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## Still a Frightening Unknown: Achieving a Constitutional Balance between Civil Liberties and National Security during the War on Terror

Frank J. Williams  
*Rhode Island Supreme Court*

Nicole J. Dulude Esq.  
*Rhode Island Supreme Court*

Kimberly A. Tracey  
*Rhode Island Supreme Court Law Clerk Department*

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# Still a Frightening Unknown: Achieving a Constitutional Balance between Civil Liberties and National Security during the War on Terror.

The Honorable Frank J. Williams\*  
Nicole J. Dulude, Esq.\*\* and  
Kimberly A. Tracey\*\*\*

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1. See MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 235 (1991) (employing the phrase “frightening unknown” to describe the continuing challenges and conflict between national security and civil liberties in wartime).

\* Chief Justice of the Rhode Island Supreme Court, founding chair of The Lincoln Forum, and member of the Court of Military Commissions Review for tribunals to be held in Guantánamo Bay, Cuba. Chief Justice Williams has been a leader in the Lincoln community for the past thirty years and lectures nationally on Abraham Lincoln. Additionally, Chief Justice Williams has published numerous articles on Abraham Lincoln and civil liberties in wartime. Although Chief Justice Williams is a member of the Court of Military Commissions Review, nothing stated in this Article should be construed as prejudgment by him of any cases that may reach that court.

\*\* Law Clerk to the Honorable Frank J. Williams, Chief Justice of the Rhode Island Supreme Court; J.D., Roger Williams University School of Law 2006; B.A., University of Rhode Island.

\*\*\* Law Clerk, Rhode Island Supreme Court Law Clerk Department; J.D., Roger Williams University School of Law 2007; B.A., University of Vermont.

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## INTRODUCTION

*"[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"<sup>2</sup>*

Two hundred and thirty-one years ago the founders created a nation whose citizens would be vested with certain unalienable rights—rights that remain an integral part of America today. Key among them are the principles of "Life, Liberty, and the pursuit of Happiness,"<sup>3</sup> which shaped the bedrock of our democracy. Accordingly, those who conceived of this nation saw fit to guarantee citizens certain civil liberties and carefully inscribe those guarantees in our most revered document, the Constitution. In a similar vein, the framers of the Constitution intently concentrated on national security matters and enshrined numerous protections in that same document, knowing that attention to such matters would be vital to the nation's success and longevity. In the end, the representatives of thirteen inchoate states approved a well-balanced set of guarantees, ensuring both the nation's enjoyment of continued survival and its citizens' enjoyment of great liberties.

Recently, however, the War on Terror<sup>4</sup> has brought that sacred document and its cherished rights back under microscopic scrutiny in response to an outpouring of allegations that certain

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2. Abraham Lincoln, Speech to Special Session of Congress (July 4, 1861), *as reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 430 (Roy P. Basler ed., 1953) [hereinafter 4 COLL. WORKS]. Lincoln's words were uttered in response to critics who contend that Article I, Section 9 of the Constitution authorizes only Congress and not the President to suspend the writ of habeas corpus.

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

4. The War on Terror refers to the various military actions taken to break down terrorist cells throughout the world and curtail the spread of terrorism following the September 11, 2001 attacks on the United States. *See generally* 9/11 FIVE YEARS LATER: SUCCESSES AND CHALLENGES (2006), available at <http://www.whitehouse.gov/nsc/waronterror/2006/waronterror0906.pdf>.

President Bush has explained: "[T]he world has come together to fight a new and different war, the first, and we hope the only one of the 21st century. [It is a] war against all those who seek to export terror, and a war against those governments that support or shelter them." George W. Bush, Prime Time News Conference (Oct. 11, 2001), available at <http://www.whitehouse.gov/news/releases/2001/10/20011011-7.html>.

civil liberties guaranteed in the Constitution have been tread upon in the name of national security.

Such criticism constantly makes headlines while we fight the War on Terror, a war that arose in the context of threats to the United States unlike any it previously had faced.<sup>5</sup> The United States is engaged in battle with an enemy it cannot see, and, as it attempts to ward off enemy combatants<sup>6</sup> both at home and abroad, it is subject to immense scrutiny around the globe. At the same time, the very real threat of another attack continues to cast a dark cloud over the nation.<sup>7</sup>

Despite this wartime climate, many Americans remain less than sympathetic to our government's efforts to strengthen homeland security and locate terrorists who seek to jeopardize our nation's security and well-being.<sup>8</sup> Instead, many lament that President George W. Bush has sweepingly abrogated some civil liberties of those detained in Guantánamo Bay, Cuba, an allegation that, as we attempt to demonstrate here, could not be

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5. George W. Bush, Remarks by the President in Photo Opportunity with the National Security Team (Sept. 12, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>; *see also* Rebecca Grant, *An Air War Like No Other*, 86 AIR FORCE J. 30, 30-36 (2002).

6. The laws of war recognize two types of combatants: lawful and unlawful. Lawful combatants wear a uniform or don an emblem, and they adhere to the laws and customs of war. As such, they may be captured and detained as prisoners of war. *See* LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERROR* 221 (2005) (citing Hague Convention, Oct. 18, 1907, 36 Stat. 2296). By contrast, unlawful combatants, sometimes referred to as enemy combatants are not uniformed and do not adhere to the laws of war. They may be captured and detained, and they may be tried by a military tribunal for their unlawful actions. *See id.*; *see also* *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942). The Military Commissions Act of 2006 recognizes this distinction. *See* United States Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified at 10 U.S.C. §§ 948a-950w and other sections of titles 10, 18, 28, and 42) [hereinafter MCA].

7. George W. Bush, President's Radio Address (Aug. 12, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/08/print/20060812.html>.

8. *See generally* BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006); JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006); *THE WAR ON OUR FREEDOMS, CIVIL LIBERTIES IN AN AGE OF TERRORISM* (Richard C. Leone & Greg Anrig, Jr. eds., 2003). *See also* Mark Mazzetti & David E. Sanger, *Al Qaeda Threatens; U.S. Frets*, N.Y. TIMES, July 22, 2007, § 1, at 12 (noting that al Qaeda is stronger now than ever before and is currently plotting new attacks).

more untrue. Their critique is twofold. First, critics question the government's decision to try suspected alien unlawful enemy combatants by military commission, urging that the civil liberties of such persons are jeopardized by refusing them access to civilian courts.<sup>9</sup> Second, critics relentlessly contend that the Constitution requires those individuals detained during the War on Terror, including alien unlawful enemy combatants, be afforded an immediate opportunity to challenge their detention before an Article III court<sup>10</sup> by petitioning for a writ of habeas corpus.<sup>11</sup>

Addressing allegations that the Bush administration has violated the Constitution with its policies concerning judicial treatment of detainees' claims, Associate Justice Stephen G. Breyer of the United States Supreme Court has cogently articulated the government's obligation: "The Constitution always matters, perhaps particularly so in times of emergency.... Security needs may well matter, playing a major role in determining just where the proper constitutional balance lies."<sup>12</sup> It is this proper constitutional balance of both civil liberties and national security that our three co-equal branches of government have worked rigorously to attain amidst the current wartime climate.<sup>13</sup>

One of the means the government has employed to achieve that constitutional balance is the establishment of special military commissions, replete with procedural safeguards, for the purpose of trying alien unlawful enemy combatants.<sup>14</sup> To implement this process, the right of detainees to initiate an immediate review of their detention before an Article III judicial branch court has admittedly taken a backseat to the overriding need to protect

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9. *See infra* Part VI.A.

10. Article III of the United States Constitution vests the judicial power of the United States in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III.

11. *See infra* Part VI.B.

12. Associate Justice Stephen G. Breyer, Address before the Association of the Bar of the City of New York, Liberty, Security, and the Courts (Apr. 14, 2003), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_04-15-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_04-15-03.html).

13. *Id.*

14. MCA, *supra* note 6. Importantly, the MCA only applies to alien unlawful enemy combatants. *Id.* at § 948b(a). Under the act, the term "alien" means a person who is not a citizen of the United States. *Id.* at § 948a(3).

America and its citizens. In the place of the immediate right to challenge one's detention, combined provisions of the United States Military Commissions Act of 2006 (MCA)<sup>15</sup> and the Detainee Treatment Act of 2005 (DTA),<sup>16</sup> establish a unique four-layered process, ensuring that alien unlawful enemy combatants are treated with fairness and integrity throughout the Article I, executive branch, process.<sup>17</sup>

Despite the government's efforts to create a military tribunal system that, consistent with American tradition and the laws of war, affords a panoply of procedural protections to alien unlawful enemy combatants, the protocol has become the subject of significant criticism from numerous politicians, journalists, and academics. Nevertheless, the government's decisions have garnered some support from members of the judiciary—the Article III courts. The recent decision of the United States Court of Appeals for the District of Columbia Circuit, *Boumediene v. Bush*,<sup>18</sup> marked the first recognition by an appellate court in the post-9/11 era that the Constitution does not constitute a “suicide pact”<sup>19</sup> during the War on Terror. To the dismay of alien unlawful enemy combatants, the decision represented a turning point and an affirmation by one Circuit Court that exchanging habeas corpus review for a four-stage judicial review process is constitutional and achieves the sought-after balance.<sup>20</sup>

It was thought that the *Boumediene* decision would settle significant debate over the MCA's constitutionality given the United States Supreme Court's initial denial of certiorari review

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15. MCA, *supra* note 6.

16. Detainee Treatment Act of 2005, 42 U.S.C.S. § 2000dd (Lexis 2005) [hereinafter DTA].

17. See MCA, *supra* note 6; DTA, *supra* note 16.

18. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478, *cert. granted*, *Boumediene v. Bush*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).

19. The precise origin of this expression is unknown. Although some have attributed it to Abraham Lincoln, the term “suicide pact” does not appear to have been used in any official document until Associate Justice Robert H. Jackson's dissent in *Terminello v. Chicago*, 337 U.S. 1 (1949). Justice Jackson's very prescient comment in that dissent was: “There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.” *Id.* at 37.

20. See *infra*. Part IV.A.

of that case.<sup>21</sup> However, in a most unusual move, for the first time in over 60 years,<sup>22</sup> the Supreme Court reversed its previous denial of certiorari and granted the petition.<sup>23</sup> The Supreme Court is expected to consider that case during its fall 2007 term.<sup>24</sup>

This Article does not advocate that the system used to try detainees should be revamped, nor does it argue what process should be used to protect the nation in such dire times.<sup>25</sup> Rather, the authors contend that the system currently in place is a rational, plausible, and historically consistent approach which, at a minimum, satisfies our Constitution and the laws of war. Accordingly, this Article presents historical, legal, and policy reasons in support of a satisfactory balance between civil liberties and our national security as they relate to non-United States citizens.

In so doing, this Article argues that the current process, which does not altogether deprive detainees of a right of access to Article III courts, but rather merely delays such access while ensuring four levels of review, is necessary to safeguard the country during this national emergency. Part I of this Article focuses on Article I, Section 9, Clause 2 of the United States Constitution, which authorizes the suspension of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it,”<sup>26</sup> and proceeds to outline the history of the suspension of the Great Writ. Criticism surrounding the Bush administration’s decisions about how to safeguard the United States seems to these writers to be particularly ill-founded when one considers that the President’s actions pale in comparison to

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21. *Boumediene*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007).

22. See David G. Savage & Carol J. Williams, *High Court to Reconsider Guantanamo; In a Rare Reversal of Themselves, the Justices Agree to Weigh Detainees’ Right to their Day in Federal Court*, L.A. TIMES, June 30, 2007, at A1.

23. *Boumediene*, 476 F.3d 981, *cert. denied*, 127 S. Ct. 1478, *cert. granted*, *Boumediene v. Bush*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).

24. Savage, *supra* note 22.

25. The authors understand that there are broader issues with respect to the War on Terror, ranging from strategies and tactics to our government’s call at home for men and women to fight in defense of our nation. Although these issues are beyond the scope of this Article, the authors in no way mean to depreciate the importance of these issues.

26. U.S. CONST. art. I, § 9.

actions taken by prior presidents, such as Abraham Lincoln, who, despite his widespread suspension of habeas corpus, is still ranked among the nation's greatest leaders.<sup>27</sup> Lincoln's actions, although radical, were necessary during the Civil War, as now, when grave national security problems were pandemic.<sup>28</sup>

Almost 150 years later, the Bush administration, like Lincoln, is faced with yet another grave national emergency that requires unpopular decisions. Part II of this Article identifies the national security concerns that have beset our nation both before and in the aftermath of September 11, 2001. During this time, alien unlawful enemy combatants, who are motivated by a form of diabolical nihilism and whose goals are antithetical to the bedrock principles upon which our nation was founded, seek to cloak themselves with privileges deeply engrained in our democracy. For example, such individuals contend that they should be afforded our constitutional right of habeas corpus, despite their avowed purpose of destroying America and its citizens, the nation which guarantees the very rights they are intent on obliterating. The Constitution was never intended for this purpose.<sup>29</sup> Part II further illustrates that, although in these times we are a far more vulnerable country than ever before, given the magnitude of the threat of harm to our nation and the horrific tools available to our nihilistic enemies, there continues to be even sharper criticism of the Bush administration's methods of safeguarding our homeland.<sup>30</sup>

Part III of this Article analyzes the United States Supreme

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27. See, e.g., ARTHUR M. SCHLESINGER, JR., RATING THE PRESIDENTS: WASHINGTON TO CLINTON, 112 POL. SCI. Q. 179, 189 (1997) (ranking Lincoln the greatest United States president); *Wall Street Journal* and Federalist Society Poll, 2005, as reprinted in PRESIDENTIAL LEADERSHIP, RATING THE BEST AND WORST IN THE WHITE HOUSE 11 (James Taranto & Leonard Leo eds., 2005) (ranking Lincoln the second greatest United States president, just after George Washington); Lydia Saad, *Lincoln Resumes Position as Americans' Top-Rated President*, THE GALLUP POLL NEWS SERVICE, Feb. 19, 2007, available at <http://www.galluppoll.com/content/Default.aspx?ci=26608&VERSION=p>; ABC News Poll, Feb. 16-20, 2000, available at <http://www.pollingreport.com/wh-hstry.htm> (ranking Lincoln the greatest United States president).

