Id.* at 473.

[100] *Id.* at 470-71.

[101] *Id.* at 471-73. But see *infra* notes 331-41 and accompanying text (discussing

"some evidence" standard should govern the adjudication of the habeas factual review.[102] The Fourth Circuit reasoned that Article III courts are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not, concluding that this type of action would run the risk of obstructing war efforts authorized by Congress and undertaken by the executive branch.[103]

Absent from the Fourth Circuit's opinion is the substantial concern the district court expressed over Hamdi's prolonged, incommunicado detention. To date, Hamdi remains in military custody in Norfolk, Virginia, where he has been since April 2002. The Fourth Circuit's opinion also does not resolve when Hamdi's detention might cease to be lawful, although it does suggest that his detention may last at least so long as U.S. troops are still on the ground in Afghanistan, including reconstruction efforts.[104]

On December 4, 2002, the Southern District of New York issued the first ruling on Padilla's habeas corpus petition.[105] The decision has been reported as a victory for petitioners,[106] as the district court, unlike the Fourth Circuit, did grant Padilla the right to consult with counsel while his habeas corpus petition was pending to prepare factual challenges to his classification as "enemy combatant."[107] However, the decision also represents a victory for the executive regarding its powers to detain and try Padilla in military tribunals. Moreover, Padilla's victory to meet with counsel could be diminished by national security measures possibly affecting Padilla's private meetings with counsel and access to government information, as well as by the limited scope

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separation of powers concerns as between the political branches not addressed by the Fourth Circuit).

[102] *Id.* at 474.

[103] *Id.*

[104] *Id.* at 476.

[105] Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). Judge Makasey who wrote the opinion is the same judge who deferred to the executive's interpretation of the material witness statute. *See infra* notes 151-52 and accompanying text.

[106] Benjamin Weiser, *Judge Says Man Can Meet with Lawyer to Challenge Detention as Enemy Plotter*, N.Y. TIMES, Dec. 5, 2002, at A24.

[107] *Padilla*, 233 F. Supp. 2d at 569-70. The executive did not oppose Padilla's legal right to file a habeas corpus petition. *Id.* at 598-99. Therefore, the district court presumed the habeas corpus statute to apply and only considered whether Padilla's attorney had next-friend standing; whether the secretary of defense was the appropriate respondent; whether the court had jurisdiction given that Padilla was no longer in New York; and nature and scope of judicial review under the statute. *Id.* at 575-87, 604-10.

and deferential standard of judicial review that will apply in his case.

Like the Fourth Circuit, the district court affirmed the executive's authority to designate Padilla an "enemy combatant" under both the president's inherent powers as commander in chief[108] and Congress' September 18 Joint Resolution.[109] In so holding, the district court rejected petitioner's challenges over whether the executive can seize and detain U.S. citizens captured on U.S. soil, absent a clear congressional declaration of war and when the current conflict lacks clarity and scope of duration given that the enemy is al Qaeda.[110] Rather, the district court principally relied on *The Prize Cases*[111] and *Ex parte Quirin*[112] to uphold the executive's actions.[113] Specifically, the district court read *Ex parte Quirin* to authorize the executive to detain and try unlawful combatants, including U.S. citizens, and cited dicta in the case to hold that this power may be independent from congressional authority.[114] The district court, moreover, rejected the

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[108] *Id.* at 587-96.

[109] *Id.* at 596-99.

[110] *Id.* at 587.

[111] *Id.* at 587-89 (citing The Prize Cases, 67 U.S. (2 Black) 635 (1862)). The Court rejected a challenge to the president's authority to impose a blockade on the secessionist states when there had been no declaration of war. *The Prize Cases*, 67 U.S. at 635. *The Prize Cases* Court acknowledged that the president may not declare war but held that the president has the authority to defend the country from acts of aggression without waiting for special legislative authority. *Id.* The Court also held that it is up to the president to determine in such circumstances the degree of force the crisis demands. *Id.* at 670.

[112] *Ex parte* Quirin, 317 U.S. 1 (1942). *But see infra* notes 260-62 and accompanying text (distinguishing *Ex parte Quirin* from the 9/11 "enemy combatant" cases).

[113] The district court also relied on the laws of war. For example, the district court cited Article 118 of the Third Geneva Convention to authorize the detention of all combatants until the cessation of active hostilities. *Padilla*, 233 F. Supp. 2d at 592-93.

[114] *Id.* at 595-96. *Ex parte Quirin* involved a habeas corpus challenge to sentences rendered by a U.S. military court against eight German soldiers who smuggled themselves into the United States, hid their uniforms, and planned sabotage before being caught. *Id.* at 594. Two of the detainees claimed to have U.S. citizenship, yet that claim did not change the outcome of the case. *Id.* The Supreme Court stated that U.S. citizens who donned foreign uniforms and swore allegiance to a country at war with the United States could lawfully be treated like other members of the armed forces. *Id.* at 605-07. By relying on *Ex parte Quirin*, the district court distinguished *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), which set aside Milligan's conviction by military tribunals during the Civil War on the ground that civilian courts were still in operation. In doing so, the district court distinguished Padilla from Milligan in that Milligan was not an unlawful combatant. *Padilla*, 233 F. Supp. at 593-94. Rather, the district court stated that Padilla, like the saboteurs in *Ex parte*

argument that *Ex parte Quirin* is distinguishable because, unlike the current conflict, Congress had declared war against Germany during WWII.[115] To do so, the district court reasoned that such a reading would be inconsistent with *The Prize Cases*, which did not require a declaration of war to authorize inherent executive national security powers.[116] Furthermore, the district court resolved the issue of the uncertainty of scope and duration of the current conflict simply by stating that so long as U.S. troops remain in al Qaeda and Afghanistan in pursuit of al Qaeda fighters, there is no basis for contradicting the President's assertion that the conflict is ongoing.[117] Finally, the district court held that even if congressional authorization was deemed necessary to uphold Padilla's detention, the President has such authority under the September 18 Joint Resolution.[118] Like the Fourth Circuit, the district court also considered that the Joint Resolution constituted an act of Congress, fulfilling the requirement under 18 U.S.C. § 4001(a) that: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[119]

Thus, while Padilla will be permitted to meet with counsel, he will not be able to challenge the legality of his military confinement on legal grounds. Rather, Padilla will be allowed to meet with his attorney solely to refute the factual allegations the executive has provided for deeming him an "enemy combatant."[120] Moreover, even Padilla's practical ability to refute the execu-

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Quirin, is alleged to be in active association with an enemy with whom the United States is at war. *Id.*

115 *Id.* at 595-96.

116 *Id.* The district court's conclusion that to limit *Ex parte Quirin* to its facts—i.e., to authorize military tribunals against U.S. citizens only when Congress has declared war—would overrule *The Prize Cases* is unsupported. The facts in *The Prize Cases* were predicated on the executive's need to act quickly to defend the United States militarily against threats. *See supra* note 111. In contrast, *Ex parte Quirin* deals with how states should mete out punishment to detained unlawful combatants who do not represent the same immediate threat. Therefore, the cases are distinguishable on important facts.

117 *Id.* at 590-91.

118 *Id.* at 588-89, 595-99.

119 *Id.* at 595-99. *But see infra* note 271 and accompanying text (discussing the vague language of the statutory authority relied on by the executive for the military tribunals).

120 *Id.* at 598-601. The district court furthermore held that Padilla neither had a Sixth Amendment right to counsel, which applies to criminal proceedings, nor a Fifth Amendment due process right where he has the remedy of the writ. *Id.* at 599-603.

tive's factual allegations will be substantially limited because the district court will not require the executive to disclose information relevant to that determination, based on national security grounds. For example, the district court will not make available the sealed Mobbs Declaration, but rather a redacted version that excludes the executive's sources of information and the evidence that corroborates its factual findings.[121] Finally, the district court adopted a deferential standard of review to examine the executive's factual basis for classifying Padilla as an "enemy combatant." The district court will uphold such classification so long as there is "some evidence" that Padilla engaged in a mission against the United States on behalf of an enemy with whom the United States is at war and that evidence has not been entirely mooted by subsequent events.[122]

The executive's third victory occurred when two district courts dismissed the habeas corpus petitions filed on behalf of all or some non-U.S. citizen detainees held as "enemy combatants" in Guantanamo Bay.[123] The district courts did not reach the issue of the executive's inherent powers to execute these detentions.[124] Instead, the district courts held that they lacked jurisdiction to hear the petitions inter alia,[125] because the habeas corpus statute[126] does not apply to foreign nationals who, at no relevant time, have not been within U.S. territorial jurisdiction.[127] In so

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[121] *Id.* at 609-10.

[122] *Id.* at 607-08.

[123] *See* Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub. nom.* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003); Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002), *aff'd in part*, *rev'd in part by* 310 F.3d 1153 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 2073 (2003).

[124] The D.C. petition for habeas corpus alleged, inter alia, a violation of the War Powers Clause of the Constitution because the November 13 Military Order was not authorized by Congress, and the powers vested in the executive pursuant to it were too broad. Rasul v. Bush, Petition for Writ of Habeas Corpus, ¶¶ 28-33, 50-51 (D.C.C. Feb. 21, 2002), *available at* http://news.findlaw.com/hdocs/docs/terrorism/rasulbush021902pet.html.

[125] The United States District Court for the Central District of California also dismissed the lawsuit holding that petitioners lacked next-friend and third-party standing to assert claims on behalf of the detainees. *Coalition of Clergy*, 189 F. Supp. 2d at 1039-44.

[126] 28 U.S.C. § 2241 (1948). The relevant provision reads: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." *Id.* § 2241(a).

[127] The courts rejected that Guantanamo Bay is part of U.S. territory because territorial jurisdiction requires that the territory be subject to U.S. sovereignty or rule. *Coalition of Clergy*, 189 F. Supp. 2d at 1049; *Rasul*, 215 F. Supp. 2d at 68-71. *But see infra* notes 321-30 and accompanying text.

holding, both district courts relied on *Johnson v. Eisentrager*.[128] *Eisentrager* held that the writ should not be issued in the case of German nationals tried in China for alleged war crimes committed in Japan.[129] The Central California District Court read *Eisentrager* to apply when non-U.S. citizen "enemy combatants" are captured outside U.S. territory. The Central California District Court stated that the Guantanamo Bay detainees are like the petitioners in *Eisentrager*: "They are aliens; they were enemy combatants; they were captured in combat; they were abroad when captured; they are abroad now; since their capture, they have been under the control of only the military; [and] they have not stepped foot on American soil."[130] The D.C. District Court did not read *Eisentrager* as "hing[ing] on the fact that petitioners were enemy aliens, but on the fact that they were aliens outside the territory over which the United States was sovereign."[131] Yet, the D.C. District Court acknowledged that courts have granted habeas corpus review to certain foreign nationals outside U.S. territory, therefore also drawing a distinction between "friendly aliens and enemy aliens."[132] The D.C. District Court distinguished "the friendly alien" line of cases from the Guantanamo Bay detainees because the former involved "a narrow class of individuals who are akin to citizens, i.e., those persons seeking to prove their citizenship and those aliens detained at the nation's ports."[133]

On November 18, 2002, the Ninth Circuit affirmed in part and vacated in part the Central California District Court.[134] Specifi-

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[128] 339 U.S. 763 (1950).

[129] *Id.* at 766.

[130] *Coalition of Clergy*, 189 F. Supp. 2d, at 1048. *But see infra* notes 321-30 and accompanying text (distinguishing *Eisentrager* from the Guantanamo Bay detentions).

[131] *Rasul*, 215 F. Supp. 2d at 67. *But see infra* notes 324-30 and accompanying text (distinguishing *Eisentrager* from the Guantanamo Bay detentions).

[132] *Id.* at 65. The court discussed *Chin Yow v. United States*, 208 U.S. 8, 13 (1908), which permitted habeas action to a foreign national seeking admission to the country to assure a hearing on his claims to citizenship, and *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), which allowed a habeas petition by a foreign national who had been restrained and barred from landing in the United States.