28. See *infra* Part IB.

29. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 144 (2006).

30. See *infra* Part II.



Court's struggle to strike a constitutional balance between civil liberties and national security in decisions such as *Rasul v. Bush*,<sup>31</sup> *Hamdi v. Rumsfeld*,<sup>32</sup> *Rumsfeld v. Padilla*,<sup>33</sup> and, most recently, *Hamdan v. Rumsfeld*.<sup>34</sup>

Part IV of this Article analyzes Congress's simultaneous struggle to achieve that same balance through legislation such as the Detainee Treatment Act of 2005<sup>35</sup> and the United States Military Commissions Act of 2006.<sup>36</sup>

Part V takes a comprehensive look at the landmark decision of the United States Court of Appeals for the District of Columbia Circuit in *Boumediene v. Bush*,<sup>37</sup> the first appellate decision to review and declare at least one portion of the Military Commissions Act of 2006 constitutional.<sup>38</sup>

Finally, Part VI offers critical analysis and policy reasons in support of the Bush administration's efforts to protect the United States by placing the need for national security at this time, somewhat higher in its hierarchy of values than certain aspects of individual civil liberties, especially as they relate to alien enemy combatants.<sup>39</sup>

## I. SUSPENSION OF HABEAS CORPUS IN WARTIME

*"Civil liberties depend on national security in a broader sense. Because they are the point of balance between security and liberty, a decline in security causes the balance to shift against liberty. . . . [W]ithout physical security there is likely to be very little liberty."*<sup>40</sup>

### A. Affording citizens a right of habeas corpus

Often known as the "Great Writ of Liberty,"<sup>41</sup> habeas corpus<sup>42</sup>

31. *Rasul v. Bush*, 542 U.S. 466 (2004).

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

33. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

34. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

35. DTA, *supra* note 16.

36. MCA, *supra* note 6.

37. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478, *cert. granted*, *Boumediene v. Bush*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).

38. *See infra* Part V.

39. *See infra* Part VI.

40. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 46-47 (2006).

41. *See* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT

is the constitutionally authorized means by which a court may immediately assume jurisdiction and inquire into the legality of an individual's detention.<sup>43</sup> If a court, upon making this inquiry, concludes that an individual has been unlawfully detained, it is empowered to immediately release him or her.<sup>44</sup>

As the framers of the Constitution took pains to make clear, the privilege is by no means absolute. In August of 1787, a great debate took place on the floor of the Constitutional Convention<sup>45</sup> over what evolved into the suspension clause in Article I, Section 9.<sup>46</sup> Federalists like James McHenry reported back to their constituencies about the compromises made at the convention. In a speech to the Maryland legislature, McHenry explained that “[p]ublic safety may require suspension of the [Habeas] Corpus in cases of necessity: when those cases do not exist, the virtuous Citizen will ever be protected in his opposition to power, ‘till corruption shall have obliterated any sense of Honor & Virtue from a Brave and free People.’”<sup>47</sup>

As is evident from the resulting Constitution, the Federalists prevailed; they succeeded in balancing this important civil liberty with the recognized need for public safety.<sup>48</sup> That balance was achieved by authorizing, in explicit constitutional language, the suspension of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>49</sup> As history would later confirm, the framers of our Constitution wisely included such

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OF LIBERTY 1 (2001).

42. The suspension clause, as set forth in Article I, Section 9, Clause 2 of the Constitution, 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.” U.S. CONST. art. I, § 9.

43. FREEDMAN, *supra* note 41, at 1.

44. *Id.*

45. Erwin Chemerinsky, *The Individual Liberties Within the Body of the Constitution: A Symposium: Thinking about Habeas Corpus*, 37 CASE W. RES. 748, 752 (1987).

46. FREEDMAN, *supra* note 41, at 12.

47. *Id.* at 17. (quoting Speech of James McHenry to the Maryland House of Delegates (Nov. 29, 1787), as reprinted in Eric M. Freedman, *Milestones in Habeas Corpus: Part I: Just Because John Marshall Said It, Doesn't Make It So: Ex parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 554 (2000)).

48. *Id.*

49. U.S. CONST. art. I, § 9, cl. 2; POSNER, *supra* note 40, at 54.

a provision, foreseeing that there would be times of national emergency that would require relinquishing some civil liberties to some degree to concentrate on concerns about public safety and national security. Less than a century later, the framers' concerns became a reality.

*B. Lincoln's suspension of habeas corpus*

In April 1861, on the heels of the bombardment of Fort Sumter in Charleston Harbor by Confederate forces, Lincoln called for reinforcements to protect Washington, D.C.<sup>50</sup> Responding to Lincoln's call for state militias, the Sixth Massachusetts Regiment arrived in Baltimore, where riots congested the streets and rioters attempted to prevent troops from reaching Washington.<sup>51</sup> The regiment from Massachusetts forged its way from one railroad station to another, sustaining twelve deaths with several more soldiers being wounded.<sup>52</sup> By then, the Civil War was underway. The nation's capital was in jeopardy, given that it was bordered by Virginia, a secessionist state, and Maryland, whose threats to secede were widely known.<sup>53</sup> Newspaper headlines loudly proclaimed the horror endured by the soldiers passing through Baltimore. Giving America a glimpse of that horror, *The New York Times* reported: "It is said there have been 12 lives lost. Several are mortally wounded. Parties of men half frantic are roaming the streets armed with guns, pistols and

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50. Abraham Lincoln, Proclamation Calling Militia and Convening Congress (Apr. 15, 1861), as reprinted in 4 COLL. WORKS, *supra* note 2, at 430; see also ABRAHAM LINCOLN: A DOCUMENTARY PORTRAIT THROUGH HIS SPEECHES AND WRITINGS 160-62 (Don E. Fehrenbacher ed., 1964). Responding to the fact that Confederate troops had opened fire on Fort Sumter, Lincoln called out the militia of the several states of the Union and convened a special session of Congress.

51. DANIEL FARBER, LINCOLN'S CONSTITUTION 16 (2003).

52. An April 19, 1861 headline in the *New York Times* read: "Startling From Baltimore: The Northern Troops Mobbed and Fired Upon – The Troops Return the Fire – Four Massachusetts Volunteers Killed and Several Wounded – Several of the Rioters Killed." LINCOLN IN THE TIMES: THE LIFE OF ABRAHAM LINCOLN AS ORIGINALLY REPORTED IN THE NEW YORK TIMES 110-11 (David Herbert Donald & Harold Holzer eds., 2005) [hereinafter LINCOLN IN THE TIMES].

53. Frank J. Williams, *Abraham Lincoln and Civil Liberties: Then and Now – The Southern Rebellion and September 11*, 60 N.Y.U. ANN. SURVEY OF AM. LAW 466 (2004); see also MICHAEL LIND, WHAT LINCOLN BELIEVED: THE VALUES AND CONVICTIONS OF AMERICA'S GREAT PRESIDENT 174 (2004).

muskets . . . a general state of dread prevails.”<sup>54</sup> In the days and weeks that followed, the city of Washington was virtually severed from the states of the North.<sup>55</sup> Troops stopped arriving,<sup>56</sup> telegraph lines were slashed,<sup>57</sup> and postal mail from the North reached the city only infrequently.<sup>58</sup>

Lincoln immediately perceived the grave danger that the war would be lost if the Confederates seized the capital or caused it to be completely isolated, but he was reluctant to suspend the Great Writ.<sup>59</sup> Finally, prompted by the urging of his Secretary of State, William H. Seward, Lincoln, an attorney, concluded that the suspension of habeas corpus could not wait.<sup>60</sup> Although Congress was in recess, Lincoln, relying on the constitutional authorization that the framers had perceptively included years before, issued a proclamation suspending the writ, believing that his duty to protect the capital and the Union required such an action.<sup>61</sup>

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54. LINCOLN IN THE TIMES, *supra* note 52, at 110-11.

55. Williams, *supra* note 53, at 466.

56. LIND, *supra* note 53, at 174.

57. LINCOLN IN THE TIMES, *supra* note 52, at 110-11.

58. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 22 (1998); *see also* Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), *as reprinted in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 518, 524 (Roy P. Basler ed., Rutgers University Press, 1953) [hereinafter 5 COLL. WORKS].

59. At one point, Lincoln ruminated that bombarding cities in Maryland would be a preferable alternative to suspending the writ of habeas corpus. *See* Abraham Lincoln, Order to General Winfield Scott (Apr. 27, 1861), *as reprinted in* 4 COLL. WORKS, *supra* note 2, at 344.

60. REHNQUIST, *supra* note 58, at 23 (quoting ‘A Day with Governor Seward at Auburn, *as reprinted in* F.B. Carpenter, Seward Papers, No. 6634 (July 1870)).

61. On April 27, 1861 Abraham Lincoln reluctantly ordered General Winfield Scott to suspend habeas corpus where necessary to avoid the overthrow of the government and to protect the nation’s capital:

To The Commanding General of the Army of the United States:

You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally, or through the officer in command at the point where resistance occurs, are authorized to suspend the writ.

ABRAHAM LINCOLN.

Abraham Lincoln, Order to General Winfield Scott (Apr. 27, 1861), *as reprinted in* 4 COLL. WORKS, *supra* note 2, at 344.

Lincoln's unilateral suspension of habeas corpus between Washington and Philadelphia was instrumental in securing communication lines to the nation's capital.<sup>62</sup> The effect was to enable military commanders to arrest and detain individuals indefinitely in areas where martial law had been imposed.<sup>63</sup> Many of those detained were individuals who attempted to halt military convoys.<sup>64</sup> Lincoln saw that immediate action and a declaration of martial law was necessary to divest civil liberties from those who were disloyal and whose overt acts against the United States threatened its survival without the rights explicit in our usual judicial process.<sup>65</sup>

Nevertheless, Lincoln's actions did not go unchallenged; criticism was not lacking. Despite the urgent situation that warranted Lincoln's suspension of habeas during the Civil War, his critics bemoaned his decision as an act of civil disobedience,<sup>66</sup> and they deemed his actions illegal.<sup>67</sup> Lincoln himself responded to such criticism in a message to a special session of Congress on July 4, 1861. In Lincoln's words:

The provision of the Constitution that "[t]he privilege of habeas corpus, shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it," is equivalent to a provision – is a provision – that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety *does* require it. It was decided that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed

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62. See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 146 (1980).

63. LIND, *supra* note 53, at 174.

64. See LINCOLN IN THE TIMES, *supra* note 52, at 117.

65. POSNER, *supra* note 40, at 45.

66. See NEELY, *supra* note 1, at xvi; POSNER, *supra* note 40, at 85-86 (describing civil disobedience as an act of a private individual who feels a moral obligation and duty to disobey a particular positive law).

67. B.F. McClerren, Op-Ed, *Lincoln's Actions May Apply Today*, TIMES-COURIER, Nov. 19, 2001.

that the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.<sup>68</sup>

Lincoln explained that his actions were not only justified, but were required of him pursuant to his oath to preserve, protect, and defend the Constitution of the United States.<sup>69</sup> In August 1861, Congress ratified the President's actions in all respects.<sup>70</sup>

To Lincoln, there was no tolerable middle road. He was acutely aware that some citizens would sharply criticize him for suspending the Great Writ. The alternative, however, was far worse in his estimation. In Lincoln's judgment nothing would be worse than allowing the nation to succumb to Confederate forces. Even some of those who deemed Lincoln's actions unconstitutional have noted the real-world emergency with which he was faced. One commentator has noted: "Lincoln's unconstitutional acts during the Civil War show that even legality must sometimes be sacrificed for other values. We are a nation under law, but first we are a nation."<sup>71</sup>

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68. Abraham Lincoln, Speech to Special Session of Congress (July 4, 1861), *as reprinted in* 4 COLL. WORKS, *supra* note 2, at 430.

69. *Id.* (Lincoln's actual words were: "Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"). See also JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR 211 (2007) (noting that Lincoln's oath imposed a larger duty that "overrode his obligation to heed a lesser specific provision in the Constitution").

The oath that every president must take before entering on the execution of that high office is explicitly set forth in Article II, Section 1 of the Constitution. It should also be recalled that the Preamble to the Constitution specifically states that providing "for the common defence" and "securing the blessings of liberty" are among the goals which the Constitution is intended to serve.

70. Act of August 6, 1861, ch. 63, Sec. 3, 12 Stat. 326. Although this language did not expressly ratify the President's suspension of habeas corpus, it was widely understood as having done so. See BRIAN MCGINTY, LINCOLN AND THE COURT ch. 3, 29 (forthcoming Harvard University Press Feb. 15, 2008).

71. Richard A. Posner, *The Truth about our Liberties*, in RIGHTS VS. PUBLIC SAFETY AFTER 9/11: AMERICA IN THE AGE OF TERRORISM 27 (Amitai Etzioni & Jason H. Marsh eds., 2003).