[133] *Id.* at 67. The court sometimes appears to distinguish among foreign nationals who can petition for habeas based on their degree of connection to the United States, concluding more broadly that "if the individual is an alien without any connection to the United States, courts have generally focused on the location of the alien seeking to invoke the jurisdiction of the courts of the United States." *Id.*

[134] Coalition of Clergy v. Bush, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2073 (2003).

cally, the Ninth Circuit affirmed that petitioners lacked next-friend and third-party standing to bring a habeas petition on behalf of the detainees because, inter alia, they did not have a significant pre-existing relationship with the detainees.[135]

The Ninth Circuit, however, vacated the portions of the California district court opinion which reached the question of jurisdiction under *Eisentrager*, but on the basis of judicial restraint rather than on the merits. The Ninth Circuit considered that once the California district court found that petitioners lacked standing to file the complaint, its consideration of the additional jurisdictional questions was unnecessary, and therefore, constituted an ultra viros act.[136] It is, therefore, still unclear whether the Ninth Circuit would read *Eisentrager* differently than the two district courts. On May 19, 2003, the U.S. Supreme Court denied the petition for writ of certiorari without opinion.[137]

The U.S. Supreme Court denied certiorari in the Ninth Circuit Guantanamo Bay case two months after the Court of Appeals for the District of Columbia affirmed the D.C. District Court's dismissal of the habeas corpus petition on behalf of Guantanamo Bay detainees for lack of jurisdiction.[138] In affirming the district court, the Court of Appeals for the District of Columbia expanded the reading of *Eisentrager* to hold that all foreign nationals, whether friendly or enemy, do not have a right to litigation in the United States, unless they have established their presence in U.S. territory.[139] The Court of Appeals for the District of Columbia, therefore, rejected petitioner's position that the district court could not dismiss the writ unless it first conducted a factual determination of whether the detainees were, in fact, "enemy aliens," which they denied.[140] Further, the Court of Appeals for the District of Columbia also rejected that, despite U.S. control, the Guantanamo Bay Naval Bay is U.S. territory because the United States has occupied it under a lease with Cuba since 1903

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135 *Id.* at 1162-64.

136 *Id.* at 1164.

137 Coalition of Clergy v. Bush, 123 S. Ct. 2073 (2003).

138 Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

139 *Id.* at 1141.

140 *Id.* at 1142. The petition, which was filed on behalf of three Guantanamo Bay detainees, claimed that the Australian detainee was living in Afghanistan when the Northern Alliance captured him in early December 2001; that one of the British detainees traveled to Pakistan for an arranged marriage after September 11, 2001; and that the other British detainee went to Pakistan after September 11, 2001 to visit relatives and continue his computer education. *Id.* at 1137.

and despite the lease's indefinite term, the Naval Bay continues to recognize the ultimate sovereignty of Cuba.[141]

B. "Material Witnesses"

In contrast to the "enemy combatant" cases, the courts' degree of deference to the executive's interpretation of the "material witness" statute has been inconsistent. The "material witness" statute authorizes a person's detention "[i]f it appears from an affidavit filed by a party that the testimony of a person is material in [any] criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena. . . ."[142] Dissent over the meaning of the statute emerged with respect to whether, as the executive claims, the "material witness" statute applies to secure testimony for a grand jury proceeding, or, as petitioners suggest, only during the pretrial stages of a criminal trial.[143]

Two judges of the Southern District of New York reached vastly different conclusions. Regardless of which decision is more consistent with the statute, the degree of deference the judges accorded the executive's interpretation of the "material witness" statute varied according to the judge's different notions of the degree to which the cases implicated national security affairs, and therefore, the degree to which the Bill of Rights limits the executive's powers.

Judge Scheindlin, who sided with petitioners,[144] revealed both skepticism over the executive's claims that Awadallah's detention is necessary to protect national security, as well as whether the executive can act without regard to the Bill of Rights. In the case before her, petitioner Awadallah challenged the legality of his detention as a "material witness," and sought to suppress his

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[141] *Id.* at 1142. *But see infra* notes 324-30 and accompanying text (disputing that *Eisentrager* should have controlled in the Guantanamo Bay cases).

[142] 18 U.S.C.A. § 3144 (West 2000). The rest of the provision reads that "[n]o material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent the failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure." *Id.*

[143] United States v. Awadallah, 202 F. Supp. 2d 55, 61-62 (S.D.N.Y. 2002); *In re* Application of the United States for a Material Witness Warrant, 213 F. Supp. 2d 287, 288 (S.D.N.Y. 2002).

[144] *Awadallah*, 202 F. Supp. 2d at 63.

grand jury testimony after the executive charged him with perjury for not admitting he knew one of the hijackers.[145] Judge Scheindlin was certainly aware that Awadalla's detention took place in the context of a national emergency. Yet, Judge Scheindlin did not consider Awadalla's detention to be sufficiently related to terrorism and characterized his detention as not based on probable cause to believe that he had committed any crime.[146] Similarly, Judge Scheindlin's expression of deep concern over Awadalla's civil liberties reveals that she did not view this case as giving rise to a political question. For example, to introduce her opinion, she chose quotes from cases that either limited the executive's claims to certain inherent war powers or subjected Congress' war powers to Bill of Rights limitations.[147] As to the facts, she included a detailed account of Awadalla's treatment as a "material witness," including the length of his detention,[148] isolation,[149] and physical mistreatment.[150] Judge Scheindlin's recounting of those facts also challenged the executive's practice of keeping information about "material witnesses" secret.

In contrast, Chief Judge Mukasey, aside from agreeing with the executive's interpretation of the "material witness" statute,[151] showed little regard for the detainee's other allegations of abuse of power under the statute, granting the executive complete dis-

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[145] Awadallah apparently knew two of the hijackers. *Id.* During his grand jury testimony he stated he did not know the name of one of the hijackers, but the government later discovered he wrote the hijacker's name in one of his school examinations. *Id.*

[146] *Id.* She similarly argued that conceding to the executive's interpretation of the "material witness" statute would result in a 4th Amendment violation by allowing the government to effectively skirt probable cause to detain. *Id.* at 76-79.

[147] *Id.* at 57. Judge Scheindlin quotes language from *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866), *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963), and *United States v. Robel*, 389 U.S. 258, 264 (1967).

[148] *Awadallah*, 202 F. Supp. 2d at 58. Awadallah remained detained as a material witness for twenty-one days before being brought to testify before a grand jury. *Id.* He was subsequently charged with perjury and remained imprisoned for a total of eighty-three days before his release on bail. *Id.* at 59.

[149] *Id.* at 58. The executive treated Awadallah as a high-security inmate, detained him in various prisons across the country, kept him in solitary confinement, and denied him family visits, use of the phone, and, sometimes, access to his lawyer. *Id.* at 58-60.

[150] *Id.* at 60. Awadallah was strip-searched every time he left his cell, had to wear a "three-piece suit," had to render his grand jury testimony shackled to a chair, and presented evidence that corroborated his allegations of physical abuse. *Id.* at 60-61.

[151] *In re* Application of the United States for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D.N.Y. 2002).

cretion. In contrast to how much Judge Scheindlin revealed about Awadalla, Judge Mukasey did not even disclose the identity of the petitioner, nor did he provide any facts indicating why the government detained him as a "material witness." In fact, Judge Mukasey asserted that the sole representation of the attorney general on the materiality of the witness was sufficient, stating that "[t]he government has so represented, and that should end the matter."[152] This outcome is not surprising given Judge Mukasey's characterization of the detainee: "Doe was not an attractive candidate for bail, confined initially as a deportable alien and the subject of a material witness warrant in connection with the investigation of a ghastly attack."[153] Judge Mukasey appeared satisfied that any detention the executive linked to September 11, irrespective of its reasons, warranted courts granting the utmost discretion to the executive.

C. National Security Secrets

Finally, in the cases dealing with the public's collective right to know what "their Government is up to,"[154] the courts either applied strict standards of judicial review or granted wide discretion to the executive on whether to withhold information about the detainees or to close immigration hearings to the public. The courts' degree of deference to the executive's claims of national security secrets turned on whether the courts viewed the executive's law enforcement practices as sufficiently linked to terrorism to warrant greater executive discretion, and relatedly, on the courts' concerns over the executive's abuse of power.

In the FOIA litigation, the D.C. District Court ordered the executive to release the names of the detainees and of their lawyers, concluding that the executive failed to meet its burden under the FOIA of proving why the information should not be disclosed.[155] The FOIA exemptions relied on by the executive

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[152] *Id.* at 302. Judge Mukasey also dismissed petitioner's claim that the executive delayed his deportation to detain him as a material witness, in part, by creating an unprecedented duty on the part of the detainee to hasten his deportation. *Id.* at 301.

[153] *Id.*

[154] U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773 (1989).

[155] Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 97 (D.D.C. 2002). Applying the same standard, the court did not order the release of the detainees' dates and locations of arrest, detention and release. On August 15, 2002, the court granted the government a stay of the order to release the names pending appeal. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 217 F. Supp. 2d

permit law enforcement to withhold information when such information "could reasonably be expected" to "interfere with [law] enforcement proceedings;"[156] "endanger the life or physical safety of [any individual];"[157] or "constitute an unwarranted invasion of personal privacy."[158] The court did not read the "could reasonably be expected" standard as requiring deference to law enforcement.

There are two reasons for this result. First, while understanding that these detentions are occurring in the context of a national security crisis, the court recognized that the FOIA distinguishes between the degree of judicial deference accorded to government secrets about national defense actions (national security), and that given to law enforcement practices. Related to this is the court's skepticism as to whether the detentions were sufficiently linked to terrorism that the court should grant the executive the broader discretion granted under the FOIA to matters of national security. Second, the court was motivated by its desire to safeguard the public's ability to hold the government accountable for what it perceived to be abuses of power.

The district court immediately rejected the executive's attempt to obtain the same level of judicial deference for secrets related to its law enforcement practices as is generally accorded to national security secrets under the FOIA's first exemption (Exemption 1).[159] In fact, the court found it significant that the executive did not rely on the FOIA's national security Exemption 1 in the case.[160] Rather, the court read the law enforcement FOIA's exemptions to require the executive to provide the courts particularized and focused information for withholding each of the discrete categories of information sought, rather than broad assertions as to all categories.[161] Thus, for example, the court ex-

58, 58-59 (D.D.C. 2002). On June 17, 2003, the Court of Appeals for the District of Columbia reversed the district court. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003).

156 5 U.S.C. § 552 (b)(7)(A) (West 1996).

157 *Id.* § 552 (b)(7)(F).

158 *Id.* § 552 (b)(7)(C).

159 *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 103 ("Exemption 1 protects matters that are 'specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy.' 5 U.S.C. § 552(b)(1). Exemption 1 cases receive considerable deference from the courts, which must give 'substantial weight' to agency affidavits on national defense and foreign policy issues.") (citation omitted).

160 *Id.*

161 *Id.* at 104.

amined each of the executive's claims that withholding the names of the detainees and their lawyers would interfere with enforcement proceedings[162] and invalidated them when, inter alia, the executive failed to substantiate the potential for the alleged harm.[163] The court expressed skepticism, for instance, that the detentions were sufficiently related to terrorism to support the executive's conclusion that disclosing their names would interfere with the investigation.[164] In fact, the court noted that the executive had already "ruled out" links to terrorism for hundreds of detainees, insofar as only seventy-four of the original 751 detainees still remained in custody as of May 31, 2002.[165] Therefore, the court concluded, in the absence of an allegation of "reasonable specificity" that detainees have a connection to terrorism, the government's claims are pure speculation.[166] Similarly, the court refused to apply the executive's "mosaic theory," that revealing any "bits and pieces of information that may appear innocuous in isolation" could allow terrorist organizations to build a picture of the investigation to thwart the executive's attempts to investigate and prevent terrorism. In so doing, the court noted that such a theory has only been applied to national security secrets under Exemption 1, and not to law enforcement practices.[167]

Second, the court was motivated by the strong policy interest of safeguarding the public's right to hold its government account-

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[162] *Id.* at 101. The executive provided three reasons why the disclosure of the detainee's names would interfere with law enforcement. *Id.* First, the disclosure of the detainees' names could deter "knowledgeable witnesses" from cooperating because terrorist organizations may refuse to deal with them or may harass them. *Id.* Second, the disclosure of their names could allow terrorist organizations to map the progress of the investigation and thereby develop the means to impede them. *Id.* Third, the public release of names could allow terrorist organizations to create false or misleading information. *Id.*

[163] *Id.* at 105. The court also invalidated the executive's assertions about the need for secrecy when the government itself did not protect the information it was now seeking to withhold. *Id.* at 102. The executive claimed, for example, that detainees had the option of informing others of their detention. *Id.* at 102. The court also highlighted that the executive contradicted its own rationale by its own extensive practice of disclosure. *Id.*

[164] *Id.* The court held that the executive did not establish a "rational link" between the disclosure of the detainees' names and harm to their cooperation in the investigation on terrorism because it never proved that any of the detainees had any connection to terrorism. *Id.*

[165] *Id.*

[166] *Id.* at 103.