1. *The Case of John Merryman*

Only a month after Lincoln's proclamation, Captain Samuel Yohe, empowered by Lincoln's suspension of habeas, entered the Baltimore home of John Merryman, a discontented American who had spoken out vigorously against President Lincoln and had actively recruited a company of Confederate soldiers.<sup>72</sup> There, he arrested Merryman for various acts of treason, including his leadership of the secessionist group that conspired to destroy and ultimately did destroy railroad bridges after the Baltimore riots.<sup>73</sup> The government believed that Merryman's decision to form an armed group to overthrow the government was an act far beyond a simple expression of dissatisfaction, which would be protected under the Constitution.

Merryman's attorney sought a writ of habeas corpus,<sup>74</sup> directing his petition to Supreme Court Chief Justice Roger Brooke Taney.<sup>75</sup> Lawyers for Merryman suspected that Chief Justice Taney would entertain the petition in Washington,<sup>76</sup> but because he was then assigned to the Circuit Court sitting in Maryland,<sup>77</sup> he took up the matter in Baltimore and granted the

72. 1 JOHN T. MORSE, JR., *AMERICAN STATESMAN: ABRAHAM LINCOLN* 287 (1921); 4 JOHN G. NICOLAY & JOHN HAY, *ABRAHAM LINCOLN: A HISTORY* 174 (New York, The Century Co. 1890).

73. DUKER, *supra* note 62, at 147.

74. *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md.1861).

75. Interestingly, Merryman's attorney filed the writ with Chief Justice Taney, not as a circuit judge but in his capacity as Chief Justice of the Supreme Court. Some historians believe this decision was made because Merryman's counsel sought to circumvent the Circuit Court, whose writs of habeas corpus had been ignored by military commanders in another case. Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 *CARDOZO L. REV.* 81, 90-91 n.27 (1993) (citing 5 *CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 842 (1974)).

76. *See, e.g.*, Arthur T. Downey, *The Conflict Between the Chief Justice and the Chief Executive: Ex parte Merryman*, 31 *J. OF SUPREME CT. HIST.* 262, 262-78 (2006).

77. Apart from their duties on the Supreme Court, it was customary at that time for Supreme Court justices to work also as Circuit Court justices. Each Supreme Court justice was assigned to one of the seven circuits. District Court judges in the area were paired with the Supreme Court justice assigned to that circuit and would hold Circuit Court together. If a Supreme Court justice was unable to attend, in some instances, a District Court judge would hold Circuit Court alone. 5 *CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 248

writ.<sup>78</sup> Despite Chief Justice Taney's demand to have Merryman brought before the court, the commander of the fort where Merryman was detained, George Cadwalader, respectfully refused, relying on President Lincoln's suspension of habeas corpus.<sup>79</sup> Outraged, Chief Justice Taney authored *Ex parte Merryman*, opining that Congress alone had the power to suspend the writ of habeas corpus.<sup>80</sup>

Although the case is published in the Federal Cases reporter and labeled as a case from the April 1861 term of the Circuit Court for the District of Maryland, the original opinion, in Chief Justice Taney's longhand, is captioned "Before the Chief Justice of the Supreme Court of the United States at Chambers."<sup>81</sup>

Unfortunately for Chief Justice Taney, his words carried no precedential value as an in-chambers opinion.<sup>82</sup> Chief Justice Taney recognized this but forwarded his in chambers opinion to President Lincoln.<sup>83</sup> Ironically, it was Taney who, only a month before, had administered the President's oath,<sup>84</sup> which the President now relied upon to justify his actions.

If one thing is certain, it is that Chief Justice Taney's opinion did not deter Lincoln. Rather, Lincoln turned to Attorney General Edward Bates for confirmation that his decision to suspend

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(1974). Circuit justices were responsible for disposing of applications arising in cases from state and federal courts within that circuit. These applications included requests for bail, certificates of appealability, extensions of time, injunctions, stays, writs of habeas corpus, and writs of error or appeal. Cynthia J. Rapp, *In Chambers Opinions by Justices of the Supreme Court*, 5 GREEN BAG 2d 181, 182-83 (2002).

78. *Merryman*, 17 F. Cas. at 145, 147.

79. See, e.g., Downey, *supra* note 76, at 262-78.

80. *Ex parte Merryman*, 17 F. Cas. at 147. The Chief Justice pointed to the suspension clause found in Article I of the Constitution, which outlines congressional duties.

81. SWISHER, *supra* note 77, at 848.

82. Typically, a Circuit Justice would either grant or deny the application before him. Occasionally, however, Circuit Justices would issue an in chambers opinion explaining the reasons for their decisions. Rapp, *supra* note 77, at 182. These opinions were typically brief and were not circulated to the full court before release. *Id.*

83. FARBER, *supra* note 51, at 17; see also JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 12 (2007) (stating that "Taney went out of his way to mock the president, circulating his opinion as widely as possible to embarrass the administration.").

84. MCGINTY, *supra* note 70, at ch. 1, 4.



habeas corpus was within his authority.<sup>85</sup> Bates responded as follows:

I am clearly of opinion that, in a time like the present, when the very existence of the nation is assailed, by a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity.<sup>86</sup>

Disregarding the in chambers opinion of Chief Justice Taney, Lincoln boldly broadened the scope of the suspension of the writ.<sup>87</sup> In the draft of Lincoln's report to Congress (the only extant copy of his speech of July 4, 1861),<sup>88</sup> he passionately defended his position:

The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution? . . . [A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?<sup>89</sup>

Lincoln ardently explained that the outbreak of the Civil War made it necessary "to call out the war power of the government and so to resist force employed for the destruction by force for its

85. Abraham Lincoln, Letter to Edward Bates (May 30, 1861), *as reprinted in* 4 *COLL. WORKS, supra* note 2, at 390.

86. 10 *OFFICIAL OPINIONS OF THE ATTORNEY GENERAL OF THE UNITED STATES, ADVISING THE PRESIDENT AND HEADS OF DEPARTMENTS IN RELATION TO THEIR OFFICIAL DUTIES* 81 (W.H. & O.H. Morrison 1868).

87. Abraham Lincoln, Letter to Henry W. Halleck (Dec. 2, 1861), *as reprinted in* 5 *COLL. WORKS, supra* note 58, at 35; Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), *as reprinted in* 5 *COLL. WORKS, supra* note 58, at 436-37; Abraham Lincoln, Proclamation Suspending Writ of Habeas Corpus (Sept. 15, 1863), *as reprinted in* 6 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 451-52 (Roy P. Basler ed., Rutgers University Press, 1953) [hereinafter 6 *COLL. WORKS*]; *see also* FARBER, *supra* note 51, at 159.

88. No official copy of Lincoln's speech of July 4, 1861 has been found. The cited text is Lincoln's second proof, which contains his final revisions. *See* 4 *COLL. WORKS, supra* note 2, at 421 n.1.

89. Abraham Lincoln, Speech to Special Session of Congress (July 4, 1861), *as reprinted in* 4 *COLL. WORKS, supra* note 2, at 430.

preservation.”<sup>90</sup> Lincoln further professed that his actions, “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them.”<sup>91</sup>

Although the Constitution is silent with respect to which branch of government is authorized to exercise the power to suspend habeas, Lincoln’s words reflected his own belief that he had exercised a power that required at least some cooperation and approval from Congress.<sup>92</sup> Whatever confusion remained regarding the legality of Lincoln’s unilateral suspension of habeas was quelled two years later when Congress, in addition to its previous ratification of August 6, 1861,<sup>93</sup> enacted legislation empowering the President to suspend the writ nation-wide while rebellion continued.<sup>94</sup>

## 2. *The Case of Clement L. Vallandigham*

On September 24, 1862, Lincoln issued a proclamation, declaring martial law and authorizing the use of military tribunals to try civilians within the United States who are believed to be “guilty of disloyal practice” or who “afford[ed] aid and comfort to Rebels.”<sup>95</sup> This was just the beginning. The following March, Lincoln appointed Major General Ambrose Burnside as commanding general of the Department of the Ohio.<sup>96</sup> After only one month in that position, Burnside issued General Order No. 38, authorizing imposition of the death penalty for those who aided the Confederacy and who “declared sympathies for the enemy.”<sup>97</sup>

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90. *Id.* at 426.

91. *Id.* at 429.

92. *Id.* at 431.

93. *See supra* text accompanying note 70.

94. Habeas Corpus Act, ch. 80, 12 Stat. 755 (1863).

95. *See* Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), *as reprinted in* 5 COLL. WORKS, *supra* note 58, at 436-37. Over 2,000 cases were tried by military tribunals during the Civil War and the Reconstruction Period. LEONARD CUTLER, *THE RULE OF LAW AND THE LAW OF WAR: MILITARY COMMISSIONS AND ENEMY COMBATANTS POST 9/11* 4 (2005).

96. *See* Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL OF RTS. J. 105, 119 (1998).

97. General Order No. 38, *as reprinted in* BENJAMIN PERLEY POORE, *THE LIFE AND PUBLIC SERVICES OF AMBROSE E. BURNSIDE, SOLDIER-CITIZEN-STATESMAN* 206 (1882).

With this order as justification, military officials arrested anti-war Congressman Clement L. Vallandigham of Ohio for a public speech he delivered in Mount Vernon, lambasting President Lincoln, referring to him as a political tyrant, and calling for his overthrow.<sup>98</sup> Specifically, Vallandigham was charged with having proclaimed, among other things, that “the present war was a wicked, cruel, and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing out liberty and to erect a despotism; a war for the freedom of the blacks and the enslavement of the whites.”<sup>99</sup>

Although he was a United States citizen who would ordinarily be tried for criminal offenses in the civilian court system, Vallandigham was tried before a military tribunal a day after his arrest.<sup>100</sup> Vallandigham, an attorney, objected that trial by a military tribunal was unconstitutional, but his protestations to the Lincoln administration fell on deaf ears.<sup>101</sup> The military tribunal found the Ohio Copperhead<sup>102</sup> in violation of General Orders No. 38 and ordered him imprisoned until the war’s end.<sup>103</sup> Subsequent to this sentence, Vallandigham petitioned the United States Circuit Court sitting in Cincinnati for a writ of habeas corpus, which, perhaps much to Chief Justice Taney’s dismay, was denied.<sup>104</sup> In a final attempt, Vallandigham petitioned the United

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98. POORE, *supra* note 97, at 208; REHNQUIST, *supra* note 58, at 65-66.

99. *Ex parte Vallandigham*, 68 U.S. 243, 244 (1864).

100. *Id.*; see also Curtis, *supra* note 96, at 121.

101. *Vallandigham*, 68 U.S. at 246.

102. Copperheads were Northern Democrats who sided with the South and opposed the Civil War. Republicans dubbed such war opponents Copperheads because of the copper liberty-head coins they wore as badges. 1 ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 498-99 (David S. Heidler & Jeanne T. Heidler eds., 2000). The term Copperhead was “borrowed from the poisonous snake of the same name that lies in hiding and strikes without warning. However, ‘Copperheads’ regarded themselves as lovers of liberty, and some of them wore a lapel pin with the head of the Goddess of Liberty cut out of the large copper penny minted by the Federal treasury.” Frank J. Williams, *Abraham Lincoln and Civil Liberties in Wartime*, HERITAGE LECTURES 5 n.18 (May 5, 2004), available at <http://www.heritage.org/Research/NationalSecurity/hl834.cfm>.

103. THE TRIAL OF HON. CLEMENT L. VALLANDIGHAM BY A MILITARY COMMISSION AND THE PROCEEDINGS UNDER HIS APPLICATION FOR A WRIT OF HABEAS CORPUS IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO 33 (Cincinnati, Rickey & Carroll 1863).

104. *Id.* at 37-39, 272.

States Supreme Court for a writ of certiorari, but his petition to the Court was unsuccessful, the court ruling that it was without jurisdiction to review the military tribunal's proceedings.<sup>105</sup>

Not surprisingly, the trial of Vallandigham by a military tribunal subjected Lincoln to yet more criticism. His critics bemoaned his decision, deeming it "a palpable violation of the . . . Constitution."<sup>106</sup> Lincoln insisted, however, that civilians captured away from the battlefield could lawfully be tried by a military tribunal because the whole country, in his opinion, was a war zone.<sup>107</sup> Lincoln further defended his suspension of habeas corpus:

If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them . . . The constitution itself makes the distinction; and I can no more be persuaded that the government can constitutionally take no strong measure in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown to not be good food for a well one.<sup>108</sup>

President Lincoln, concerned about the harshness of Vallandigham's punishment and the potential criticism over Vallandigham's arrest, detention, and trial by military tribunal, commuted his sentence to banishment to the Confederacy.<sup>109</sup>

### 3. *The Case of Lambdin P. Milligan*

In 1866, the war having ended, the Supreme Court was called upon to consider the legality of Lincoln's suspension of habeas

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105. *Vallandigham*, 68 U.S. at 251.

106. See Annotation to Lincoln's Letter to Matthew Birch and Others, as reprinted in 6 COLL. WORKS, *supra* note 87, at 300.

107. MCPHERSON, *supra* note 69, at 217.

108. To Erastus Corning and Others (June 12, 1863), as reprinted in 6 COLL. WORKS, *supra* note 87, at 267.

109. See Curtis, *supra* note 96, at 121. The Confederacy was not happy to see Vallandigham, who made his way to Winsor, Ontario, opposite Ohio, where he ran unsuccessfully for Governor of Ohio.

corpus and his use of military tribunals.<sup>110</sup> The Supreme Court, upon which Taney no longer sat, as he had died in 1864, proceeded to conclude, as Taney had in *Merryman*, that the President could not unilaterally suspend the writ of habeas corpus.