[167] *Id.*

able to the rule of law, a principle the court believed motivated the FOIA's enactment.[168] The court considered this policy interest to be particularly strong when the executive conducts secret arrests, "a concept odious to a democratic society."[169] The court demonstrated its concern that the executive had abused its powers, particularly when detaining in secret and for prolonged periods "material witnesses" who are not accused of crimes.[170] The court observed: "[T]he Government has kept secret virtually everything about these individuals, including the number of people arrested and detained, as well as their identities. The public has no idea, whether there are 40, 400, or possibly more people in detention on material witness warrants."[171] Thus, for example, when evaluating the executive's claim that disclosing the names of the detainees would infringe their privacy, the court held that the detainees' privacy interests are outweighed by the public's interests in "open[ing] agency action to the light of public scrutiny."[172] The court further stated that "[u]nquestionably, the public's interest in learning the identities of those arrested and detained is essential to verifying whether the Government is operating within the bounds of the law."[173]

The executive, however, never had to release the names of the detainees and their attorneys because on June 17, 2003, a split Court of Appeals for the District of Columbia Circuit reversed the D.C. District Court's order.[174] In contrast to the district

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[168] *Id.* at 96.

[169] *Id.* (citing Morrow v. District of Columbia, 417 F.2d 728, 741-42 (D.C. Cir. 1969)).

[170] *Id.* at 104.

[171] *Id.* at 106. In November of 2002, the media reported that in the fourteen months of the nationwide terrorism investigation, defense attorneys have disclosed that at least forty-four persons have been detained as material witnesses. Fairaru & Williams, *supra* note 24. The article also reported that of the forty-four, twenty-nine have been released, nine are still in custody—as material witnesses, criminal suspects, convicted felons, or immigration violators, and it is unclear what happened to six more. *Id.* The executive, however, has refused to confirm these numbers, citing court orders and grand jury secrecy rules, despite that only twenty of the forty-four have ever been brought before a grand jury. *Id.* The court also noted that plaintiff's complaints of mistreatment—denial of right to counsel, prolonged detention, mistreatment of detainees—had been sufficiently substantial that the Department of Justice's Office of the Inspector General has initiated an investigation into the executive's treatment of the detainees. *Id.* at 103.

[172] *Id.* at 105.

[173] *Id.* at 106.

[174] Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003) (Sentelle & Henderson, JJ.) (Tatel, J., dissenting). The court of appeals also affirmed the district court's ruling that allowed withholding under Exemption 7(A)

court and the dissenting opinion, the court of appeals majority accorded the utmost judicial deference to the executive in times of national security without considering the countervailing public's interest in being able to hold the executive accountable for alleged Bill of Rights abuses.

The court of appeals allowed the executive to rely solely on the FOIA's Exemption 7(A) (interference with law enforcement) to withhold all the information sought by petitioners, reasoning that the executive's declaration on the need for secrecy must be accorded appropriate judicial deference as a matter of national security and, therefore, as mandated by separation of powers.[175] The court of appeals stressed that, unlike law enforcement agencies, judges are ill-prepared to weigh the variety and subtle and complex factors in determining whether disclosure of information would compromise an investigation.[176] Further, the court of appeals rejected that the executive's mosaic arguments should apply solely to the FOIA's Exemption 1 (national security), as judicial deference should depend on the substance of the danger posed, rather than the FOIA exemption invoked.[177] Instead, the court of appeals held that judicial deference should govern so long as the executive's declaration raises legitimate concerns that disclosure would impair national security.[178] Thus, the court of appeals found reasonable the executive's argument that, despite that the detainee's names were already public, a compiled list of all the names would compromise the anti-terrorism investigation.[179] The court of appeals further agreed with the executive that disclosure of detainees' names could lead to retribution, increase their stigma, and, as a result, discourage cooperation.[180] The court of appeals also rejected petitioner's argument that the executive's claim for secrecy was undermined by its own disclosure practices.[181] It reasoned that courts should not second-guess when the executive has chosen to release partial information for tactical reasons.[182]

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some of the more comprehensive detention information sought by plaintiffs. *Id.* at 933.

[175] *Id.* at 925, 928.
[176] *Id.* at 926-28.
[177] *Id.* at 927-29.
[178] *Id.* at 927.
[179] *Id.* at 926.
[180] *Id.* at 929-30.
[181] *Id.* at 930.
[182] *Id.*

In addition to reversing the district court on FOIA grounds, the court of appeals rejected plaintiff's arguments that disclosure is independently required by the First Amendment and common law right of access to government information. As to the First Amendment, the court of appeals rejected that *Richmond Newspapers, Inc. v. Virginia*,[183] which established a right of access to criminal proceedings, should extend to non-judicial documents that are not part of a criminal trial.[184] Rather, the court of appeals described *Richmond Newspapers* as a judicially created limited First Amendment right, where the First Amendment does not expressly address the right of the public to receive information.[185] As such, the court of appeals refused to "convert the First Amendment right of access to criminal judicial proceedings" into a requirement of government disclosure, particularly about an investigation where doing so could compromise the government's ability to prevent terrorism.[186] Finally, the court of appeals held that any common law right of access to information was preempted by the FOIA.[187]

Circuit Judge Tatel's strong dissent closely paralleled the district court's reasons for refusing the executive's request to keep secret the names of the detainees and their attorneys. Tatel differed with the majority on three significant principles. First, while acknowledging the executive's compelling interest to defend the nation against future acts of terrorism, Tatel criticized the majority for entirely overlooking the public's compelling interest in knowing whether the executive, in responding to the September 11 attacks, is violating the constitutional rights of hundreds of persons it has detained.[188] For example, Tatel expressed grave skepticism that the public should have to accept the executive's claims that detainees have access to counsel without question, particularly amidst allegations of prolonged, incommunicado detention of persons solely on the basis of religion and ethnicity.[189] Second, Tatel reminded the majority that despite its reliance on separation of powers, the court is being asked to interpret the FOIA, a statute that strongly favors openness, pre-

183 448 U.S. 555 (1980).
184 *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 933.
185 *Id.* at 933-34.
186 *Id.* at 935.
187 *Id.* at 936-37.
188 *Id.* at 937.
189 *Id.*

cisely because Congress recognzied that an informed citizenry is "vital to the functioning of a democratic society."[190] Tatel, in fact, admonishes the majority for refusing to "second-guess" the executive's judgments about matters of national security where the courts would be doing "the job Congress assigned to the judiciary by insisting that the government do the job Congress assigned to it: provide a rational explanation of its reasons for claiming exemption from FOIA's disclosure requirements."[191] Third, Tatel criticized the majority for adopting a level of judicial deference that amounts to rubber-stamping the executive's unsupported claims for secrecy, which is inconsistent even with the heightened deference standard under the FOIA's Exemption 1 (national security).[192] Tatel observed that "[e]ven when reviewing Exemption 1's applicability to materials classified in the interest of national security, we have made clear that no amount of deference can make up for agency allegations that display, for example, a 'lack of detail and specificity, bad faith, [or] failure to account for contrary record evidence,' since 'deference is not equivalent to acquiescence.'"[193]

With these principles in mind, Tatel explained why the executive failed to meet the FOIA federal law enforcement exemptions to withhold, not only the names, but the bulk of the requested information about the detainees.[194] In summary, with regard to Exemption 7(A) (interference with law enforcement), Tatel criticized the executive's all-or-nothing categorical denial of all information,[195] despite the fact that most of the detainees have no ties to terrorism.[196] Similarly, Tatel criticized the executive treating all the information requested about the detainees the same without justifying why some of the information compromises the investigation.[197] Tatel also questioned the execu-

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[190] *Id.* at 938 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)).

[191] *Id.* at 945.

[192] *Id.* at 939-40.

[193] *Id.* (quoting Pratt v. Webster, 673 F.2d 408 (D.C. Cir. 1982)).

[194] *Id.* at 940. Tatel also concluded that the government had no basis under any FOIA exemption to withhold the names of the detainees' attorneys. *Id.* at 949-51.

[195] *Id.* at 940.

[196] *Id.* at 941-42. Tatel explains that a list of federally charged detainees attached to the government's motion for summary judgment reported that only one detainee had been criminally charged in the September 11 attacks and only 108 (out of 1182) had been charged with any federal crime—primarily violations of antifraud statutes.

[197] *Id.* at 943. Specifically, Tatel focuses on the executive's refusal to disclose the

tive's selective disclosure of some of the detainee's information, without providing an explanation for doing so.[198] With regard to Exemption 7(C) (unwarranted invasion of privacy), Tatel found that the detainee's personal interest in privacy was outweighed by the public's interest in knowing whether the executive is violating the rights of detained persons.[199] On Exemption 7(F) (endanger to life and physical safety), since the executive claimed retaliation against persons affiliated with terrorism, Tatel questioned why the release of names of persons not associated with terrorism would also be endangered.[200] Lastly, with regard to Exemption 3,[201] which encompasses Federal Rule of Criminal Procedure 6(e)'s prohibition of disclosure of "matters occurring before the grand jury," Tatel refused to allow the executive to rely on it with regard to persons who have neither testified before grand juries nor were scheduled to do so.[202]

Finally, regarding the litigation challenging the executive's decision to close "special interest" immigration hearings, the Sixth and Third Circuits are split on whether to require immigration judges to make case-by-case determinations about the need to close a hearing.[203] The executive unilaterally sought to close immigration hearings in "special interest"[204] deportation cases, asserting arguments analogous to those in the FOIA litigation that open hearings would compromise the anti-terrorism investigation and stigmatize the detainees.[205] Both circuits applied the *Richmond Newspapers*[206] "experience and logic" standard to deter-

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dates of detention and release, which could reveal to the public how long persons have been detained, raising concerns about possible constitutional violations.

198 *Id.* at 943-44.

199 *Id.* at 946. Tatel also doubted the executive's concern over the detainee's privacy interest, when it has already disclosed so much information about them. *Id.* at 945.

200 *Id.* at 948.

201 Exemption 3 exempts from disclosure matters that are "specifically exempted from disclosure by statute . . ., provided that such statute . . . requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C.A. § 552(b)(3) (West 2003).

202 *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 948.

203 Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (affirming the district court); N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002) (reversing the district court).

204 *See supra* notes 32-33 and accompanying text.

205 *Detroit Free Press*, 303 F.3d at 705; *N. Jersey Media Group, Inc.*, 308 F.3d at 202.

206 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (finding a First Amendment right to open criminal trials).

mine whether the newspaper publisher petitioners had a First Amendment right to attend immigration hearings, a finding that would apply a strict scrutiny standard to the executive's decision to close the hearings. The circuits disagreed that deportation hearings, at least those that implicated a national security concern, met the *Richmond Newspapers* "experience and logic" standard, with only the Sixth Circuit holding that the petitioners had a First Amendment right to attend such hearings.[207] Underlying the circuits' different application of the *Richmond Newspapers* standard to the deportation hearings were the courts' opposing views on whether the executive, by ordering all "special interest cases" closed, was legitimately acting within the scope of national security affairs.

The *Richmond Newspapers* First Amendment "right of access" standard requires courts to consider "whether the place and process have historically been open to the press and general public [the experience prong] . . . [and] whether public access plays a significant positive role in the functioning of the particular process in question [the logic prong]."[208] The Third Circuit applied this two-prong test more strictly against petitioners than the Sixth Circuit. On the "experience prong," for example, which required a historical analysis of the openness of deportation proceedings, the Third Circuit disagreed with the Sixth Circuit's conclusion that a history of presumptively open deportation hearings, rather than an express Congressional mandate to open deportation hearings, sufficed to establish a tradition of openness.[209] In con-

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[207] *Detroit Free Press*, 303 F.3d at 704; *N. Jersey Media Group, Inc.*, 308 F.3d at 219.

[208] *N. Jersey Media Group, Inc.*, 308 F.3d at 209 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (Press Enterprise III)).