On October 5, 1864, Lambdin P. Milligan, a lawyer and Indiana citizen, had been arrested by the military commander for that military district on the basis of his belief that Milligan was plotting to overthrow the government.<sup>111</sup> Although Milligan was not captured on the battlefield, he was tried by a military commission and sentenced to death even though the civilian courts were functioning in Indiana.<sup>112</sup> Before the sentence was carried out, Milligan petitioned the Circuit Court of the United States for the District of Indiana for a writ of habeas corpus.<sup>113</sup> The Circuit Court certified the question to the Supreme Court, which assumed jurisdiction and issued the writ.<sup>114</sup>

In so concluding, the Supreme Court reasoned that the suspension of habeas corpus was permissible, but that such a suspension did not apply to Milligan's case because he had not joined the Confederate forces and was captured away from the battlefield in an area where civilian courts were still operating.<sup>115</sup> According to the Court, Milligan was simply a person who was ideologically aligned with the Confederates and not an enemy combatant who should be tried by a military tribunal.<sup>116</sup> Therefore, Milligan could only be properly tried in a civilian court and not by a military tribunal.<sup>117</sup> This post-war, post-Taney Court also impliedly validated Chief Justice Taney's opinion in *Merryman* as it agreed that only Congress may authorize the suspension of habeas corpus.<sup>118</sup>

*Milligan* did make clear, however, that the right of American citizens to seek a writ of habeas corpus may be suspended during wartime so long as those citizens have joined enemy forces or have been captured on the battlefield. Indeed, without such a ruling,

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110. *Ex parte Milligan*, 71 U.S. 2 (1866).

111. *THE MILLIGAN CASE* 64 (Samuel Klaus, ed., Gaunt, Inc. 1997).

112. *Milligan*, 71 U.S. at 106-07.

113. *Id.* at 107-09.

114. *Id.* at 110-11.

115. *Id.* at 127, 131.

116. *Id.* at 131.

117. *Id.*

118. *Id.*

“the Union could not have fought the Civil War, because the courts would have ordered President Lincoln to release thousands of Confederate POWs and spies.”<sup>119</sup>

*C. World War II Prompts Trials by Military Commission Without Habeas Corpus Protections.*

In accordance with the venerable maxim that “what’s past is prologue,”<sup>120</sup> almost a century after its decision in the *Milligan* case, the Supreme Court revisited the legality of trials by military tribunal without habeas corpus protection in the context of a different war.

This time it was President Franklin D. Roosevelt who was faced with the momentous decision of to how to try detainees at the height of World War II.<sup>121</sup> His order, denying enemy captives access to the United States courts and authorizing trials by military tribunals, resulted in the placement of *Ex parte Quirin*<sup>122</sup> on the Supreme Court’s docket; the *Quirin* case closely mirrored the issues addressed in *Milligan*.

In June 1942, several months after Congress had declared that a state of war existed between Germany and the United States, eight German saboteurs, acting for the German Reich, a belligerent enemy nation, boarded two submarines in occupied France and traveled to Long Island, New York, and Ponte Vedra Beach, Florida, respectively.<sup>123</sup> The German-born saboteurs were engaged in a plot to destroy war facilities in the United States.<sup>124</sup>

Upon the eventual capture of the enemy agents, President Roosevelt convened a secret military tribunal to try the eight men, resulting in a guilty verdict and a death sentence for each.<sup>125</sup> The prisoners petitioned the United States District Court for the District of Columbia for a writ of habeas corpus, which was

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119. YOO, *supra* note 29, at 146.

120. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1. Shakespeare’s words are inscribed on the National Archives Building on Pennsylvania Avenue in Washington, D.C. See RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 245 (Suzy Platt, ed., 1993).

121. LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* 37-44 (2005).

122. *Ex parte Quirin*, 317 U.S. 1 (1942).

123. *Id.* at 21.

124. *Id.* at 20-21.

125. *Id.* at 22; see also FISHER, *supra* note 121, at 43-44.

denied.<sup>126</sup> The prisoners then petitioned the United States Supreme Court for certiorari review of the district court's decision and additionally petitioned the Supreme Court for leave to file their petitions for habeas corpus in that Court as well.<sup>127</sup> The Court of Appeals had not yet issued a decision when the prisoners also petitioned the United States Court of Appeals for the District of Columbia Circuit.<sup>128</sup> Before a decision was issued by the Court of Appeals, the prisoners again petitioned the Supreme Court for certiorari, which the Court granted.<sup>129</sup>

The Supreme Court considered whether the detention of the petitioners by the United States was consistent with the laws and Constitution of the United States.<sup>130</sup> The Court explained that "military tribunals . . . are not courts in the sense of the Judiciary Article [of the Constitution]."<sup>131</sup> Instead, the Court held that such Article I tribunals are administrative bodies within the military that are utilized to determine the guilt or innocence of "declared enemies," and to subsequently pass judgment.<sup>132</sup>

Upholding the jurisdiction of the military tribunals to hear the cases of the German saboteurs, the Court emphatically stated:

The law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.<sup>133</sup>

In so ruling, the Court went to great lengths to distinguish its holding from that rendered years before in *Milligan*.<sup>134</sup> The Supreme Court emphasized that the holding in *Milligan* should be

126. *Quirin*, 317 U.S. at 18.

127. *Id.*

128. *Id.* at 19-20.

129. *Id.*

130. *Id.* at 24-25.

131. *Id.* at 39.

132. *Id.*

133. *Id.* at 30-31.

134. *Id.* at 29.

limited to the facts of that case. As the *Quirin* Court noted, Milligan was a citizen of Indiana and had never been a resident of any state involved in the rebellion nor had he been an enemy combatant who would qualify as a prisoner of war.<sup>135</sup> *Quirin*, however, involved “enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform—an offense against the law of war.”<sup>136</sup> Those critical distinctions allowed the Court to rule in the government’s favor.<sup>137</sup>

Having resolved, in *Quirin*, the appropriateness of trying in the United States unlawful enemy combatants by military tribunal, the Court in 1950 next considered the related question of whether alien prisoners seized overseas during wartime had the right to petition the courts of the United States for a writ of habeas corpus.<sup>138</sup>

The case of *Johnson v. Eisentrager*<sup>139</sup> involved one Ludwig Eisentrager, who had operated a German intelligence office in Shanghai and, with his cohorts, had contracted to aid the Japanese during World War II in return for money and food.<sup>140</sup> The spies additionally agreed, *inter alia*, to intercept American naval communications and transmit them to the Japanese forces.<sup>141</sup>

In 1946, the United States military captured Eisentrager and twenty-six other foreign intelligence officers in China.<sup>142</sup> The officers were tried and convicted by a United States military commission and were then imprisoned in a German prison then controlled by the United States Army.<sup>143</sup>

Seeking to challenge their detention, Eisentrager and twenty other German nationals petitioned the United States District Court for the District of Columbia for a writ of habeas corpus.<sup>144</sup> The district court dismissed the petition for lack of jurisdiction,

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135. *Id.*

136. *Id.* at 46.

137. *Id.* at 48.

138. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

139. *Id.*

140. CUTLER, *supra* note 95, at 37.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Eisentrager*, 339 U.S. at 765.



but the Court of Appeals subsequently reversed, reinstating the petition for habeas corpus and remanding the case for further proceedings.<sup>145</sup>

When the case finally reached the United States Supreme Court on the government's petition for certiorari, the high court agreed with the district court and held that the petitioners had no right to petition for a writ of habeas corpus.<sup>146</sup> Finding the location of the prisoners' capture, conviction, and detention dispositive, the Supreme Court noted: "These prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."<sup>147</sup>

It would be another half century before the past would become prologue<sup>148</sup> yet again. In 2001 issues of the habeas corpus rights of enemy combatants, markedly similar to those that arose during the administrations of Abraham Lincoln and Franklin Roosevelt, appeared once again on the Supreme Court's docket.

## II. NATIONAL SECURITY AFTER SEPTEMBER 11, 2001

*"In your hands, my dissatisfied fellow countrymen, and not in mine, is the momentous issue of civil war. The government will not assail you. You can have no conflict, with being yourselves the aggressors. You have no oath registered in Heaven to destroy the government, while I shall have the most solemn one to 'preserve, protect and defend' it."*<sup>149</sup>

The events of September 11, 2001 were as inhumane as they were unanticipated by most Americans and individuals throughout the world. On that cloudless autumn morning, nineteen Islamic terrorists hijacked four commercial jet airliners, intentionally flying two of the planes into the twin towers of New York City's World Trade Center and one into the Pentagon in

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145. *Eisentrager v. Forrestal*, 174 F.2d 961, 968 (D.C. Cir. 1949).

146. *Eisentrager*, 339 U.S. at 791.

147. *Id.* at 778.

148. SHAKESPEARE, *supra* note 120, at act 2, sc. 1.

149. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), as reprinted in 4 COLL. WORKS, *supra* note 2, at 271.

Arlington, Virginia.<sup>150</sup> The fourth plane, believed to have been aimed at a governmental target in Washington, D.C., crashed in Shanksville, Pennsylvania when its passengers attempted to retake control of the plane to avert further mass murder.<sup>151</sup> In one morning, almost 3,000 innocent civilians perished on American soil as victims of horrific depredations committed by nihilistic barbarians.<sup>152</sup>

During the days and months following these savage terrorist attacks, Americans demanded improved homeland security.<sup>153</sup> Homeland security alerts, flashing colors ranging from red and orange to yellow and green scrolled across television sets, computer screens, and electronic airport billboards nationwide, reminding Americans that the nation's security was at risk.<sup>154</sup>

President Bush, aware of his solemn duty to take action to defend and protect the United States, responded.<sup>155</sup> As a nation, we responded with a War on Terror in the hope that it would serve

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150. See THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 1-4, 7, 8, 10 (2004).

151. *Id.* at 14.

152. See September 11, 2001 Victim's List at <http://www.september11victims.com> (last visited Aug. 3, 2007).

153. See, e.g., Editorial, *A higher price for airline safety; President's plan: Restoring faith, travel, economy requires basic adjustments in expectations*, THE BALTIMORE SUN, Sept. 28, 2001, at 22A; Jeff Donaldson, *Bono fields student questions*, THE DESERT SUN, Sept. 28, 2001, at 1B; Lauren Fagan, *Crisis pits protection against liberty*, SOUTH BEND TRIB., Oct. 7, 2001, at A1 (reporting on a post-September 11, 2001 survey titled "Personal Freedom vs. National Security" by Business Week Online indicating that Americans are more willing to sacrifice civil liberties during wartime); Editorial, *Fear of Flying*, THE SAN DIEGO UNION-TRIB., Sept. 28, 2001; Jay Winik, *Security Comes Before Liberty*, WALL ST. J., Oct. 23, 2001, at A26.

154. See Homeland Security Presidential Directive-3 (Mar. 2002), available at <http://www.whitehouse.gov/news/releases/2002/03/20020312-5.html> (establishing a system structured to alert Americans to threat levels and protective measures).

155. George W. Bush, Radio Address (Sept. 15, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010915.html> ("We are planning a broad and sustained campaign to secure our country and eradicate the evil of terrorism."); see also George W. Bush, Radio Address (Dec. 17, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html> ("The American people expect me to do everything in my power under our laws and Constitution to protect them and their civil liberties. And that is exactly what I will continue to do, so long as I'm the President of the United States.").

to secure our borders.<sup>156</sup>

The President's critics wasted no time in declaring that September 11th did not constitute the commencement of a war.<sup>157</sup> They argued that President Bush generalized the War on Terror, likening it to the so-called war on drugs, war on poverty, gang wars, or war of the sexes.<sup>158</sup> Nevertheless, the President, the Congress, and the terrorists have made it abundantly clear that we are a nation at war.<sup>159</sup>

Three days after the attacks that compromised our nation's security, President Bush declared a national emergency<sup>160</sup> to which Congress, in agreement, responded by enacting an Authorization for Use of Military Force (AUMF) on September 18, 2001.<sup>161</sup> The AUMF empowered the President to "take action and prevent acts of international terrorism against the United States."<sup>162</sup> It further authorized 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."<sup>163</sup> Congress's authorization was, in all respects, a ratification of the President's

156. George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

157. See, e.g., *Bush Says it's Time for Action*, CNN, available at <http://archives.cnn.com/2001/US/11/06/ret.bush.coalition/index.html> (last visited Aug. 5, 2007). This criticism continues today. See, e.g., BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 13 (2006) (describing the War on Terror as a "preposterous expression."); Samantha Power, *Our War on Terror*, N.Y. TIMES, July 29, 2007, at § 7 (Book Review), at 8 (describing the War on Terror as metaphorical).

158. See, e.g., Todd Richardson, "War on Terror" difficult to define, BALTIMORE SUN, Sept. 2, 2004, available at [http://seattletimes.nwsourc.com/html/nationworld/2002023596\\_russanal02.html](http://seattletimes.nwsourc.com/html/nationworld/2002023596_russanal02.html) (the War on Terror has been deemed analogous to the War on Drugs because the 'enemy' is unascertainable and terrorism, like drugs, will not likely end as a result of a war).

159. See YOO, *supra* note 29, at 11.

160. George W. Bush, Declaration of National Emergency by Reason of Certain Terrorist Attacks (Sept. 14, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-4.html>.

161. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (2001) (enacted).

162. *Id.*

163. *Id.*

actions as Commander-in-Chief and checkmated any potential criticism he might have otherwise been subjected to (as was President Lincoln) for acting unilaterally.<sup>164</sup> Further confirming the existence of a state of war, approximately two months later the President issued an order permitting the establishment of military commissions to detain and prosecute suspected terrorists.<sup>165</sup> The effect of that order was to convene the first United States military commission in over fifty years.<sup>166</sup> President Bush emphasized that trial by military commission was necessary “in light of grave acts of terrorism and threats of terrorism . . . to protect the United States and its citizens.”<sup>167</sup> His order made it clear that it was not practical for such tribunals to apply without modifying the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the federal courts.<sup>168</sup>

The President’s order establishing military commissions was suspect in the eyes of some legal commentators.<sup>169</sup> The American Bar Association (ABA) convened a task force on terrorism and the law, which eventually issued a report and recommendation.<sup>170</sup> Although the ABA conceded that the President’s order did “not expressly suspend[] the writ of habeas corpus,” fearing that the order might be interpreted as having done so, the ABA took the

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164. CUTLER, *supra* note 95, at 23.

165. Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order of Nov. 16, 2001]. Military tribunals are constitutionally and statutorily authorized special courts composed of military personnel and/or civilians who are commissioned to sit as both trier of fact and of the law. In such proceedings, any evidence deemed to have probative value will be admitted.

166. See Press Release, U.S. Department of Defense Office of the Assistant Secretary of Defense, No. 820-04, First Military Commission convened at Guantánamo Bay, Cuba (Aug. 24, 2001), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=7667>.

167. Military Order of Nov. 16, 2001, *supra* note 165.

168. For specific examples of the difficulties inherent in trying unlawful enemy combatants in the civilian criminal justice system, see *infra* Part VI.A.

169. See Alberto R. Gonzales, Op-Ed, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 (noting that “[s]ome in Congress and some civil libertarians remain skeptical of the military commissions”).

170. American Bar Association, Task Force on Terrorism and the Law, Report and Recommendations on Military Commissions, Jan. 4, 2002, at 1, available at <http://www.abanet.org/leadership/military.pdf>.

position that, even if the President desired to suspend the writ, "it is most unlikely that [he] could."<sup>171</sup> In its recommendation, the ABA urged the government to afford habeas corpus relief in the federal courts for those tried by military commission in the United States.<sup>172</sup>

Against this backdrop, detainees held captive by the United States in Guantánamo Bay, Cuba petitioned the federal courts for habeas corpus relief.

### III. DETAINEES SEEK IMMEDIATE RELIEF FROM THE JUDICIARY

#### A. *The Trilogy*: Padilla, Rasul, and Hamdi.

June 2004 marked a turning point for those detained in Guantánamo as the United States Supreme Court, in a trilogy of cases, spelled out what was required of the United States government in its efforts to properly achieve the necessary constitutional balance between civil liberties and national security. Some discussion of these cases is necessary.

##### 1. *Rumsfeld v. Padilla*<sup>173</sup>

On May 8, 2002, acting pursuant to a previously issued arrest warrant, federal law enforcement agents arrested Jose Padilla, a United States citizen, at O'Hare International Airport in Chicago.<sup>174</sup> Padilla was considered to be a material witness with respect to the September 11, 2001 attacks, and he was also believed to have been engaged in plotting to plant a radiological dispersal device<sup>175</sup> in the United States.<sup>176</sup> Within one month of his arrest, Padilla was designated an enemy combatant who posed a grave threat to national security.<sup>177</sup> Accordingly, he was placed

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171. *Id.* at 11.

172. *Id.* at 17.

173. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

174. *Id.* at 430-31.

175. A radiological dispersal device is terminology often used to refer to a "dirty bomb." Argonne National Laboratory, Human Health Fact Sheet (Aug. 2005), available at <http://www.ead.anl.gov/pub/doc/rdd.pdf>.

176. See William Glaberson, *Judges Question Detention of American*, N.Y. TIMES, Nov. 18, 2003, at A19.

177. *Padilla*, 542 U.S. at 430; see also James Risen & Philip Shenon, *Traces of Terror: The Investigation; U.S. Says it Halted Qaeda Plot to use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1.

in the custody of the Department of Defense, and he was held in a United States Navy brig in Charleston, South Carolina.<sup>178</sup> Padilla immediately petitioned the United States District Court for the Southern District of New York for habeas corpus relief pursuant to 28 U.S.C. § 2241.

In denying Padilla's petition, the district court held that the President of the United States was authorized to designate and detain an American citizen captured on American soil as an "enemy combatant."<sup>179</sup> Padilla could, therefore, challenge any subsequent conviction by way of appeal.

Dissatisfied, Padilla appealed to the United States Court of Appeals for the Second Circuit, which disagreed with the district court's ruling.<sup>180</sup> The Second Circuit ruled that the executive branch could not detain American citizens in military detention facilities without congressional authorization.<sup>181</sup> Ultimately, the court remanded the case to the district court with instructions to grant the writ of habeas corpus and direct the Secretary of Defense to release Padilla within thirty days unless criminal charges were brought against him or unless he was held as a material witness in connection with grand jury proceedings.<sup>182</sup>

The case reached the United States Supreme Court on the government's appeal. It was believed that the Court would address the issue of whether an American citizen captured within the United States could be denied access to the American court system.

To Padilla's disappointment, however, the Court did not decide that issue. Rather, in a 5 to 4 decision, the Court ruled on jurisdictional grounds and held that Padilla's habeas corpus petition had been improperly filed.<sup>183</sup> Because Padilla was held at the Navy brig in Charleston, South Carolina, the habeas petition was faulty because it should have been filed in the United States District Court for the District of South Carolina.<sup>184</sup> Moreover, the petition should have named as the defendant the Navy facility's

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178. *Padilla*, 542 U.S. at 432.

179. *Padilla v. Bush*, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002).

180. *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003).

181. *Id.*

182. *Id.*

183. *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004).

184. *Id.*

commander, not the Secretary of Defense.<sup>185</sup> Accordingly, the Court reversed the Second Circuit's decision and remanded the case so that it could be dismissed without prejudice.<sup>186</sup>

Padilla promptly filed a new petition for a writ of habeas corpus, this time appropriately invoking the jurisdiction of the United States District Court for the District of South Carolina.<sup>187</sup> Agreeing with the petitioner, the district court ruled that the President lacked the authority to detain Padilla and that therefore, his detention was in violation of the Constitution.<sup>188</sup> The district court ordered that the government either bring federal criminal charges against Padilla or release him.<sup>189</sup> However, when the case reached the United States Court of Appeals for the Fourth Circuit on the government's appeal, that appellate court reversed the district court's ruling and held that the AUMF authorized Padilla's detention without prosecution for the duration of hostilities.<sup>190</sup> Padilla then petitioned the Supreme Court for a writ of certiorari.<sup>191</sup> While this petition was pending, however, the government indicted Padilla,<sup>192</sup> and in late 2005 the Bush administration filed a motion in the Fourth Circuit seeking the court's approval of Padilla's transfer from military custody in Charleston to the custody of a federal detention center in Miami, Florida.<sup>193</sup> Concerned that, if the appellate court were to approve the transfer, the Supreme Court's consideration of Padilla's pending petition for certiorari would be affected, the Fourth Circuit deferred consideration of the issue and denied the request. The court concluded that the Supreme Court ought to decide the

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185. *Id.* at 442. The Court so ruled because the facility commander was Padilla's immediate custodian. Secretary Rumsfeld, therefore, was improperly named as a defendant in the original filing.

186. *Id.* at 451.

187. *Padilla v. Hanft*, 423 F.3d 386, 390 (4th Cir. 2005).

188. *Id.*

189. *Id.*

190. *Id.* at 391, 397.

191. *See Padilla v. Hanft*, 547 U.S. 1062 (2006).

192. *See Hanft v. Padilla*, 546 U.S. 1084 (2006).

193. *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005) (mem.). The government's motion was made pursuant to Supreme Court Rule 36, which authorizes the transfer of a prisoner in a habeas corpus proceeding only upon the authorization of the court or judge who entered the decision under review.

case.<sup>194</sup>

Dissatisfied with the Fourth Circuit's ruling, the Bush administration petitioned the Supreme Court for the same authorization.<sup>195</sup> On January 4, 2006, the Supreme Court ordered Padilla's transfer from Charleston to Miami, this time to face criminal conspiracy charges in civilian court.<sup>196</sup> After slightly more than a day of deliberations, on August 16, 2007, a federal jury found Padilla guilty of terrorism conspiracy charges.<sup>197</sup> Padilla now faces life imprisonment.<sup>198</sup>

## 2. Rasul v. Bush

In a decision rendered the same day as the *Padilla* decision, the Supreme Court was called upon to answer a single question: "whether the habeas corpus statute<sup>199</sup> confers a right to judicial review of the legality of Executive detention of aliens [at Guantánamo]."<sup>200</sup> By contrast with what it did in the *Padilla* case, the Supreme Court reached the merits of the case, answering the question in the affirmative.<sup>201</sup>

Under American law, detained individuals seeking habeas

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194. *Id.* at 583-84.

195. *Hanft v. Padilla*, 126 S. Ct. 978 (2006).

196. *Id.*; see also Terry Aguayo, *Padilla Pleads Not Guilty; Bail is Denied*, N.Y. TIMES, Jan. 13, 2006, at A14.

197. Abby Goodnough & Scott Shane, *Padilla is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1. Some commentators suspect that critics of the Military Commission system will point to the *Padilla* verdict in support of their position that the civilian criminal justice system is suitable to try detainees during the War on Terror. However, as the editorial staff of the *Wall Street Journal* was quick to note, the *Padilla* verdict is "not a model for the future handling of enemy combatants." Editorial, *The Padilla Verdict*, WALL ST. J., Aug. 17, 2007, at A12. As discussed further *infra*, it would be unrealistic to try alien enemy combatants in the civilian criminal justice system. See *infra* Part VI.A. While it is easy to require law enforcement agents to afford protections required of our criminal justice system such as *Miranda* warnings when arresting citizens in a local airport, for example it would be wholly unrealistic to expect that such protections could be afforded to alien enemy combatants arrested in a desert in the Middle East. *The Padilla Verdict*, *supra*. Failing to afford such protections would result in defendants tried in the civilian criminal justice system being set free. *Id.*

198. Goodnough, *supra* note 197.

199. 28 U.S.C. §§ 2241(a), (c3) (2000).

200. *Rasul v. Bush*, 542 U.S. 466, 475 (2004).

201. *Id.* at 484.



corpus relief must first invoke the court's jurisdiction by establishing either they are citizens of the United States or the Court has jurisdiction over such a petition.<sup>202</sup> Because the detainees in *Rasul v. Bush* were not, in fact, citizens, the issue was narrowed to whether there was federal court jurisdiction over the Guantánamo Bay facility.<sup>203</sup>

Relying on *Johnson v. Eisentrager*,<sup>204</sup> the United States District Court for the District of Columbia ruled that no court in the United States has jurisdiction to hear habeas petitions filed by aliens detained outside the United States.<sup>205</sup> On appeal to the United States Court of Appeals for the District of Columbia Circuit, the district court's ruling was affirmed,<sup>206</sup> with the appellate court also relying on *Eisentrager*.

When the case reached the United States Supreme Court, the government again urged that *Eisentrager* controlled.<sup>207</sup> As further support for its position, the government had cited the treaty between the United States and Cuba regarding Guantánamo Bay.<sup>208</sup> Pointing to that portion of the treaty specifying that the United States maintains "complete jurisdiction" while Cuba has "ultimate sovereignty,"<sup>209</sup> the government argued that habeas corpus would not be available because no federal court would have jurisdiction over such a petition.<sup>210</sup> For their part, however, the detainees pointed to the government's concession that, if the prisoners were being held in the United States, the federal courts would be open to them.<sup>211</sup> According to the detainees, there was "no persuasive reason why an area subject to the complete, exclusive, and indefinite jurisdiction and control of the United States, where this country alone has wielded power for more than a century, should be treated the same as occupied enemy territory,

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202. *Id.*

203. *Id.* at 475.

204. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

205. *Rasul v. Bush*, 215 F. Supp. 2d 55, 66 (D.D.C. 2002).

206. *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003).

207. *Rasul*, 542 U.S. at 475.

208. *Id.*

209. *See Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations*, Feb. 23, 1903, available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba002.htm>.

210. *Rasul*, 542 U.S. at 475.

211. Brief of Petitioners at 41, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334).

temporarily controlled as an incident of wartime operations.”<sup>212</sup>

In its 6-3 decision, the majority quickly rejected the government’s contentions, noting the difference between those detained in Guantánamo and the *Eisentrager* detainees.<sup>213</sup> The Court explained:

[The detainees in *Rasul*] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with or convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.<sup>214</sup>

Writing for the majority, Associate Justice John Paul Stevens opined that a detainee need not be within the territorial jurisdiction of a district court for the court to have jurisdiction pursuant to the habeas statute.<sup>215</sup> Citing *Milligan* and *Quirin*, the Court noted that federal courts have, in fact, reviewed applications for habeas relief during wartime.<sup>216</sup> The Court recalled that in *Milligan* it entertained the habeas petition of an American who plotted to attack military installations during the Civil War, and in *Quirin*, the petition of self-proclaimed enemy combatants who were convicted of war crimes and detained in the United States during World War II.<sup>217</sup>

Holding that the district court did, in fact, have jurisdiction over such challenges made by detainees with respect to their indefinite detention in a facility under the control of the United States,<sup>218</sup> the Supreme Court remanded the matter to the district court.<sup>219</sup>

In a vehement dissent, in which Chief Justice Rehnquist and Associate Justice Thomas joined, Associate Justice Antonin Scalia

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212. *Id.* at 41-42.

213. *Rasul*, 542 U.S. at 476 (Justice Kennedy concurred in the judgment but not in Justice Stevens’ opinion).