[209] *Id.* at 212-13. The Sixth Circuit, for example, found the fact that Congress had repeatedly enacted statutes closing exclusion, but never deportation hearings, to be compelling evidence that deportation hearings have traditionally been open. *Detroit Free Press*, 303 F.3d at 701. Similarly, the Sixth Circuit considered it relevant that since 1965, INS regulations have explicitly required deportation proceedings to be presumptively open, a position that Congress never amended, despite numerous revisions to the immigration laws. *Id.* Furthermore, the Sixth Circuit noted that part of the explanation as to why Congress has never closed deportation hearings resided in Congress' recognition that deportees enjoy greater procedural rights than those who are excluded from the United States. *Id.* at 702. In contrast, the Third Circuit expressly rejected petitioner's argument that Congress' practice of closing exclusion proceedings while remaining silent on deportation proceedings creates a presumption that it intended deportation hearings to be open. *N. Jersey Media Group, Inc.*, 308 F.3d at 212-13.

trast to the Sixth Circuit,[210] the Third Circuit declined to find that deportation hearings "boast a tradition of openness sufficient to satisfy *Richmond Newspapers*."[211]

More revealing, however, was the Third Circuit's unprecedented decision to incorporate the national security analysis into the "logic prong," rather than (as did the Sixth Circuit) treat these concerns as evidence of a compelling state interest and apply it to a strict scrutiny standard.[212] Prior applications of the "logic prong" had only inquired into whether openness played a positive role in a given proceeding.[213] Thus, when applying the "logic prong," courts evaluated solely the presence of values served by openness, including the promotion of informed discussion of governmental affairs; a perception of fairness; the therapeutic value of open hearings; and accountability of public officials.[214] In contrast, the Third Circuit decided that the "logic prong" must also "take [into] account the flip side—the extent to which openness impairs the public good."[215] Thus, the Third Circuit balanced the executive's arguments that open deportation hearings would threaten national security by revealing sources and methods of the ongoing terrorist investigation.[216] The executive advanced, inter alia, the "mosaic" theory, namely that even minor pieces of evidence that might appear innocuous would provide valuable clues and allow terrorists to piece information together from the different cases to see a pattern that would reveal the course and gaps in the investigation.[217] While the Third Circuit conceded to petitioners that the executive's arguments were speculative, it nonetheless declined to conduct a judicial inquiry into the credibility of these security concerns, determining that "national security is an area where courts have traditionally extended great deference to Executive expertise."[218] Moreover, the Third Circuit mentioned only in passing the dangers of deference to the executive when constitutional liberties are at stake,

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[210] *Detroit Free Press*, 303 F.3d at 701 ("Nonetheless, deportation proceedings historically have been open. Although exceptions may have been allowed, the general policy has been one of openness.").

[211] *N. Jersey Media Group, Inc.*, 308 F.3d at 212.

[212] *Detroit Free Press*, 303 F.3d at 707-10.

[213] *N. Jersey Media Group, Inc.*, 308 F.3d at 202.

[214] *Id.* at 217.

[215] *Id.* at 202.

[216] *Id.* at 217-19.

[217] *Id.* at 218-19.

[218] *Id.* at 219.

especially in times of national crisis.[219] Ultimately, however, the Third Circuit declined to conclude that "[o]n balance . . . openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension."[220]

In contrast, the Sixth Circuit did not incorporate the national security analysis into the "logic prong," and held that public access played a significant positive role in deportation hearings.[221] By finding a First Amendment right of access to deportation hearings, the Sixth Circuit then subjected the executive's allegations of national security concerns to a strict scrutiny standard.[222] The Sixth Circuit also considered the executive's arguments, including the mosaic theory justification for closing all "special interest" deportation hearings.[223] Like the Third Circuit, the Sixth Circuit also claimed to defer to the executive's judgment that certain information revealed during removal proceedings could impede the ongoing anti-terrorism investigation.[224] However, the opinion subsequently reveals the court's deep skepticism of the executive's claims. When the Sixth Circuit criticized the Creppy Directive, for example, for not being narrowly tailored,[225] it observed that the directive "does not apply to a 'small segment of particularly dangerous' information but a broad, indiscriminate range of information, including information likely to be innocuous."[226] Similarly, the Sixth Circuit criticized the executive for not using a definable standard to determine what constitutes a "special interest" case.[227] In fact, the Sixth Circuit noted that the executive even conceded that certain non-U.S. citizens known to have no links to terrorism will be designated "special interest" cases, supposedly to foreclose the terrorists' ability to draw inferences about the investigation on the basis of which hearings are

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219 *Id.* at 220.

220 *Id.*

221 Detroit Free Press v. Ashcroft, 303 F.3d 681, 703-04 (6th Cir. 2002) (finding that openness in deportation hearings protects against unfairness; enhances the quality of the hearing; serves a therapeutic purpose; and, particularly after September 11, enhances the perception of integrity and fairness of the process and ensures greater citizen participation in government).

222 *Id.* at 704-09.

223 *Id.* at 705-07.

224 *Id.* at 707.

225 *Id.*

226 *Id.* at 692.

227 *Id.*

open or closed.[228] The Sixth Circuit also challenged the executive's assertion about the need for secrecy when the executive had already allowed detainees to disclose much of the information.[229] Ultimately, the Sixth Circuit dismissed the executive's "mosaic intelligence" claims to national security as mere speculation,[230] which only heightened the need to protect the First Amendment:

> Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them "special interest" cases. The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors.[231]

Thus, even in the few opinions in the post-September 11 litigation to date, there are marked differences. What explains these different results? Why are the courts so preoccupied in some cases with individual rights and so willing in others to defer to the executive? Do these opinions merely reflect the judge's own political inclinations? Or are there some guiding principles that explain their decision-making? Part II.B explores three principles that potentially guide judges' decision-making in national security cases. These principles explain, in part, the differences in the post-September 11 litigation.

While the judges' personal views undoubtedly play a role in the outcome of the litigation, such an explanation is far too simple to be satisfactory. National security cases present judges with a host of reasons why they should not intervene,[232] including that a judicial misstep due to lack of expertise in national security matters may result in grave harm to the nation.[233] At the same time, however, judges must uphold important principles in the Constitution. What role should separation of powers concerns play in their decision-making? What role should the Bill of Rights have? The judiciary's attempt to balance these difficult

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228 *Id.*

229 *Id.* at 708.

230 *Id.* at 709.

231 *Id.* at. 683.

232 *See* Kaplan, *supra* note 43, at 1830-59 (discussing and critiquing the normative rationales that influence judges' decisions not to intervene in matters of national security).

233 *Id.* at 1804.

considerations are reflected in the guiding principles discussed below.

II

A. The National Security/Domestic Affairs Dichotomy Post-September 11

The preliminary results of the post-September 11 litigation reveal a general pattern of greater deference to the executive in its treatment of "enemy combatant" detainees. This result can be explained, at least in part, by the greater degree of deference courts accord the executive when its acts more clearly implicate national security than domestic affairs.

The national security/domestic affairs dichotomy grew principally from the language and facts in *Curtiss-Wright*[234] and *Youngstown*.[235] *Curtiss-Wright* involved the criminal indictment of the Curtiss-Wright Corporation for violating President Roosevelt's executive order (adopted pursuant to a joint resolution from Congress) by selling machine guns to Bolivia.[236] The *Curtiss-Wright* Court characterized the President's actions as implicating purely external affairs, over which he retained extra-constitutional inherent powers.[237] *Youngstown* involved President Truman's attempt, based solely on an executive order, to seize privately-owned steel mills in the United States in order to avert an industry-wide strike that the executive alleged would adversely affect the United States' position in the Korean War.[238] Most commentators agree that whereas *Youngstown* implicated national security concerns (the Korean War), its facts should be considered to involve more domestic affairs because the seizure—the takeover of an entire industry—had only an attenuated link to the war efforts.[239]

These two cases have generally been paired as reflecting two competing positions on the nature of the executive's powers in national security matters.[240] *Curtiss-Wright* has become the lodestar for those who advocate for executive inherent powers in

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234 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315 (1936).

235 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.2 (1952).

236 Brownell, *supra* note 49, at 17-19.

237 *Id.*

238 *Id.* at 42-43.

239 *Id.* at 104.

240 A few scholars treat *Curtiss-Wright* and *Youngstown* as unrelated, reading the former as concerning the president's inherent powers in national security and the

national security affairs.[241] In contrast, *Youngstown* is favored by those who support a vision of shared power among the three branches of government in matters of national security.[242] Some in this latter camp, for example, have read *Youngstown* as overruling *Curtiss-Wright*.[243] Yet, many national security cases decided since *Youngstown* have followed the *Curtiss-Wright* rationale.[244] This means that the co-existence of *Curtiss-Wright* and *Youngstown* has created some ambiguity, which has yet to be resolved by the Supreme Court[245] and scholars alike.[246]

Without attempting to resolve the ambiguity or constitutional faithfulness of the *Curtiss-Wright/Youngstown* co-existence, this analysis of the post-September 11 litigation is premised on the observation that national security cases decided since *Curtiss-Wright* and *Youngstown* consistently reveal that the courts grant the executive greater discretion to act in regard to national security than in domestic affairs.[247] Thus, for example, executive actions pursuant to congressional delegation in national security affairs have a greater probability of being upheld than similar actions in the domestic sphere.[248] Similarly, the executive also has a greater chance that its actions will be upheld even when Congress is silent, provided its actions implicate national security matters.[249]

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latter as concerning the lack of executive inherent powers in domestic affairs. *Id.* at 10 n.15.

241 *Id.* at 8.

242 *Id.* at 9.

243 *See* KOH, *supra* note 43, at 108-112.

244 *See id.* at 134-46 (citing Snepp v. United States, 444 U.S. 507 (1980), Dames & Moore v. Regan, 453 U.S. 654, 662 (1981), INS v. Chadha, 462 U.S. 919, 952 (1983), and Dep't of Navy v. Egan, 484 U.S. 518 (1988)).

245 Brownell, *supra* note 49, at 9. In the only U.S. Supreme Court case that has addressed the relationship between *Curtiss-Wright* and *Youngstown*, the Court acknowledged their ambiguity but did little to resolve it. *Id.* at 65-69 (discussing *Dames & Moore*, 453 U.S. at 662). Most commentators have characterized *Dames & Moore* as talking like *Youngstown* but walking like *Curtiss-Wright* because ultimately the Court upheld executive orders issued by Presidents Carter and Reagan to unfreeze Iranian assets and suspend all claims in U.S. courts against Iran during the Iran-Hostage Crisis, although such action was not authorized by Congress. *Id. Dames & Moore* deviated from *Youngstown* because in the latter case, congressional silence and legislative history was interpreted against the president, whereas the opposite was true in *Dames & Moore*. *Id.* at 66.

246 *Id.* at 70-109 (discussing six different interpretations of *Curtiss-Wright* or *Youngstown*).

247 *Id.* at 77, 107.

248 *Id.* at 102.

249 *See Dames & Moore*, 453 U.S. at 678-79.

Most, if not all national security cases,[250] however, will also interfere in domestic affairs. Therefore, the courts, as in *Youngstown*, will likely need to assess to what extent a particular case is less about national security and more about domestic affairs, to determine the appropriate degree of deference. This assessment is not easy, as the distinction between national security and domestic affairs is often difficult.[251] The national security/domestic affairs distinction, when applied to the new so-called war on terrorism, for example, can easily become muddled, given the complex combination of concrete and elusive factual and legal factors that have characterized it.

On the one hand, many of the characteristics of the September 11 events, and of the government's response to those events, are those of a country defending itself from a grave external threat to its national security. The horrible events of September 11 offer tangible and compelling evidence that the United States was the target of an attack comparable in magnitude to Pearl Harbor, and yet more callous, insofar as civilians were used as weapons and became the principal targets. Moreover, although the attack was not orchestrated by a nation, substantial consensus emerged that the attack constituted an act of aggression that justified U.S. military retaliation in self-defense.[252] Two months after the attack, the United States launched a military strike in Afghanistan for "harboring" al Qaeda. The executive undertook this military response with the approval of most nations,[253] the United Nations,[254] and the U.S. Congress.[255] This fact was significant be-

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250 It could be persuasively argued, for instance, that *Curtiss-Wright*, which also involved criminal sanctions against a domestic corporation, did not involve completely national security concerns. Brownell, *supra* note 49, at 88.

251 *Id.* at 103. *See also* Edgar & Schmidt, *supra* note 43, at 352.

252 Article 51 of the U.N. Charter reads in relevant part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. CHARTER art. 51, para. 1.

253 *See supra* note 3 and accompanying text.

254 *See* S.C. Res. 1368, *supra* note 2. In addition, NATO's North Atlantic Council stated that it regarded the attack as an action implicating Article V of the Washington Treaty, which provides that an "armed attack against one or more of the Allies in Europe or North America shall be considered an attack against all." Press Release, Office of the Press Secretary, NATO Chief Stresses International Resolve: Remarks by the President and NATO Secretary General Lord Roberton in Photo Opportunity (Oct. 10, 2001), *at* http://www.whitehouse.gov/news/releases/2001/10/print/20011010-6.html.

255 *See* September 18 Joint Resolution, *supra* note 1.

cause it signaled that attacks carried out by non-state actors (such as al Qaeda) could be considered acts of war[256] and that, moreover, state responsibility for such acts may extend to those nations who "harbor" the perpetrators.[257] It was in the course of this largely sanctioned U.S. strike in Afghanistan that the U.S. military captured and detained hundreds of "prisoners of war" in Afghanistan and in Guantanamo Bay, and at least three persons in the United States.[258] Existing laws of war authorize the detention of combatants, despite serious concerns that the United States is violating the minimal protections guaranteed to "prisoners of war" under these instruments.[259]

Based on these factors, the courts' greater deference to the executive in its detention of "enemy combatants" is explained, in part, because courts reasonably view these detentions as within the scope of national defense. In the past, the Supreme Court has upheld the detention and military trials of "enemy combatants," including those who are U.S. citizens.[260] This is not to say,

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[256] *But see* Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677, 685 (2002) (concluding that the al Qaeda attacks on the United States "cannot be prosecuted as war crimes because the United States and al Qaeda cannot be 'at war' under international law").

[257] *See* M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 100 (2002).

[258] The United States captured most individuals detained in Guantanamo Bay on or near the battlefield in Afghanistan or Pakistan. Some, however, came from further afield, such as the six Algerian detainees arrested and transported to Guantanamo Bay from Bosnia. By mid-August of 2002, some 598 suspected Taliban and al Qaeda prisoners, nationals of at least forty-three countries, had been transferred to the U.S. base at Guantanamo. Lawyers Committee for Human Rights, *A Year of Loss: Reexamining Civil Liberties Since September 11*, at 43 (Sept. 5, 2002) [hereinafter Lawyers Committee Report], *at* http://www.lchr.org/us_law/loss/loss_report.pdf.

[259] Foremost, for example, is the fact that the November 13 Military Order does not distinguish between lawful and unlawful combatants. *See* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1263 (2002). In fact, although the President has involved the language of war, he has ignored the cardinal principle of the laws of war that "individuals" detained as combatants engaged in fighting must be released when the hostilities cease, unless they are found to have committed war crimes. *See* George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635, 636 (2002). *See also* Lawyers Committee Report, *supra* note 258, at 44-48. *But see* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002) ("So long as American troops remain on the ground in Afghanistan and Pakistan in combat with and pursuit of al Qaeda fighters, there is no basis for contradicting the President's reported assertions that the conflict has not ended."); Hamdi v. Rumsfeld, 316 F.3d 450, 475 (4th Cir. 2003) (same).

[260] *Ex parte* Quirin, 317 U.S. 1, 31 (1942) (holding that unlawful combatants are subject to capture and detention as prisoners of war by opposing military forces and,

however, that the detentions of "enemy combatants" since September 11 do not raise concerns that the executive may be exceeding the reasonable scope of military detentions.[261]

For example, despite the district court's reliance on *Ex parte Quirin* to uphold the legality of Padilla's detention,[262] Padilla's detention is sufficiently distinct from the eight defendants who were, in fact, uniformed members of the German military who donned civilian clothing after surreptitiously entering the United States to engage in sabotage on behalf of a state against which Congress declared war. In contrast, while the executive alleges that Padilla intended to disperse a dirty bomb in the United States on behalf of al Qaeda,[263] Padilla is not alleged to have taken part in the U.S. armed conflict in Afghanistan nor in the September 11 attacks. Padilla could well be tried criminally for his alleged attempted act of terrorism in the United States, although it is less persuasive that he should be treated as an "enemy combatant." The international community has yet to reach consensus on who is a terrorist, or on when a terrorist can be said to have become an "enemy combatant,"[264] and yet this question was not addressed by the *Padilla* district court. The military's powers to detain under the November 13 Military Order[265] is

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in addition, to trial and punishment by military tribunals for acts which render their belligerence unlawful). The President's authority to detain "enemy combatants" presents a different question than whether the Constitution places any limits on his treatment of such detainees, including denial to their right to judicial review. *See* discussion *infra* Part II.B.

[261] *See* ABA Preliminary Report, *supra* note 7, at 10; Fletcher, *supra* note 259, at 635.

[262] *Padilla*, 233 F. Supp. 2d at 591-95.

[263] *Id.* at 572. The Mobbs Declaration states, inter alia, that Padilla traveled to Afghanistan in 2001 to discuss the "dirty bomb" plan with a senior al Qaeda member and that he received training from al Qaeda operatives to conduct terrorism.

[264] *See* Christopher L. Blakesley, *The Terrors of Dealing with September 11th*, 10 NEV. LAW. 7, at 7, 15 (Sept. 2002).

[265] Section 3 of the Bush Military Order authorizes and directs the Secretary of Defense to take into custody and "detain[ ] at an appropriate location . . . outside or within the United States" all "individual[s] subject to the order." November 13 Military Order, *supra* note 17. Section 2 of the Order defines "individual subject to this order" to mean:

> any individual who is not a United States citizen with respect to whom [the President] determine[s] from time to time in writing that there is reason to believe that such individual . . . (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign

also not limited to individuals associated with al Qaeda or who knowingly participated in terrorist acts.[266]

Another example of executive overreach in matters of national security is the proposed military tribunals in the November 13 Military Order. The executive's inherent power to detain enemy combatants as war prisoners is distinct from its power to adjudicate their guilt and mete out their punishment, the latter generally requiring congressional authorization.[267] Yet, the executive has already designated six Guantanamo Bay prisoners as eligible for trials before military commissions.[268] In this regard, the President has offered a rather weak claim to have promulgated the November 13 Military Order pursuant to prior congressional authorization by relying on unrelated language of the September 18 Joint Resolution and provisions of the Uniform Code of Military Justice (UCMJ).[269] The September 18 Joint Resolution is best

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policy, or economy; or (iii) has knowingly harbored one or more individuals described [in the first two categories above].

Id. The executive has not made available the text of the orders for the detention of U.S. citizens as "enemy combatants." *See supra* notes 19-23 and accompanying text.

266 *See* Katyal & Tribe, *supra* note 259, at 1261 (arguing that the range of people eligible for capture under the November 13 Order is vast and could potentially jeopardize the rights and liberties of approximately 20 million non–U.S. citizens in the United States as well as any non-U.S. citizen anywhere in the world). Katyal and Tribe criticize specifically that the November 13 Order's only standard for jurisdiction is President Bush's unilateral written statement that he has "reason to believe" that a particular non-U.S. citizen at some point committed, or aided or abetted, a named terrorist organization. *Id.* This could include, for example, a member of the Irish Republican Army who threatens the American embassy in London. *Id.* More problematic is the fact that neither "aid[ed] or abet[ted]" a terrorist, nor "act[ed] in preparation . . . for" terrorism, contain a mens rea requirement. *Id.* at 1263. The November 13 Order, therefore, could include entirely innocent conduct "such as hiring a car for a friend when the friend turns out to be a terrorist, or donating money to a charity when that charity turns out to be a front for terrorism." *Id.*

267 *Id.* at 1266-95 (concluding that absent an emergency that threatens truly irreparable damage to the nation or its Constitution, or when the president establishes such tribunals in conquered territory, the Constitution's text and judicial precedent require congressional authorization for military tribunals). *See also* Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 1 (2001) [hereinafter Paust, *Courting Illegality*]. *But see* Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249, 250 (2002) (arguing that President Bush probably had independent constitutional authority to issue the November 13 Military Order as commander in chief).

268 Adam Liptak, *Threats and Responses: The Legal Context; Tribunals Move from Theory to Reality*, N.Y. TIMES, July 4, 2003, at A12.

269 A few scholars have also argued that Article 15 of the Articles of War, now codified in the Uniform Code of Military Justice [UCMJ] at 10 U.S.C. § 821 provides the president's strongest argument for such statutory authority. Bradley & Goldsmith, *supra* note 267, at 252-53.

understood as Congress' authorization to the executive to use military force in Afghanistan. At least one district court and the Fourth Circuit have agreed with the executive that the "use of all necessary and appropriate force" language in the September 18 Joint Resolution must include the detention of "enemy combatants" as an inherent component of warfare.[270] Whether courts will also consider military trials as inherent components of warfare remains to be seen when these have required congressional authorization. Similarly, scholars question that the UCMJ could be read to authorize the proposed military tribunals.[271]

On the other hand, most certain is that the executive has a substantially weaker claim to inherent national security powers when its detentions involve persons with respect to whom the executive lacks evidence linking them to the September 11 attacks or to al Qaeda. In the aftermath of September 11, the executive has also conducted a so-called domestic war on terrorism in ways that conjure up images of the United States' past elusive wars, as for example against a perceived communist threat,[272] or

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270 Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 594-99 (S.D.N.Y. 2002); Hamdi v. Rumseld, 316 F.3d 450, 467 (4th Cir. 2003).

271 Katyal & Tribe, *supra* note 259, at 1288-89 (rejecting the argument that the UCMJ authorized the creation of such military tribunals since in general the statute has been read narrowly to avoid military trials, in the absence of a formal declaration of war, of those who do not serve in our armed forces); Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 441 (2002) ("The statutory basis for military commissions is so thin as to be almost invisible. The Uniform Code of Military Justice (UCMJ) . . . does little more than acknowledge the existence of such tribunals."); Juan R. Torrvella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 666-67 (2002).

272 For example, during WWI, the Espionage Sedition Act of 1917 led to the conviction of many socialist leaders and 150 members of the Industrial Workers of the World. Bucklin, *supra* note 48, at 89. During the Depression, the 1938 House Committee of Un-American Activities (HUAC) investigated anyone its members assumed had participated in a communist conspiracy to cause economic chaos and subversion in the United States. *Id.* at 90. Those investigated included the Boy Scouts, the Camp Fire Girls, and Shirley Temple. *Id.* During WWII the Smith Act of 1940 prescribed the prosecution of anyone who engaged in activities deemed to "interfere with or impair the loyalty, morale, or discipline of the armed services," or who advocated "overthrowing or destroying the government in the United States by force or violence." *Id.* at 93-94. When WWII ended, President Truman created the Temporary Commission on Employee Loyalty to test the loyalty of all federal employees, while HUAC resurfaced to "investigate" members of the Hollywood entertainment industry. *Id.* at 94-95. In 1950, the McCarran Act made it illegal for a member of a Communist organization to "hold any nonelective office or employment under the United States," or to "engage in any employment in any defense facility," or "to apply for or use a passport." *Id.* at 95. During the Vietnam War,

against all foreigners or U.S. citizens who look like the enemy.[273] Such "wars" become elusive not solely when the threat to national security is uncertain (unlike the threat of communism, few question that terrorism is a viable threat), but also when so many become too easily branded or treated as the "enemy."

In the course of this "domestic war on terrorism," the executive has detained more than 1000 individuals, often in secret, incommunicado detention, for prolonged periods of time.[274] Yet, from what the public knows, it appears that fewer than 0.3 percent of the detained have been charged with terrorist acts or linked to al Qaeda.[275] For this reason, members of Congress and civil rights groups have expressed concern that overwhelmingly the detainees' connection to terrorism or al Qaeda is attenuated, at best.[276] Many detainees were identified to the executive through "suspicions and tips based solely upon perceptions of their racial, religious, or ethnic identity."[277] Moreover, many of these detentions were the result of the executive's practice of ra-

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President Nixon continued the "red-baiting" tactics by establishing a secret police and by attacking the right of political dissent, this time without congressional approval. *Id.* at 95-96.

273 For example, the Alien and Sedition Acts of 1917-1918 allowed the president to detain enemy non-U.S. citizens in time of war and to deport any non-U.S. citizen (not just "enemies") he deemed a threat to national security. *Id.* at 86. The Alien Act of 1918 authorized the attorney general to deport any non-U.S. citizen without the benefit of due process if they were members of an organization which the chief law enforcement agent of the nation thought was advocating the overthrow of the government. *Id.* at 90. In 1920 alone, more than 4000 suspected subversives were arrested in thirty-three cities. *Id.* The Smith Act of 1940 also required all non-U.S. citizens to register with the government and to be fingerprinted if over fourteen years of age. *Id.* at 94. In the wake of the Japanese attack on Pearl Harbor, over 110,000 Japanese and Japanese Americans were ordered interred. *Id.* at 91.

274 *See supra* notes 7-11 and 20-33 and accompanying text.

275 *See supra* notes 13-14 and accompanying text.

276 147 CONG. REC. S13923 (daily ed. Dec. 20, 2001) (statement of Sen. Feingold) ("[W]e still do not know the identities of hundreds of other individuals still held in detention, the vast majority of whom have no link to September 11 or al-Qa[e]da."). *See also U.S.: Ensure Protections for Foreign Detainees*, Human Rights News, *at* http://www.hrw.org/press/2001/11/pakfordet1201.htm (Dec. 1, 2002) ("Most of the criminal charges are reportedly minor and not directly linked to terrorism.").