214. *Id.*

215. *Id.* at 478-79.

216. *Id.* at 474-75.

217. *Id.*

218. *Id.* at 483.

219. *Id.* at 485.

described the majority's opinion as "a wrenching departure from precedent."<sup>220</sup> According to Justice Scalia, the majority impliedly overruled *Eisentrager* and ignored the plain language of the habeas statute, which requires that at least one federal district court have territorial jurisdiction over detainees.<sup>221</sup> Because Guantánamo detainees are not located within the territorial jurisdiction of any federal district court, Justice Scalia concluded that jurisdiction pursuant to the habeas statute was improper.<sup>222</sup>

### 3. Hamdi v. Rumsfeld

A third case heard by the Supreme Court in April of 2004 involved Yaser Esam Hamdi, an American citizen captured on the battlefield in Afghanistan in 2001.<sup>223</sup> Because Hamdi was captured overseas in a combat zone, the case presented a far different issue from that in *Padilla*,<sup>224</sup> and his status as a United States citizen distinguished the issues in his case from those before the Court in *Rasul*.

Although Hamdi was born in Louisiana, he moved with his family when he was a young child to Saudi Arabia.<sup>225</sup> He eventually affiliated with the Taliban and was captured when his unit surrendered to the Northern Alliance forces during a battle in Afghanistan.<sup>226</sup>

After Hamdi's capture he was first detained in Afghanistan and was later transferred to the United States Naval Base at Guantánamo Bay, where he remained for four months.<sup>227</sup> Upon learning that Hamdi was an American citizen, the government transferred him to a Navy brig in Norfolk, Virginia and then to a similar brig in Charleston, South Carolina.<sup>228</sup> The government designated him an "illegal enemy combatant" on the basis of its belief that he had been aiding the Taliban in combat against

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220. *Rasul*, 542 U.S. at 505 (Scalia, J., dissenting).

221. *Id.* at 505 n.5.

222. *Id.*

223. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

224. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring) ("To compare this battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges.").

225. *Hamdi*, 542 U.S. at 510.

226. *Id.*

227. *Id.*

228. *Id.*

American forces in Afghanistan.<sup>229</sup> Hamdi's detention prompted his father to petition the United States District Court for the Eastern District of Virginia for a writ of habeas corpus.<sup>230</sup>

Before the district court, Hamdi argued that, as an American citizen, he was entitled to the full panoply of constitutional protections, including the right to petition for a writ of habeas corpus.<sup>231</sup> The United States government, not convinced, moved to dismiss Hamdi's petition.<sup>232</sup> In support of its motion, the government attached the affidavit of Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy.<sup>233</sup> Mobbs attested to the fact that Hamdi had been captured in Afghanistan during armed hostilities and that a series of American military screening procedures had determined that he met the criteria for determining that he was an unlawful enemy combatant.<sup>234</sup>

However informative the Mobbs affidavit may have been, the district court believed that it fell short of containing enough information to justify Hamdi's detention.<sup>235</sup> Not surprisingly, the government sought interlocutory review of the district court's ruling in the United States Court of Appeals for the Fourth Circuit.<sup>236</sup> When the case reached that court, the panel expressly indicated that deference, in the conduct of war, should be afforded to the President. It stated: "The judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II."<sup>237</sup> The court upheld the President's authority to detain a United States citizen captured on the battlefield and his authority to designate such an individual an unlawful enemy combatant.<sup>238</sup>

The case reached the United States Supreme Court<sup>239</sup> and in

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229. *Id.* at 510-11.

230. *Id.* at 511.

231. Petition for Writ of Habeas Corpus, at 6, *Hamdi v. Rumsfeld*, No. 2:02cv439 (E.D. Va. 2002), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/hamdi/hamdirums61102pet.pdf>.

232. *Hamdi v. Rumsfeld*, 294 F.3d 598, 601 (4th Cir. 2002).

233. *Hamdi v. Rumsfeld*, 316 F.3d 450, 461 (4th Cir. 2003).

234. *Id.* at 461-62.

235. *Id.* at 462.

236. *Id.*

237. *Id.* at 466.

238. *Id.* at 474-75.

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

stark contrast to the Fourth Circuit's opinion, eight of the nine justices<sup>240</sup> rejected the government's position that great deference should be afforded to presidential decisions regarding national security.<sup>241</sup> Writing for the plurality,<sup>242</sup> Associate Justice Sandra Day O'Connor explained that "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the nation's citizens."<sup>243</sup>

The plurality decision in *Hamdi* is illustrative of the concept of separation of powers that is so deeply rooted in the American system of government. Most notable is the judiciary's ability to review actions of the executive branch that allegedly have infringed upon a citizen's constitutional rights. According to the Court, such judicial review is available, even in times of national emergency. The Court's decision in *Hamdi* maintains individual civil liberties while simultaneously divesting the White House of its power to limit the rights of United States citizens who had been designated unlawful enemy combatants during a national emergency.<sup>244</sup>

The plurality of the Court in *Hamdi* was also greatly concerned that detaining individuals indefinitely would deprive such persons of their due process rights. Although cognizant of the consideration that national security interests militate in favor of more lenient procedural rules, the Court nonetheless opined that the government had failed to achieve the appropriate constitutional balance.<sup>245</sup> The Court reasoned that "the risk of an erroneous deprivation of a detainee's liberty is unacceptably high under the Government's proposed rule."<sup>246</sup> Justice O'Connor's opinion mandated that citizen-detainees receive notice of the government's factual basis for their classification as enemy combatants and a fair opportunity to rebut that assertion before a neutral decision maker.<sup>247</sup> Expressing the *Hamdi* plurality's due

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240. Justice Clarence Thomas was the only justice to side entirely with the government.

241. *Hamdi*, 542 U.S. at 535-36.

242. The plurality consisted of Justices O'Connor, Kennedy, Rehnquist, and Breyer.

243. *Hamdi*, 542 U.S. at 536.

244. *Id.*

245. *Id.* at 532.

246. *Id.*

247. *Id.* at 533.

process concerns, Justice O'Connor wrote: "An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate fact-finding before a neutral decision-maker."<sup>248</sup> Furthermore, the plurality indicated that Hamdi "unquestionably has the right of access to counsel in connection with the proceedings on remand."<sup>249</sup>

According to the plurality, "it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."<sup>250</sup> The plurality perceived irony in the denial by the United States of personal liberties at home while simultaneously fighting for such liberties abroad.<sup>251</sup>

The plurality's decision officially repudiated the United States government's suspension of certain of Hamdi's individual liberties<sup>252</sup> because due process should afford him a meaningful opportunity to contest his detention before a neutral decision maker.

Nonetheless, the government had reason to be pleased with another aspect of the Hamdi decision. Five members of the court agreed that citizens of the United States could be held as enemy combatants,<sup>253</sup> and four of them also believed that the President had the authority to designate specific persons as enemy combatants.<sup>254</sup>

Justices Scalia and Stevens, dissented, maintaining that Hamdi was entitled to habeas corpus relief "unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus."<sup>255</sup> Although conceding that Hamdi's case was not an easy one in light of the competing demands of national security and the rights of citizens to personal liberties,

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248. *Id.* at 538.

249. *Id.* at 539.

250. *Id.* at 532.

251. *Id.*

252. *Id.*

253. The members of the court who were of that opinion were Chief Justice Rehnquist and Justices O'Connor, Kennedy, Thomas, and Breyer.

254. The members of the court who were of that opinion were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer.

255. *Hamdi*, 542 U.S. at 573.

the two justices tilted towards the side of personal liberty.<sup>256</sup>

However, whatever hope remained for the Bush administration's policies in the wake of *Hamdi*, was eviscerated by a decision of the Supreme Court two years later.

#### B. Hamdan v. Rumsfeld

In what was described by one journalist as "the most significant setback yet for the administration's broad expansions of presidential power,"<sup>257</sup> the United States Supreme Court in *Hamdan v. Rumsfeld*<sup>258</sup> ruled that President Bush's first attempt at establishing military commissions violated both the Uniform Code of Military Justice (UCMJ) and the four Geneva Conventions signed in 1946.<sup>259</sup> As such, the high court struck down the military commissions, leaving Congress and the President to reconsider their approach to this gathering storm.<sup>260</sup>

Salim Ahmed Hamdan, a Yemeni national, who was originally charged with conspiracy to commit "offenses triable by military commission," had petitioned the United States District Court for the District of Columbia Circuit for a writ of habeas corpus in response to his impending military commission trial.<sup>261</sup> The district court granted Hamdan's petition<sup>262</sup> and in November of 2004 it barred the military commission from trying Hamdan because, the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva III)<sup>263</sup> mandates that those tried by military commission must first be designated a prisoner of war, and a "competent tribunal" had not yet

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256. *Id.* at 554.

257. Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 30, 2006, at A1. *But see* James Taranto, Op-Ed, *The Truth About Guantanamo*, WALL ST. J., June 26, 2007 (labeling some of Greenhouse's coverage of the *Hamdan* decision as "purple prose"). Taranto notes that "journalists have falsely portrayed Guantanamo as an affront to the Constitution and international law." Specifically, he points to the *New York Times's* coverage of *Hamdan*, which he believes rather dramatically overplayed the significance of the Supreme Court's decision. *Id.*

258. 126 S. Ct. 2749 (2006).

259. *Id.*

260. *See id.*

261. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004) (mem.).

262. *Id.* at 173.

263. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135.

determined whether Hamdan fit this criterion.<sup>264</sup> The district court also ruled that the military commission that sought to try Hamdan was formed in violation of the UCMJ.<sup>265</sup> Setting out the precise requirements, the district court explained that, before a prisoner may be tried by a military tribunal, there must first be a hearing in order to determine whether the terms of the Geneva Convention apply.<sup>266</sup> If they do apply, the defendant is entitled to have his case heard under the UCMJ and would receive the same procedural safeguards as any member of the American armed forces.<sup>267</sup> The Bush administration appealed.<sup>268</sup>

In July of 2005, the United States Court of Appeals for the District of Columbia Circuit, granted a victory, although temporary, for the government and overturned the lower court's decision.<sup>269</sup> The Circuit Court panel stated unequivocally that the Geneva Convention does not apply to members of the al Qaeda terrorist network.<sup>270</sup>

Responding to the Circuit Court's decision, the military commission prepared to try Hamdan, but its efforts were again thwarted when the United States Supreme Court agreed to review the Circuit Court decision.<sup>271</sup> Chief Justice Roberts' earlier involvement in the case resulted in his recusal at the Supreme Court level.<sup>272</sup> In a blow to the Bush administration, the Court rendered a 5-3 decision, holding that the military commissions, as then structured, violated the UCMJ and the Geneva Convention.<sup>273</sup> In the end, the Court did not take issue with the existence of the military tribunals *per se*, but rather focused its concern on the procedural means employed to convene them.<sup>274</sup>

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264. *Hamdan*, 344 F. Supp. 2d at 160.

265. *Id.* at 165-66.

266. *Id.* at 161-62.

267. *Id.* at 160.

268. *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005).

269. *Id.* at 44.

270. *Id.* at 40. The present Chief Justice, John Roberts, at that time a judge on the Court of Appeals for the District of Columbia Circuit, was one of those who ruled in favor of the government's position.

271. *Hamdan v. Rumsfeld*, 126 S. Ct. 622, 622 (2006).

272. *Id.*

273. Editorial, *No Blank Check for Bush*, BOSTON GLOBE, June 30, 2006, at A16.

274. *Review & Outlook: Affirming Military Tribunals*, WALL ST. J., Feb. 20, 2007, at A14.



Four members of the Court explicitly advised the President to reconsider his strategy and to seek authorization from Congress.<sup>275</sup> “Nothing prevents the President from returning to Congress to seek the authority he believes necessary,” Justice Breyer noted in his concurring opinion, which was joined by Associate Justices Anthony M. Kennedy, David H. Souter, and Ruth Bader Ginsburg.<sup>276</sup>

Beyond their suggestion to the President, these four justices also made clear that Congress had authority to revisit the issue and to ultimately grant the President the power to convene such tribunals.<sup>277</sup> Justice Kennedy stated: “[A]s presently structured, Hamdan’s military commission exceeds the bounds Congress has placed on the President’s authority. . . . Because Congress has prescribed these limits, Congress can change them.”<sup>278</sup>

Currently, Hamdan remains in custody and, in light of Congress’s subsequent passage of the Military Commissions Act of 2006,<sup>279</sup> he is awaiting trial by military commission.

#### IV. CONGRESSIONAL ACTION

While the judiciary diligently worked to articulate its understanding of the rule of law, across the street members of Congress sought to comply with the Supreme Court’s rulings. The fruit of their efforts was the passage of two acts, both designed to establish the ground rules for prosecuting suspected terrorists in both chartered and uncharted legal territory.

##### A. *The Detainee Treatment Act of 2005*

An early amendment to a defense authorization bill, approved by the Senate on November 10, 2005, sought to deprive alien enemy combatants of access to the federal courts altogether.<sup>280</sup> However, within days of that bill’s approval, Senators Lindsey O.

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275. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2808 (2006) (Kennedy, J., concurring). Justices Souter, Ginsberg, and Breyer joined Justice Kennedy’s concurrence.

276. *Id.* at 2799 (Breyer, J., concurring).

277. *Id.* at 2808 (Kennedy, J., concurring).

278. *Id.*

279. *See infra* section IV.B.