277 Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1578 (2002). *See also* The OIG Report, *supra* note 4, at 15-16 ("[T]he 762 aliens classified as September 11 detainees were arrested by FBI-led terrorism task forces pursuing investigative leads . . . rang[ing] from information obtained from searches of the hijackers' cars and personal effects to anonymous tips called in by members of the public suspiscious of Arab and Muslim neighbors who kept odd schedules."); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002).

cial profiling, in which it purported to conduct "voluntary interviews" of more than 5000 male foreign nationals from Middle Eastern or Islamic countries.[278] More recently, the executive has continued this same practice with the recent INS requirement that certain non-immigrants, mostly Arab men, register with the INS.[279] Perhaps more telling is that the executive has released most of the detainees or has deported them in secret, without ever charging them with a crime.[280]

These facts explain why at least some judges have viewed these post-September 11 detentions as mostly law enforcement, with some national security implications (i.e., *Youngstown*), rather than as a legitimate national defense operation (i.e., *Curtiss-Wright*). Thus, for instance, these judges did not defer to the executive's broad interpretation of the material witness or FOIA statutes. For example, Judge Scheindlin construed the material witness statute narrowly, in order to avoid a Fourth Amendment violation.[281] Similarly, Judge Kessler and Judge Tatel conducted a careful review of the executive's claims that information sought in the FOIA request must be kept secret, rejecting claims when they were unsubstantiated or contradictory.[282] In contrast, Chief Judge Mukasay, Judge Sentelle and Judge Henderson did not question the executive's characterization of the domestic war on terrorism as a matter of national security, and, therefore, deferred broadly to the executive on its interpretation of the material witness or FOIA statutes.[283]

In the past, courts have also acquiesced, sometimes reluctantly, to these elusive domestic wars, as for example when the Supreme Court upheld the internment of tens of thousands of Japanese and Japanese Americans during World War II.[284] Many have questioned whether such detentions could be affirmed in any

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[278] Volpp, *supra* note 277, at 1578.

[279] *See supra* note 23. *See also* Victor C. Romero, *Decoupling 'Terrorist' from 'Immigrant': An Enhanced Role for the Federal Courts Post 9/11*, 7 J. GENDER RACE & JUST. 201 (2003) (arguing that Attorney General Ashcroft's use of immigration proceedings in war against terrorism is improper, given that immigration remedy is deportation, not prosecution).

[280] *See supra* notes 23, 135 and accompanying text.

[281] *See supra* note 118 and accompanying text.

[282] *See supra* notes 158-66, 187-201 and accompanying text.

[283] *See supra* notes 150-52 and 173-86 and accompanying text.

[284] *See* Korematsu v. United States, 323 U.S. 214, 219-20 (1944) ("Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions.")

court of law today.[285] Indeed, *Korematsu* has been so discredited that it is also doubtful that the executive would even rely on its holding to support the current domestic war on terrorism.[286] Nonetheless, two additional factors distinguish *Korematsu* from the present case. First, the Supreme Court decided *Korematsu* after Congress had issued a formal declaration of war against Japan.[287] Second, the Supreme Court held that President Roosevelt issued his executive order to intern Japanese and Japanese Americans with full congressional authorization.[288] To date, Congress has not issued a formal declaration of war against al Qaeda, nor is it clear that Congress could do so under existing international law.[289] Second, even if the executive has been successful in asserting that Congress has authorized the detention of al Qaeda members and those who harbor them,[290] it does not follow that all or most post-September 11 detentions meet this criteria. In fact, if they did, the executive could (and would) likely hold them as "enemy combatants." Until the executive does so, however, courts are right to treat non-"enemy combatant" detentions as principally within the scope of the executive's law enforcement powers, not within national security.

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[285] *See* Sandra Takahata, *The Case of* Korematsu v. United States*: Could it be Justified Today?*, 6 U. HAW. L. REV. 109 (1984). *See also* Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1192 (1985).

[286] Unlike the internment of Japanese and Japanese Americans, the executive has never claimed (and would not want to claim) that its sweeping detention practices have been necessary to remove persons who represent a threat to the United States. Rather, the executive has argued that the clandestine nature in which terrorist groups operate makes it necessary for the government to conduct such sweeping investigations. *See* Padilla v. Bush, Motion to Dismiss Amended Petition for Writ of Habeas Corpus, Civ. No. 02-4445, at 4 (S.D.N.Y. June 26, 2002), *available at* http://news.findlaw.com/hdocs/docs/padilla/padillabush62602gmot.pdf. ("[T]he al Qaeda network and those who support it remain a serious threat, as does the risk of future terrorist attacks on United States' citizens and interests carried out, as were the attacks of September 11, through covert infiltration of the United States by enemy belligerents."). Unfortunately, the current government practices, which have mostly targeted the Muslim and Arab communities in the United States, have enormous commonalities with what happened to the Japanese and Japanese Americans during World War II. *See* Volpp, *supra* note 277, at 1591.

[287] *Korematsu*, 323 U.S. at 216-17.

[288] *Id.*

[289] *See supra* note 238. *But see* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 588 (S.D.N.Y. 2002) (deeming the September 18 Joint Resolution a declaration of war against al Qaeda).

[290] Both the Fourth Circuit in *Hamdi* and the district court in *Padilla* found that the September 18 Joint Resolution authorized Hamdi's and Padilla's detentions. *See supra* notes 92-93 and 118-19 and accompanying text.

B. Distinguishing Between "Inherent" Executive National Security Powers and Exclusive Congressional Powers

The existence of the executive's inherent national security powers to detain prisoners of war explains, in part, why the courts have accorded the executive greater deference in cases involving the detention of persons deemed "enemy combatants." These cases, however, also raise the constitutional question of whether the executive may deny or limit the rights of those it detains by purporting to try them as "enemy combatants" in military tribunals and preventing them from seeking judicial review in federal court, including habeas corpus review.

The November 13 Military Order explicitly states the President's intent to preclude the federal courts from exercising jurisdiction over those detained and tried under the order.[291] The executive has claimed that the November 13 Military Order does not, however, preclude habeas corpus review at least to anyone arrested under it in the United States.[292] However, the November 13 Miliary Order's language, and the President's actions to physically bar U.S. citizens in U.S. military prisons from meeting with counsel, strongly indicate that the executive intended to limit the scope of habeas corpus review solely to challenges involving the tribunal's jurisdiction over particular individuals.[293]

The outcomes in the "enemy combatant" decisions to date

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[291] Section 7(b) of the November 13 Military Order provides in pertinent part that the:

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

November 13 Military Order, *supra* note 17; *see also* Bryant & Tobias, *supra* note 16, at 23-24 (concluding that the Defense Military Order Number One, which established the procedures for the implementation of the November 13 Military Order, strictly forbid federal judicial review of all aspects of any proceeding undertaken under the November 13 Military Order); Paust, *supra* note 256, at 679-81 (same).

[292] White House Counsel Alberto R. Gonzalez has stated that "judicial review in civilian courts," is present under the November 13 Military Order: "[A]nyone arrested, detained or tried in the United States by a military commission will be able *to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court*." Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 (emphasis added).

[293] *Id. See also* Katyal & Tribe, *supra* note 259, at 1262; Bryant & Tobias, *supra* note 16, at 22-24.

have allowed the executive to unilaterally foreclose the Guantanamo Bay detainees' access to the courts or, with the exception of the *Padilla* holding,[294] have foreclosed any factual review of "enemy combatant" detentions in the United States. The Court of Appeals for the District of Columbia upheld the district court's holding that Guantanamo Bay detainees could not file habeas corpus petitions for lack of territorial jurisdiction.[295] In essence, the district court's contested construction of the habeas corpus statute[296] effectively granted the executive the unilateral power to bar those it alone deems "enemy combatants" from seeking habeas corpus review by simply detaining them outside U.S. territory.[297] Similarly, the Fourth Circuit instructed the district court to allow the executive to physically obstruct Hamdi's access to the courts by holding him incommunicado and by denying him access to counsel. Further, while Hamdi's habeas corpus petition moved forward on the legal challenges to his detention,[298] unlike Padilla, Hamdi will not be able to contest the factual allegation on which the executive based its decision to label him an "enemy combatant."[299] This has, in essence, denied Hamdi access to any meaningful judicial review of his detention.

As such, these cases raise important constitutional issues of separation of powers as between the executive and Congress not previously addressed by the courts. Specifically, these cases pose the question of whether the executive's unilateral curtailment of habeas corpus review for Guantanamo Bay detainees and obstruction of any factual review in Hamdi's detention amounts to

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294 *See supra* notes 105-06 and 120-22 (discussing Padilla's limited victory to access counsel and to present factual challenges to his classification by the executive as an "enemy combatant").

295 Initially both the D.C. District and the Central California District courts declared the habeas corpus statute to lack extraterritorial application. *See supra* notes 122-32 and accompanying text. The Ninth Circuit, however, subsequently vacated this portion of the Central California District Court's holding, but it did so on grounds of judicial restraint as the case was already dismissed for petitioners' lack of standing. *See supra* notes 133-36 and accompanying text. The Ninth Circuit has yet to rule on this issue on the merits. *Id.*

296 *See* Paust, *supra* note 256, at 690-91. Paust criticizes the California court's non-extraterritorial interpretation of the habeas corpus statute as unsupported by its plain meaning. *Id.* Paust argues that the court's interpretation of the statute added the words "territorial" and "sovereignty" to the statute when those words were not included by Congress, with the effect of confusing and altering its ordinary meaning. *Id.* at 691.

297 *See infra* notes 318-25 and accompanying text.

298 See *supra* notes 90-98 and accompanying text.

299 *See supra* notes 99-103 and accompanying text.

an unconstitutional suspension of the writ of habeas corpus under Article I, Section 9, Clause 2 of the Constitution which reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." Many scholars agree that a textual interpretation of the Suspension Clause requires that only Congress exercise this power.[300] Moreover, if the executive decides to subsequently charge and try the "enemy combatants," in the proposed military tribunals, these cases also foreshadow the question of whether the executive can deny "enemy combatants'" access to federal courts when the Constitution is clear that only Congress has the power to prescribe federal court jurisdiction.[301] Yet, when the courts, like the Fourth Circuit, have addressed seperation of powers, the focus has been exclusively on judicial non-interference with the political branches on matters of national security, not on whether the executive's curtailment or limitation of judicial review implicated exclusive congressional powers under Article I.[302]

The executive has asserted that the September 18 Joint Resolution and two provisions of the Uniform Code of Military Justice (UCMJ) provide congressional authorization for its issuance of the November 13 Military Order.[303] A few scholars, the Fourth Circuit and one district court have agreed with President Bush,[304] although many others question this conclusion.[305] Even leaving aside the weaknesses in the claim that Congress author-

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300 *See* George Rutherglen, *Structural Uncertainty over Habeas Corpus & the Jurisdiction of Military Tribunals*, 5 GREEN BAG 2D 397 (arguing that the Suspension Clause appears in Article I of the Constitution, in a section limiting the powers of Congress, not in Article II, which defines the powers of the president); Paust, *supra* note 267, at 21 (same); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 60-61 (1973). *See also infra* notes 311-17 and accompanying text. Recently, the U.S. Supreme Court also suggested that the suspension of the writ for federal executive detentions would require some "judicial intervention." INS v. St. Cyr, 533 U.S. 289, 300 (2001) (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)). Other scholars, however, have suggested that the president may suspend the writ in an emergency situation, at least so long as Congress is not in session. *See* Martin S. Sheffer, *Does Absolute Power Corrupt Absolutely?* (pt. 1), 24 OKLA. CITY U. L. REV. 233, 254-55 n.85 (1999).

301 Bryant & Tobias, *supra* note 16, at 4-15 (discussing Congress' exclusive powers under Article I, Section 8 and Article III, Section 2 of the Constitution to grant federal courts jurisdiction over "cases" and "controversies.").

302 *See supra* notes 86-89, 99-103 and accompanying text.

303 *See supra* note 19 and accompanying text.

304 *See supra* notes 5, 92-98, 118-19 and accompanying text.

305 *See supra* note 270 and accompanying text.

ized President Bush to issue the November 13 Military Order,[306] the president's statutory authority can only include the power to establish the tribunals, not the power to curtail judicial review.[307] The sole provision that could be read to refer to the president's power to establish military commissions provides that Congress' establishment of court martial jurisdiction under the UCMJ does not preclude the concurrent jurisdiction of other military tribunals as established by law.[308] Nothing in this language suggests that Congress has delegated to the executive any power to make laws to curtail judicial review. The November 13 Military Order and any alleged congressional support for its creation, in any case, could not suspend habeas review, given the "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction."[309]

Moreover, the legislative history of the USA PATRIOT Act and congressional action in response to the November 13 Military Order reveal strong congressional disapproval of President Bush's purported abrogation of federal court jurisdiction.[310] During the negotiation of the USA PATRIOT Act, for example, Congress rejected President Bush's request to authorize the attorney general to certify for indefinite detention any non-U.S. citizen, whether legal or illegal, whom the official deemed a na-

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306 *Id.*

307 It is also debatable that even if courts were to conclude that Congress did, in fact, authorize the president to curtail judicial review, that such delegation would be constitutional were it to amount to a suspension of the writ. There are several opposing views on the meaning of the Suspension Clause. *Compare* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126-56 (1980) (arguing that the framers intended the clause to limit Congress' powers to curb the writ in state courts but not to disallow the writ in federal court) *with* Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451 (1996) (arguing for a broader interpretation of the clause to limit Congress' ability to narrow federal habeas corpus). This Article only discusses whether the president may unilaterally suspend the writ, and does not take a position on whether Congress could authorize the president to suspend it as to the "enemy combatants" who are tried in military tribunals.

308 Section 821 of the Uniform Code of Military Justice provides that statutory provisions for court-martial jurisdiction "do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U.S.C.A. § 821 (West 2003).

309 Katyal & Tribe, *supra* note 259, at 1307 (citing INS v. St. Cyr, 533 U.S. 289, 297-98 (2001)).

310 Bryant & Tobias, *supra* note 16, at 398.

tional security threat, subject only to ministerial review.[311] Also, since then Congress has debated the constitutionality of the November 13 Military Order.[312] As a result of these debates, Senator Patrick Leahy introduced legislation to circumscribe military detainment and trials much more narrowly, and impose considerably greater procedural safeguards,[313] including subjecting detentions under the order's authority to the supervision of the U.S. Court of Appeals for the D.C. Circuit.[314]

Thus, the executive's unilateral decisions to proscribe federal court jurisdiction and to bar or substantially inhibit habeas corpus review raise significant separation of powers concerns. The president's proscription of federal court jurisdiction in the November 13 Military Order, without congressional authorization, should be declared unconstitutional since Congress alone has the power to proscribe such jurisdiction.[315] On similar grounds, courts should consider the constitutionality of the executive's bar or obstruction of the detainees' habeas corpus petitions. This analysis should consider whether the executive may exercise the power to limit or suspend the writ unilaterally in times of national security.

The Supreme Court has not definitively settled whether the president could ever exercise the power to suspend or limit the writ unilaterally.[316] However, judicial precedent has strongly dis-

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311 *Id.* at 387-91.

312 These concerns include whether President Bush abused his constitutional authority by establishing the military tribunals and whether the Order violates the Bill of Rights. *Id.* at 395-97.

313 *Id.* at 396-98 (discussing Bill 1941 introduced by Senator Patrick Leahy). For example, the bill would authorize military detainment and trial of only those persons "apprehended in Afghanistan, fleeing from Afghanistan, or in or fleeing from any other place outside of the United States where there is armed conflict involving the Armed Forces of the United States." *Id.* at 397 (citing S. 1941, § 1941(a)(3)). American citizens and lawful permanent residents would also be excluded. *Id.*

314 *Id.* at 397-98 (citing to S. 1941, § 5(d)).

315 *See* Bryant & Tobias, *supra* note 16 (concluding that the November 13 Military Order violates separation of powers insofar as it purports to usurp congressional power over the appellate jurisdiction of the Supreme Court under Article III, Section 2, and congressional power over the original jurisdiction of the lower courts under Article I, Section 8 of the Constitution).

316 *See* Rutherglen, *supra* note 300, at 400. Paradoxically, this lack of certainty is attributed to the fact that even in the midst of the nation's greatest crisis, the political branches have not been willing to test the limits of their power by, for example, consistently acting jointly to "limit" (but not entirely suspend) the writ. *Id.* (explaining that Congress has purposefully never entirely shut off all avenues of judicial relief because when it has taken action to limit the writ it has done so with qualifications that preserve the role of the ordinary civil courts). *See also* Developments in

favored suspension when the president has acted unilaterally to strip the courts of habeas corpus review. For example, when President Lincoln unilaterally suspended the writ of habeas corpus during the Civil War,[317] Chief Justice Taney declared his actions unconstitutional,[318] compelling President Lincoln to seek retroactive approval from Congress.[319] Moreover, despite language in President Roosevelt's Order to foreclose the saboteurs' access to the courts, the Supreme Court in *Ex parte Quirin* rejected the argument that defendants did not have standing to file habeas corpus petitions to challenge the constitutionality of the military commissions who tried them.[320] Similarly, in *In re*

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the Law, *The Suspension Clause*, 83 HARV. L. REV. 1263, 1265 (1970) (observing that the practice of the political branches in suspending the writ has been in accord with the principle that Congress has the sole power to suspend the writ, insofar as the executive has consistently acted pursuant to delegated authority).

317 President Lincoln's Order authorized the arrest without a trial of "'disloyal citizens'" and "anyone who expressed sympathy with the South." Melissa K. Matthews, *Restoring The Imperial Presidency: An Examination of President Bush's New Emergency Powers*, 23 HAMLINE J. PUB. L. & POL'Y 455, 465-66 (2002). Lincoln imprisoned more than 13,000 citizens, among them draft resisters, newspaper editors, judges, lawyers, and legislators. *Id.*

318 Chief Justice Roger Taney, while sitting in the U.S. Circuit in Baltimore, declared President Lincoln's suspension of the writ unconstitutional. *Ex parte* Merryman, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9487) ("I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power.") Justice Douglas in his concurrence in *Youngstown* cited *Ex parte Merryman* to note that the president alone has no power to issue the writ of habeas corpus. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 631 n.1 (1952).

319 Congress acted promptly to endorse the president's actions by enacting legislation approving what Lincoln had done. Confiscation Act of 1861, S.25, 37th Cong. (1861).

320 *See In re* Yamashita, 327 U.S. 1, 9 (1946) (discussing holding in *Ex parte Quirin*, 317 U.S. 1 (1942), stating that Congress "has not withdrawn [jurisdiction], and the Executive branch of the Government could not, unless there was suspension of the writ [of] . . . habeas corpus." Specifically, the Court recognized that military commissions decisions can be "set aside" when there is "clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex parte Quirin*, 317 U.S. at 25. The Court affirmed that the "duty . . . rests on the courts in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty." *Id.* at 19. The Court in *Ex parte Quirin* did limit, however, the scope of its review to avoid detailed inquiry into the military's compliance with the Articles of War as enacted by Congress. *See* Rutherglen, *supra* note 300, at 401-02. The factual and historical background in *Ex parte Quirin* may have had a lot to do with this limited review, including the haste with which President Roosevelt rushed the prisoners toward trial and the strength of the charges against them. *Id. See also* A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309.

Yamashita,[321] the Court affirmed that the executive "could not . . . withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus."[322]

In re Yamashita has particular relevance to the Guantanamo Bay detainees' habeas corpus petitions because the facts surrounding the detainees' situation are more analogous to the facts in *In re Yamashita* than to the facts in *Eisentrager*. Yamashita's offenses and military trial occurred in the Philippines, which were then in U.S. possession.[323] In contrast, in *Eisentrager*, decided four years after *In re Yamashita*, the Court did not hear the habeas corpus petitions of German combatants tried in military tribunals in China for alleged war crimes committed in Japan. Instead, the Court held that it lacked jurisdiction because neither the crime nor the trial took place inside U.S. territory.[324] The courts relied on *Eisentrager* to dismiss the Guantanamo Bay detainees' petitions on similar grounds.[325] Guantanamo Bay, however, like the Philippines, is in the possession and control of the United States and thus, does not fall outside U.S. jurisdiction.[326] Moreover, some of those detained in Guantanamo Bay could establish jurisdiction if they are charged with terrorist acts that occurred inside the United States. Furthermore, since *Eisentrager*, courts have not always read the same extra-territorial restriction to the habeas corpus statute. For example, courts have recognized habeas corpus jurisdiction when those being tried in military tribunals outside U.S. territory are U.S. service men, even if the crimes did not occur in the United States.[327] Similarly, courts have heard habeas corpus petitions by foreign nationals not in the United States.[328] Thus, *Eisentrager* should be limited to its facts based on important legal distinctions.

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[321] *In re Yamashita*, 327 U.S. at 9.

[322] *Id.*

[323] *Id.* at 5-6.

[324] Johnson v. Eisentrager, 339 U.S. 763, 777-78 (1950).

[325] This outcome is not surprising. In fact, some have perceptively suggested that the president appears to have constructed Guantanamo Bay according to specifications derived from *Eisentrager* precisely to avoid confrontation with the judiciary regarding the writ of habeas corpus. Rutherglen, *supra* note 300, at 403-04.

[326] *See* Paust, *supra* note 256, at 691-92; *see also* Paust, *Courting Illegality*, *supra* note 267, at 23-24 (arguing that territory within U.S. jurisdiction should include any foreign-occupied territory).

[327] Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 495 (1973).

[328] *See* Paust, *supra* note 256, at 692 n.2 (citing several cases). *See also supra* notes 131-32 (discussing the D.C. District Court's attempt to distinguish cases when

For example, the *Eisentrager* military trials tried combatants who were nationals of a country against which Congress had issued a formal declaration of war for their commission of war crimes. Moreover, the laws of war authorized the detention and trial of the *Eisentrager* petitioners because they were accused of committing war crimes recognized under humanitarian law.[329] Thus, in *Eisentrager*, the executive acted in matters of national security with clear congressional authorization and in keeping with international humanitarian law.[330] In contrast, Guantanamo Bay detainees are being held without any resolution as to their status as combatants, and if combatants, then their status as "prisoners of war" or "unlawful combatants." Moreover, unless Guantanamo Bay is declared to be U.S. territory, the executive's unilateral decision to detain the alleged combatants is inconsistent with international humanitarian law which prescribes that combatants must be detained in the territory of the party to the conflict that retains custody, or in the "occupied territory" where the hostilities took place.[331] These issues were among those that petitioners raised in their habeas corpus petitions.[332] However, the courts did not adequately consider the separation of powers implications arising from their acquiescence in the executive's manipulation of the habeus corpus statute to suspend its application to the Guantanamo Bay detainees.

With respect to Hamdi and Padilla, the courts have not entirely foreclosed their habeus corpus petitions, although courts have accorded the executive the utmost deference in their re-

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non-U.S. citizens outside the United States were granted habeas corpus review from the Guantanamo Bay detainees).

[329] Article 5 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that a "Party to the conflict" or an "Occupying Power," may detain, without a trial, those who are "definitely suspected of or engaged in activities hostile to the security of the State," and even this is only permitted within the country's own territory or in the occupied territory. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, (subdivision (art. 5)), 6 U.S.T. 3516, 3520, 75 U.N.T.S. 287, 290. The German defendants in *Eisentrager* were convicted of violating the laws of war by engaging in, permitting, or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan. *Eisentrager*, 339 U.S. at 766.

[330] *See* Rutherglen, *supra* note 300, at 403 (noting that the facts in *Eisentrager* contributed to its holding: "Denying access to the petitioners would have no effect on the rights of citizens, or of noncombatants, or even of combatants not charged with war crimes.").

[331] See *supra* note 324.

[332] *See supra* note 35 and accompanying text.

view.[333] Greater judicial deference to the political branches is undoubtedly warranted and required by the U.S. Constitution in times of national crisis.[334] The more difficult question for courts to answer, however, is exactly how much deference. Too much judicial acquiescence could permit other constitutional violations, including separation of powers as between the executive and Congress. One such example was the Fourth Circuit's decision to allow the executive to deny Hamdi access to a lawyer and its refusal to undertake any factual review of his detention, even after the executive conceded that the "some evidence" standard should govern.[335] In so holding, the Fourth Circuit ignored the long historical precedent of courts conducting at least some review of the factual determinations made by the executive,[336] even in areas where the political branches have enjoyed plenary power.[337] The Fourth Circuit also ignored the modern reality of factual review of detentions in habeas corpus petitions. The Fourt Circuit's reliance solely on *Ex parte Quirin* to conclude that the executive's factual averments in the affidavit were sufficient to confirm that Hamdi's detention conformed with a legitimate exercise of Article II war powers[338] was, at best, misguided. In *Ex parte Quirin*, the Court conducted no factual review, as most of the facts were stipulated and undisputed.[339]

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[333] *See supra* notes 87-104 and 105-22 and accompanying text.

[334] *Id.*

[335] Hamdi v. Rumsfeld, 316 F.3d 450, 473-74 (4th Cir. 2003).