280. National Defense Authorization Act for Fiscal Year 2006, 151 CONG. REC. S12666 (daily ed. Nov. 10, 2005).

Graham (R-S.C.) and Carl Levin (D-Mich.) sponsored a substitute amendment to narrow the bill's breadth.<sup>281</sup> The Graham-Levin Amendment, approved by the Senate, authorized an appeal to the courts by a person designated as an "enemy combatant" or convicted by a military commission at Guantánamo after the military trial and appeal were concluded.<sup>282</sup>

On December 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005,<sup>283</sup> which included the Graham-Levin Amendment. If there was any doubt as to the procedural safeguards afforded to Guantánamo detainees, the Detainee Treatment Act helped ease such apprehension. The act provided detainees a means of access to the United States federal court system, namely, the United States Court of Appeals for the District of Columbia Circuit, to ensure that any final decision by the military commission and appeal therefrom to the then Military Review Panel were consistent with the military order and the United States Constitution.<sup>284</sup>

Having resolved one problem, Congress, at the President's urging, addressed another.

#### B. *The Military Commissions Act of 2006*

The Supreme Court's decision in *Hamdan* prompted President Bush and his administration to revisit their strategy. The Court's decision demonstrated that the government's first attempt at achieving the proper constitutional balance between national security and civil liberties had floundered,<sup>285</sup> but its second attempt remains successful to date.<sup>286</sup>

Moments before signing into law the United States Military Commissions Act of 2006 (MCA), President Bush explained that his original attempt at establishing a system of military commissions for the trial of alien detainees failed when the

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281. *Id.*

282. *Id.*

283. DTA, *supra* note 16.

284. *Id.*

285. *See* Greenhouse, *supra* note 257.

286. *See* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007), *cert. granted*, Boumediene v. Bush, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195) (upholding the constitutionality of the Military Commissions Act).

Supreme Court held that military commissions needed to be expressly authorized by Congress.<sup>287</sup>

This time, with Congress's authorization, President Bush signed into law the MCA on October 17, 2006;<sup>288</sup> the stated purpose of the act was to bring "to justice terrorists and other unlawful enemy combatants through full and fair trials by military commissions . . ."<sup>289</sup>

The primary effect of this new legislation was to establish the jurisdiction of military tribunals. Specifically, by way of a section titled "Habeas Corpus Matters," the act abrogates federal court jurisdiction with respect to petitions for writs of habeas corpus filed by or on behalf of alien unlawful enemy combatants detained anywhere by the United States.<sup>290</sup> The section, in relevant part, provides:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>291</sup>

Maintaining our nation's commitment to Geneva III, the MCA accentuates the importance of a just system to prosecute suspected terrorists.<sup>292</sup> Accordingly, the act confers jurisdiction on military commissions that "extends solely to aliens who have engaged in hostilities against the United States or who have purposefully and materially supported hostilities against us."<sup>293</sup>

Importantly, the act affords such alien enemy combatants a full panoply of protections. Specifically, the act first authorizes a Combatant Status Review Tribunal or another competent tribunal

287. George W. Bush, Speech, President Bush Signs Military Commission Act of 2006, (Oct. 17, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>.

288. MCA, *supra* note 6.

289. *Id.*

290. *Id.*

291. *Id.* at § 7(a).

292. Geneva Convention Relative to the Treatment of Prisoners of War, Part I, art. III, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135. The MCA, in effect, affords greater protections than those mandated by Geneva III. See *infra* note 326 and accompanying text.

293. See MCA, *supra* note 6, at § 948(d).

established under the authority of either the President of the United States as Commander-in-Chief or the Secretary of Defense, to designate unlawful enemy combatants.<sup>294</sup>

Charges against those individuals fall within the jurisdiction of military commissions, special trial-level courts established to hear those cases involving offenses punishable under the act or the laws of war.<sup>295</sup> This second stage consists of procedures that are more protective of detainees' rights than was the case with any military commissions in American history.<sup>296</sup>

Equally as important, the act provides for a Court of Military Commission Review, a special appellate-level court, with a three-member panel to review the decision of the commission.<sup>297</sup>

As a third-level check, the act confirms the Detainee Treatment Act's authorization of an appeal to the United States Court of Appeals for the District of Columbia Circuit,<sup>298</sup> notwithstanding that the act otherwise eliminates federal court jurisdiction over alien detainee petitions for habeas corpus.

Finally, in addition to the foregoing, the act confers a fourth level of review, authorizing the United States Supreme Court's review, by certiorari, of the federal circuit court's decision.<sup>299</sup>

Admittedly, the MCA precludes alien detainees from seeking immediate review of their detention, but it does so by exchanging that opportunity for protections that include four separate levels of judicial review. By so doing, Congress and the President have argued that they have created an acceptable constitutional balance between civil liberties and national security.

#### V. LIFE AFTER THE MILITARY COMMISSIONS ACT

The passage by Congress of the Military Commissions Act increased debate over the level of protections that ought to be afforded to alien unlawful enemy combatants detained during the War on Terror. For those who believed that *Hamdan* settled the

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294. See *id.* at § 948a.

295. See *id.* at § 948b.

296. David B. Rivkin, Jr. & Lee A. Casey, Op-Ed, *Opposing View, Leave well enough alone; Existing laws give Guantanamo detainees all the rights they need*, U.S.A. TODAY, May 11, 2007, at 14A.

297. See MCA, *supra* note 6, at § 950(f).

298. See *id.* at § 950g.

299. See *id.* at § 950g(d).

matter, the MCA's passage was a significant setback. Both the executive and legislative branches were sharply criticized by some for their role in declining to afford alien detainees one of the rights enjoyed by American citizens—the right to immediately petition for a writ of habeas corpus.<sup>300</sup> *The New York Times* posited that “[t]he Military Commissions Act of 2006 makes it virtually impossible to contest a status tribunal’s decision,”<sup>301</sup> and it urged Congress to rewrite the act, cautioning that “[r]ewriting the act should start with one simple step: restoring to prisoners of the war on terror the fundamental right to challenge their detention in a real court.”<sup>302</sup> Such a statement demonstrates that the editorial board of the *Times* failed to comprehend the provisions of the Military Commissions Act and the protections it affords. The fact is that the act does not abrogate the right of alien detainees ultimately to appeal their conviction to an Article III court. Undermining the argument made by the *Times* was its failure to mention the four levels of review afforded to alien unlawful enemy combatants under the act.

Plainly, the act affords detainees a right to challenge their detention, even though it provides for a delay before that right can be exercised in an Article III court. In response to criticism, proponents of the act emphasized that it was a myth to believe that under the bill “detainees would lose the basic right to challenge their imprisonment.”<sup>303</sup> Rather, Senators John W. Warner Jr. (R-Va.), John McCain (R-Az.) and Lindsey O. Graham (R-S.C.) have sought to raise awareness that, “both the Detainee Treatment Act and the Military Commissions Act allow an

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300. See, e.g., Editorial, *Guilty Until Confirmed Guilty*, N.Y. TIMES, Oct. 15, 2006, § 4, at 11; Alberto J. Mora & Thomas R. Pickering, Op-Ed, *Extend Legal Rights to Guantanamo*, WASH. POST, Mar. 4, 2007, at B7; Editorial, *The Must-Do List*, N.Y. TIMES, Mar. 4, 2007, § 4, at 11.

301. *Guilty Until Confirmed Guilty*, supra note 300.

302. Editorial, *The Democrats' Pledge*, N.Y. TIMES, May 9, 2007, at A26. See also Editorial, *Gitmo: A National Disgrace*, N.Y. TIMES, June 6, 2007, at A22 (again failing to recognize that the MCA provides detainees with a means of challenging their detention); Jonathan Hafetz, Op-Ed, *Perils of an unchecked executive*, PROVIDENCE J., May 8, 2007, at B5 (also erroneously stating that the Military Commissions Act “prevents federal courts from enforcing [longstanding] rules [against illegal detention] by eliminating habeas corpus”).

303. John W. Warner et al., *Look Past the Tortured Distortions*, WALL ST. J., Oct. 2, 2006, at A10.

individual to challenge his status in administrative and judicial fora.”<sup>304</sup>

Despite these added protections, Senator Arlen Specter (R-Pa.) maintained that the provision of the act which eliminates the immediate right of detainees to seek habeas corpus was unconstitutional.<sup>305</sup> Senator Specter voted for the bill, believing some of its provisions were beneficial, but hoped that the courts would clean up the act by striking the habeas corpus provision.<sup>306</sup> However, a 2007 Court of Appeals decision upheld the act’s constitutionality.<sup>307</sup>

#### A. *Boumediene v. Bush*

On February 20, 2007, a three-member panel of the United States Court of Appeals for the District of Columbia Circuit ruled in a 2-1 decision, that the Military Commissions Act forecloses aliens detained at Guantánamo from seeking habeas corpus relief.<sup>308</sup> The decision was the first to uphold the constitutionality of a central tenet of the MCA since its passage in October 2006. Not only was this a significant victory for the Bush administration, but the decision also heralded a new era for national security.

The issue before the *Boumediene* court was whether federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as unlawful enemy combatants at Guantánamo.<sup>309</sup>

The detainees argued that the Supreme Court’s decision in *Rasul* settled the question and conferred on alien detainees a right to seek a writ of habeas corpus.<sup>310</sup> The government, however,

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304. *Id.*

305. See Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush: Constitutional Challenges Predicted*, WASH. POST, Sept. 29, 2006, at A1.

306. *Id.*

307. Editorial, *A Congressional Duty: Legislators should not expect courts to undo the lawmakers’ error of depriving foreign detainees of a fundamental right*, WASH. POST, Feb. 23, 2007, at A18.

308. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007), *cert. granted*, *Boumediene v. Bush*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).

309. *Id.* at 984.

310. Corrected Joint Brief for Appellants, at 10-11, *Boumediene v. Bush*,

urged the court to recognize that *Rasul* was decided strictly on the basis of the habeas corpus statute then in place.<sup>311</sup> According to the government, the Constitution does not afford alien detainees a right to petition for a writ of habeas corpus, nor would such a right have been available at common law. Therefore, Congress could decide whether to afford such a right to those presently detained at Guantánamo.<sup>312</sup> By enacting the MCA, Congress made clear that it would not afford such a right to detainees. Ultimately, the government hoped that the court would conclude that federal courts do not have jurisdiction over such petitions, thereby validating that provision of the Military Commissions Act which denies federal courts jurisdiction to review the detention of foreign nationals.

The majority opinion, authored by Judge A. Raymond Randolph,<sup>313</sup> immediately recognized that recent changes in the law sharply distinguished the *Rasul* decision from the issue before the court.<sup>314</sup> The majority explained that *Rasul* was decided pursuant to the habeas corpus statute then in effect, which was first altered by the passage of the DTA and then again by the passage of the MCA.<sup>315</sup>

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476 F.3d 981 (D.C. Cir. 2007) (Nos. 05-5062 & 05-5063).

311. Brief for the Federal Government Appellees, at 21-24, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) (Nos. 05-5062 & 05-5063).

312. Reply/Cross-Appellee Brief for the United States, at 12-13, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) (Nos. 05-5062 & 05-5063).

313. Judge David B. Sentelle concurred in Judge Randolph's majority opinion.

314. *Boumediene*, 476 F.3d at 984-86.

315. The MCA reads:

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

(2) Except as provided in [section 1005(e)(2) and (e)(3) of the DTA], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MCA, *supra* note 6, at § 7(a).

Judge Randolph began with the Supreme Court's proposition in *INS v. St. Cyr*,<sup>316</sup> that the Suspension Clause should be interpreted, at minimum, to protect the writ of habeas corpus, as it existed in 1789 when the first Judiciary Act established the federal court system and conferred upon the courts jurisdiction to issue writs of habeas corpus.<sup>317</sup> Accordingly, his opinion navigated the history of the Great Writ, tracing it back to its origins in medieval England and finding it compelling that, at that time, the writ of habeas corpus extended only to the King's dominions.<sup>318</sup> Furthermore, according to the court, its examination of history revealed that the privilege of habeas corpus would not have been available to aliens at the time of the passage of the first Judiciary Act unless the detainee was physically present in the United States or owned property therein.<sup>319</sup>

Examining more recent United States case law, the majority was particularly convinced that the Supreme Court's decision in *Johnson v. Eisentrager*,<sup>320</sup> "end[ed] any doubt about the scope of common law habeas."<sup>321</sup> In *Eisentrager*, the Supreme Court had stated:

We are cited to no instance where a court, in this or any country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.<sup>322</sup>

Judge Judith W. Rogers, dissenting, argued that it is unconstitutional to deprive alien detainees the right to seek habeas corpus.<sup>323</sup> According to Judge Rogers, aliens have a right to petition for a writ of habeas corpus and that right may only be suspended by Congress upon a finding that the public safety

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316. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (superseded by statute).

317. *Boumediene*, 476 F.3d at 988.

318. *Id.* at 989-90.

319. *Id.* at 990.

320. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

321. *Boumediene*, 476 F.3d at 990.

322. *Id.* (quoting *Eisentrager*, 339 U.S. at 768).

323. *Id.* at 995 (Rogers, J., dissenting).



requires it in cases of rebellion or invasion.<sup>324</sup> She reasoned that, because Congress failed to make the requisite findings to properly invoke the suspension of habeas, removal of federal court jurisdiction over such petitions was unconstitutional.