[336] John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 156 (2002) (explaining that during the nineteenth century, a court reviewing a detention decision on habeas would make its own determination of the sufficiency of the evidence). *See also* Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1089 (1995) (explaining that at English common law, habeas corpus required a showing of "sufficient cause" for detention, which required not only that such detention be justified by law but also addressed the factual basis for the legal violation that permitted the detention).

[337] INS v. St. Cyr, 533 U.S. 289, 306-07 (2001) (while examining the writ as it existed in 1789, observing that courts generally reviewed whether there was some evidence to support the facts of a deportation order). *See also* Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2522 (1998).

[338] *Hamdi*, 316 F.3d at 473.

[339] *Ex parte* Quirin, 317 U.S. 1, 20 (1942). Further, scholars have cautioned against over reliance on *Ex parte Quirin*, where justices and scholars alike have since lamented its holding. *See* Bryant & Tobias, *supra* note 320, at 330-32 (discussing a number of considerations that warrant restricting the opinion in *Ex parte Quirin*, including the alacrity with which the government prosecuted the saboteurs and the Supreme Court ratified the military commission deliberations as well as the com-

The Fourth Circuit's denial to Hamdi of what had been historically standard habeas review meant the court may have violated the Suspension Clause, if the latter is to be understood as a guarantee of habeas relief. As Professor Gerald L. Neuman has explained, "[i]f one reads the Suspension Clause as a guarantee of habeas relief, the obvious question presented is: What habeas relief?"[340] In other words, what amounts to a "suspension" of the writ should inquire into whether habeas relief must guarantee at minimum the common law right of habeas corpus, as it was understood when the Constitution was ratified, or whether habeas relief should also encompass subsequent statutory expansions of the right, and, if so, which ones?[341] Courts have yet to decide the exact scope of judicial inquiry guaranteed by the Suspension Clause, although they do agree that it must incorporate minimally the common law writ of habeas corpus as it existed in 1789.[342] Therefore, whenever courts deny the minimum habeas corpus review traditionally available to detainees on its own or in acquiescence to the executive, they must consider the effect on the Suspension Clause, as Congress alone must act to suspend the writ, even in times of national emergency.[343]

C. Balancing the Government's Need for National Security Secrets and The Public's Right To Know "What Their Government is Up To"

Finally, in the post-September 11 cases, some courts have been motivated to limit the government's ability to retain national security secrets by their desire to safeguard the public's role in holding the executive accountable to the rule of law. In the FOIA litigation, the D.C. Federal District Court ordered the executive to release to the public the names of the detainees and of

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plication of rationalizing the Court's determination after the United States invoked a quickly-drafted per curium order to execute six of the eight petitioners).

340 Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 590 (2002).

341 *Id.*

342 *See* Hafetz, *supra* note 337, at 2717. *See also* Neuman, *supra* note 340, at 589 (discussing the U.S. Supreme Court's *St. Cyr* opinion and explaining that the Court applied the minimum 1789 standard while deciding not to elaborate on the full scope of the privilege protected by the Suspension Clause because such inquiry would require resolution of difficult constitutional questions that were better avoided by the statutory interpretation the Court adopted).

343 *See supra* notes 314-20 and accompanying text.

their lawyers.[344] The reversal of the order by the Court of Appeals for the District of Columbia also provoked a strong dissent that affirmed the district court's conclusions.[345] Similarly, the Sixth Circuit ordered the executive to open its immigration hearings to the public.[346] These opinions acknowledged the executive's need to protect national security secrets. Nonetheless, the opinions imposed strict judicial standards of review, requiring the government to prove its need to keep the information secret under the FOIA, or to narrowly tailor its claims for secrecy by conducting case-by-case determinations about the need to close immigration hearings.[347]

These cases mirror the U.S. Supreme Court's exceptional holding in *New York Times* declining to enjoin newspapers from publishing the contents of a classified historical study of U.S. Vietnam War policy.[348] In that case, several of the Justices were similarly persuaded that the founding fathers intended the First Amendment to protect the principles that an informed public is a fundamental tenet of a representative government, and that open debate and discussion of public issues is often the only guarantee against tyranny.[349] This policy objective alone, however, did not

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[344] *See supra* notes 154-72 and accompanying text.

[345] *See supra* notes 187-201 and accompanying text.

[346] *See supra* notes 202-30 and accompanying text.

[347] *See supra* Part I.C.

[348] N.Y. Times Co. v. United States, 403 U.S. 713, 713 (1971).

[349] *Id.* at 717 (Black, J., joined by Douglas, J., concurring). Justice Black notes that:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. . . . The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

Id. Justice Douglas adds: "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. . . . Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health." *Id.* at 723-24 (Douglas, J., joined by Black, J., concurring). In his concurrence, Justice Stewart writes:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Id. at 728 (Stewart, J., joined by White, J., concurring).

determine the outcome in *New York Times*. Underlying several of the case's six separate concurring opinions and three separate dissenting opinions were additional considerations about the nature of the Vietnam War. Those considerations strengthened the Justices' resolve to allow this policy objective to trump the executive's interest in protecting national security secrets.[350] First, several of the opinions reveal the Court's deep schism, shared by a great deal of the public, over the government's policy in Vietnam.[351] Second, several of the opinions reveal tremendous reluctance in according the executive inherent powers to decide unilaterally when to protect national security secrets in the absence of a declared war[352] or statutory authorization.[353] Finally, several opinions reveal skepticism that the materials the executive sought to enjoin from publication implicated national security secrets.[354]

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350 Justices White, Stewart, and Marshall also expressed significant concern that the Court's grant of an injunction would amount to the creation of a remedy not legislated by Congress. *See id.* This issue is not present in the September 11 litigation, however.

351 For example, Justice Black refers to the duty of the press to disclose information as paramount to "prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell." *Id.* at 717 (Black, J., joined by Douglas, J., concurring).

352 *Id.* at 722 (Douglas, J., joined by Black, J., concurring) ("The power to wage war is 'the power to wage war successfully.' But the war power stems from a declaration of war.") (internal citations omitted).

353 In his concurring opinion, Justice Black writes: "The Government does not even attempt to rely on any act of Congress. . . . To find that the president has 'inherent power' to halt the publication of news by resort to the courts would wipe out the First Amendment. . . ." *Id.* at 718-19 ((Black, J., joined by Douglas, J., concurring). Justice White states in his concurring opinion that:

> At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press.

Id. at 732 (White, J., joined by Stewart, J., concurring). Similarly, Justice Marshall writes: "The Executive Branch has not gone to Congress and requested that the decision to provide such power [prior restraint] be reconsidered. Instead, the Executive Branch comes to this Court and asks that it be granted the power Congress refused to give." *Id.* at 746-47 (Marshall, J., concurring).

354 Justice Black's concurring opinion states: "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." *Id.* at 719 (Black, J., joined by Douglas, J., concurring). Justice Douglas writes:

> We start then with a case where there already is rather wide distribution of the material that is destined for publicity, not secrecy. I have gone over the material listed in the in camera brief of the United States. It is all history, not future events. None of it is more recent than 1968.

Few courts since the *New York Times* decision have rejected an executive nondisclosure position in matters that implicate national security secrets.[355] This result can be explained, in part, by the absence of some or all of the considerations that influenced the Court's holding in the *New York Times* litigation. Put another way, the revival of the *New York Times* decision in the September 11 litigation can be explained, in part, by the fact that similar factors to those present in the *New York Times* litigation also permeate the current domestic war on terrorism. These factors include concerns that the executive has exceeded statutory authorization or acted unilaterally to conduct law enforcement practices that fall outside the scope of national security, and that raise significant civil rights concerns. In the FOIA litigation, for example, the D.C. Federal District Court expressed skepticism that the information the executive refused to disclose implicated national security secrets. In addition, the D.C. District Court held misgivings about executive misconduct, particularly as to the treatment of material witnesses.[356] Similarly, in the immigration hearing cases, the Sixth Circuit expressed concern that the executive's unilateral decision to close immigration hearings had already resulted in indiscriminate discretion and abuses of power.[357] In contrast, the Third Circuit considered any detrimental effect of closed deportation hearings on civil liberties as nec-

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Id. at 723 n.3 (Douglas, J., joined by Black, J., concurring). Finally, Justice Brennan writes:

> Even if the present world situation were assumed to be tantamount to a time of war, or if the power or presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions, has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature.

Id. at 726 (Brennan, J., concurring).

[355] *See* Edgar & Schmidt, *supra* note 43, at 351 (observing that in the [fifteen] years since the *New York Times* case, there has been a "considerable enhancement of executive power in areas of national security secrecy, an aggrandizement significantly assisted by the Supreme Court, with Congress noticeably absent from the discourse."); Kaplan, *supra* note 43, at 1807 (observing that "[w]hile *New York Times* marks the only time the Supreme Court has rejected an executive nondisclosure position in the national security context, courts of appeals and district courts have invalidated executive national security classifications . . . although these are exceptional."); Ferguson, *supra* note 43, at 452 (observing that in the [twenty] years since the *New York Times* decision, "the Court consistently has deferred to the factual and policy judgments of the executive branch in cases dealing with official secrets.").

[356] *See supra* notes 167-72 and accompanying text.

[357] *See supra* notes 224-29 and accompanying text.

essary to protect national security.[358] Similarly, the Court of Appeals for the District of Columbia did not even address the need to balance the executive's demands for national security secrets with the civil liberties concerns associated with the secret detentions.[359] Thus, the judges' perceptions that the executive was acting beyond the scope of that required to protect national security explains the noteworthy judicial resolve in cases to protect the policy objective articulated in *New York Times* of preserving the public's ability to hold the government accountable to the rule of law.

CONCLUSION

Times of national security crisis have offered the executive its best arguments for augmenting its power, even if it means suspending civil liberties.[360] After September 11, the threat to the fundamental rights to life and personal integrity of all U.S. residents and citizens residing abroad has now become even more palpable. No doubt, these are frightening times for our nation. The U.S. government is certainly justified (and arguably required) to act zealously to protect the public from the threat of terrorism. Yet, in the face of such fear, one of the great challenges facing the United States is its ability to maintain a sensible perspective on national security issues.[361] The sacrifice of civil liberties during such national security emergencies features prominently in U.S. history.[362] The new "war on terrorism" provides no exception.

As in the past, judges have been among the first called to the difficult task of balancing the competing interests of collective security and individual rights. Yet, courts have "long viewed the conduct of . . . national security as largely beyond the province[s]

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358 *See supra* notes 219-20 and accompanying text.

359 *See supra* notes 173-86 and accompanying text.

360 *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998) (arguing that increased use of government power in time of national security crisis should preempt civil liberties).

361 *See* Edgar & Schmidt, *supra* note 43, at 349.

362 *See* Bucklin, *supra* note 48 (documenting laws and executive acts that infringed on civil liberties including the Alien and Sedition Acts; President Lincoln's suspension of the writ of habeas corpus during the Civil War; the Espionage, Sedition, and Alien Acts of 1917-1918; the 1938 House Committee of Un-American Activities (HUAC); the internment of Japanese Americans during WWII; the Smith Act of 1940; President Truman's Temporary Commission on Employee Loyalty and HUAC re-emergence during the Cold War; the McCarran Act of 1950; and President Nixon's infamous secret police (the "Plumbers").

of judicial inquiry or interference."[363] This view rests on "separation of powers concerns that emphasize the constitutional allocation of foreign affairs powers to the political branches," as well as the courts' sense of institutional incompetence to resolve matters of national security.[364] Courts may indeed prefer that Congress be charged with reviewing the executive's actions.[365] This does not mean, however, that courts should not have a significant role in examining the post-September 11 cases. As these cases have revealed, for example, many of the executive's actions since September 11 fall principally within the scope of law enforcement, not national security. One important role of the courts, therefore, is to determine whether the cases even raise a political question before deferring to the political branches. Moreover, these cases have raised separation of powers concerns, insofar as the executive appears to have exceeded the reasonable scope of any inherent executive powers in national security affairs by proscribing federal court and habeas corpus jurisdiction without congressional approval. Certainly it is also within the scope of judicial inquiry to examine whether the political branches have been faithful to the structural requirements of the checks and balances embedded in the Constitution. Finally, times of national security crisis also offer the executive its most compelling reasons to retain government secrets. However, particularly when grave civil liberites concerns are at stake, courts do have a role in ensuring that the executive does not rely solely on speculative or unsubstantiated assertions about the need for secrecy. "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."[366]

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[363] Ferguson, *supra* note 43, at 452.

[364] *Id.*

[365] *Id.* at 453.

[366] N.Y. Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., joined by Douglas, J., concurring).