Once the *Boumediene* decision was issued, it was expected that the hundreds of habeas cases already filed in the federal courts would not be heard, leaving alien unlawful enemy combatants to challenge their detention in federal courts only after the culmination of military proceedings and appeals therefrom. At the time there were approximately 400 habeas petitions pending that had been filed on behalf of unlawful enemy combatants detained at Guantánamo.<sup>325</sup>

### B. Supreme Court's Certiorari Review

In a final effort to strike down the Military Commissions Act, the alien detainees petitioned the Supreme Court for a writ of certiorari.<sup>326</sup>

The Supreme Court initially denied the detainees' petition and, in an unusual move,<sup>327</sup> published a statement of two justices respecting the denial, along with the opinion of three dissenting justices who would have granted the petition.<sup>328</sup> Justices Stevens and Kennedy wrote, "despite the obvious importance of the issues raised in these cases," in their opinion, the matter was not ripe for the Court's review until the detainees had exhausted all other avenues of appeal provided for by the MCA.<sup>329</sup>

Justices Breyer, Souter, and Ginsburg, however, disagreed, contending that immediate review by the Court was warranted to

324. U.S. CONST. art. I, § 9.

325. Josh White, *Guantanamo Detainees Lose Appeal; Habeas Corpus Case May Go to High Court*, WALL ST. J., Feb. 21, 2007, at A1.

326. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007). The Court consolidated the petition for certiorari by the *Boumediene* detainees with the petition filed by the detainees in *Al Odah v. United States*. See Letter from Neal Katyal to The Honorable William K. Suter (Mar. 28, 2007) available at <http://www.scotusblog.com/movabletype/archives/Hamdani%203-2809%20letter.pdf> (last visited Aug. 14, 2007).

327. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 301 (8th ed. 2002). "Most orders of the Court denying petitions for writs of certiorari do no more than announce the simple fact of denial, without giving any reasons therefore." *Id.*

328. *Boumediene*, 127 S. Ct. 1478.

329. *Id.*

“diminish the legal ‘uncertainty’ that now ‘surrounds’ the application to Guantánamo detainees of this ‘fundamental constitutional principle.’”<sup>330</sup>

It was thought that the Supreme Court’s denial of the petition for certiorari would allow the high court to defer consideration of the question until after the alien detainees exhausted the appeal procedures provided in the MCA.<sup>331</sup> In a most surprising turn of events, approximately three months after its denial of certiorari, the Supreme Court changed course and granted the petition.<sup>332</sup>

Despite the unusual nature of the Supreme Court’s abrupt change of position, it offered no explanation. In the view of some commentators, it was the result of a change of heart on the part of Justice Anthony M. Kennedy, who had first been opposed to granting certiorari.<sup>333</sup> Others suspect that the Court’s reversal of its previous order was in response to an affidavit submitted by a military insider.<sup>334</sup> In support of their petition for a rehearing on whether the court would grant certiorari, lawyers for the detainees filed with the Supreme Court on June 22, 2007 the seven-page affidavit of Lieutenant Colonel Stephen E. Abraham, who had been assigned to the Pentagon unit charged with running the hearings at Guantánamo.<sup>335</sup> In his affidavit, Abraham described the hearings as flawed and likened the review process to a rubber-stamp system.<sup>336</sup> Still, others have speculated that the

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330. *Id.* at 1479 (quoting Brief for United States Senator Arlen Specter as Amicus Curiae Supporting Petitioners at 19, *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (Nos. 06-1195, 06-1196)).

331. Linda Greenhouse, *Supreme Court Turns Down Detainees’ Habeas Corpus Case*, N.Y. TIMES, Apr. 3, 2007, at A18.

332. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007), *cert. granted*, *Boumediene v. Bush*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).

333. See William Glaberson, *In Shift, Justices Agree to Review Detainees’ Case*, N.Y. TIMES, June 30, 2007, at A1. The Supreme Court will grant plenary review of a certiorari case if a minimum of four justices favor granting the petition. See STERN, *supra* note 327, at 296.

334. See William Glaberson, *Unlikely Adversary Arises to Criticize Detainee Hearings*, N.Y. TIMES, July 23, 2007, at A1.

335. Appendix to Reply Brief of Petitioners to Opposition to Petition for Rehearing at i-viii, *Al Odah v. United States*, 75 U.S.L.W. 3707 (U.S. 2007) (No. 06-1196).

336. *Id.* Even assuming the truth of Abraham’s allegations, these allegations do not make the process itself unlawful. If there are abuses of the system, these need to be corrected but they do not invalidate the system

Supreme Court's order constitutes a signal that the Court is seeking an opportunity to dissolve the facility at Guantánamo Bay altogether.<sup>337</sup> If this is, indeed, the motivation behind the Supreme Court's grant of certiorari, that would be quite remarkable given the fact that three justices in the *Hamdan* majority joined Justice Breyer's concurrence and expressly invited Congress to authorize the military commissions there.<sup>338</sup> Nevertheless, because the Supreme Court did not indicate how the individual justices voted on the decision to grant certiorari, it is impossible to know with certainty what prompted such a change of course.<sup>339</sup>

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itself.

337. Carol Rosenberg, *Supreme Court to Review Guantanamo Detainee Case*, CHATTANOOGA TIMES FREE PRESS, June 30, 2007, at A1. It is the view of the writers of this law review article that significant harm would result from closing the Guantánamo Bay facility and integrating detainees into American prisons. Consider, for example, the mayhem that resulted when Irish Republican Army members were interned at the Maze Prison near Lisburn, County Antrim. The Maze Prison, which housed the bulk of the paramilitary prisoners among some of the "most hardened killers and bombers," is known for events that "reverberated far beyond the walls of its notorious H-blocks," including the dirty protest, hunger strikes, murders, riots, and, most notably, the largest break-out of prisoners. See *Doors closing for last time at 'unique' prison*, CNN, at <http://www.cnn.com/SPECIALS/2000/n.ireland/maze.html>.

It would be irresponsible to integrate those detained at Guantánamo into the United States prison system. According to John B. Bellinger III, senior legal advisor to Secretary of State Condoleezza Rice, roughly ten percent of the hundreds of individuals who have been released from Guantánamo have returned to fight against the United States in Afghanistan. Embassy of the United States, Press Release, *Releasing Guantanamo Detainees Would Endanger World, U.S. Says*, May 25, 2006, available at <http://london.usembassy.gov/terror670.html>.

We cannot make the mistake of allowing such enemies to infiltrate our prisons and to indoctrinate those incarcerated therein with their insurrectionary ideology. Indeed, as one United States Representative has noted, "there's a real damage and a real danger in bringing people that know how to make car bombs, who are experts with explosives, and putting them in proximity with American prisoners and American criminals who might pick up their capability." The Military Commissions Act and the Continued Use of Guantanamo Bay as a Detention Facility: Hearing of the House Armed Service Committee, 153 CONG. REC. D 439 (2007) (statement of Rep. Duncan Hunter (R-Ca.)).

338. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799, 2808 (2006). The four justices joining in Justice Breyer's concurrence were Justices Kennedy, Souter, and Ginsburg. See also Sheryl Gay Stolberg, *Justices Tacitly Backed Use of Guantánamo, Bush Says*, N.Y. TIMES, July 8, 2006, at A14.

339. *Hamdan*, 126 S. Ct. at 2799, 2808.

With the question now before the Supreme Court as to whether it is constitutional to detain alien unlawful enemy combatants at Guantánamo without affording them the right to habeas corpus relief, those critical of the MCA system argue for the facility's closure at Guantánamo Bay.<sup>340</sup>

#### VI. MAKING SMALL SACRIFICES FOR THE SAKE OF NATIONAL SECURITY

*"The laws will . . . not be silent in time of war, but they will speak with a somewhat different voice."*<sup>341</sup>

September 11, 2001 marked, or should have been, an awakening for the United States. We realized that our nation's borders were not secure. We became aware of the vulnerability of the nation that we had worked so rigorously to become. And we perceived the real possibility that our country's political, economic, and societal foundations were in great danger.

The risk that our country faces today is very grave,<sup>342</sup> yet many Americans turn a blind eye to this stark reality. Perhaps those who so willfully blind themselves to reality are in thrall of the notion that ignorance is bliss.<sup>343</sup> Certainly, amid the friction and abrasion in what President Lincoln called, "the race of life,"<sup>344</sup> it is all too easy to ignore the likelihood of another terrorist attack—even though we are periodically reminded of this harsh reality when law enforcement officials and the office of Homeland Security inform us of recently foiled terrorist plots.<sup>345</sup> To put the harm our nation might endure in perspective, consider that more

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340. See Thom Shanker & David Johnston, *Legislation Could be Path to Closing Guantánamo*, N.Y. TIMES, July 3, 2007, at A10.

341. REHNQUIST, *supra* note 58, at 225.

342. President's Address Before a Joint Session of the Congress on the State of the Union, 39 WEEKLY COMP. PRES. DOC. 109, Jan. 28, 2003 ("It would take one vial, one canister, one crate slipped into this country to bring a day of horror like none we have ever known.").

343. Thomas Gray, "Ode on a Distant Prospect of Eton College" (1742), *as reprinted in* THOMAS GRAY, 1 THE WORKS OF THOMAS GRAY 17 (1884) (coining the phrase "ignorance is bliss").

344. Abraham Lincoln, Speech to Special Session of Congress (July 4, 1861), *as reprinted in* 4 COLL. WORKS, *supra* note 2, at 438.

345. See Press Release, United States Department of Justice, Four Individuals Charged in Plot to Bomb John F. Kennedy International Airport (June 2, 2007), *at* <http://newyork.fbi.gov/dojpressrel/pressrel07/plot060207.pdf> [hereinafter DOJ Press Release of June 2, 2007].

than 620,000 lives were lost throughout the four years of the Civil War.<sup>346</sup> Today, at least that many lives would be lost in just one day if we were to undergo a nuclear, chemical, or biological attack by a terrorist.<sup>347</sup> In today's War on Terror, the government must do what is necessary to ensure the nation's security. President Bush has warned that "we must never make the mistake of thinking the danger of terrorism has passed."<sup>348</sup> The Department of Justice's announcement in early June of 2007 that four individuals were being charged with conspiring to attack the John F. Kennedy International Airport by blowing up the airport's major jet-fuel supply tanks and pipeline further validated the President's forewarning.<sup>349</sup> Likewise, reports that al Qaeda may have active cells in the United States further confirm that the threat of another attack continues.<sup>350</sup> Surely "[a] democracy can allow its leaders one fatal mistake—and that's what 9/11 looks like to many observers—but Americans will not forgive a second one."<sup>351</sup>

In seeming forgetfulness of the grief and sorrow that tugged at America's heart and hearth on and after September 11, 2001, the Bush administration faced sharp criticism from many who believed that the government was trampling on certain civil liberties of individuals.<sup>352</sup> They claim that the government has

346. Williams, *supra* note 102, at 2.

347. *Id.* See also Michael Ignatieff, Op-Ed, *Lesser Evils*, N.Y. TIMES, May 2, 2004, § 6 (Magazine), at 46:

Consider the consequences of a second major attack on the mainland United States – the detonation of a radiological or dirty bomb, perhaps, or a low-yield nuclear device or a chemical strike in a subway. Any of these events could cause death, devastation and panic on a scale that would make 9/11 seem like a pale prelude.

348. George W. Bush, President's Radio Address (Aug. 12, 2006), available at <http://www.whitehouse.gov/news/releases/2006/08/print/20060812.html>.

349. See Press Release, United States Department of Justice, Four Individuals Charged in Plot to Bomb John F. Kennedy International Airport (June 2, 2007), available at <http://www.usdoj.gov/opa/pr/2007/June/07nsd401.html>.

350. Lolita C. Baldor, *Officer fears al-Qaida cells already in U.S.*, PROVIDENCE J., July 25, 2007, at A1.

351. Ignatieff, *supra* note 347. See also Taranto, *supra* note 257 (opining that "[i]niciency toward detainees is on the table today only because al Qaeda has so far failed to strike America since 9/11").

352. See, e.g., Editorial, *American Liberty at the Precipice*, N.Y. TIMES, Feb. 22, 2007, at A22; Editorial, *A Spy Program in From the Cold*, N.Y. TIMES, Jan. 18, 2007, at A26; Stephen Budiansky, Op-Ed, *Military Justice*

unduly elevated its commitment to national security and circumvented the civilian court system.

No one disputes that the laws of war<sup>353</sup> are different.<sup>354</sup> We play by different rules in the midst of a national emergency—rules that are not always chivalrous or entirely in accord with all of the constitutional provisions that apply in ordinary times.<sup>355</sup> The point is that this is “no ordinary time.”<sup>356</sup> Our founders never intended that we risk the nation’s security by reading the Constitution in a myopic and non-holistic manner. One of the founding fathers, Alexander Hamilton, noted in 1801 that “[w]ar, of itself, gives to the parties a mutual right to kill in battle, and to capture the persons and property of each other.”<sup>357</sup> Hamilton recognized that “the Constitution does not require specific congressional authorization for such actions, at least after hostilities have commenced.”<sup>358</sup> In Hamilton’s view, “[t]he framers would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and convenience.”<sup>359</sup>

On the basis of considerations of that nature, American law has long recognized that national security concerns are sometimes

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*Goes AWOL*, N.Y. TIMES, Feb. 17, 2007, at A15. See generally DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2006).

353. The laws of war are “[t]he body of rules and principles observed by civilized nations for the regulation of matters inherent or incidental to the conduct of a public war, such as the relations of neutrals and belligerents, blockades, captures, prizes, truces and armistices, capitulations, prisoners, and declarations of war and peace.” BLACK’S LAW DICTIONARY 904 (8th ed. 2004). See also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 218 n.2 (7th ed. 2004) (defining the law of war as “a branch of international law that prescribes the rights and obligations of belligerents and other persons resident in a theatre of war”).

354. See, e.g., Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A23.

355. See, e.g., Mark Agrast, *Restoring the Rule of Law*, Center for American Progress, June 30, 2006, available at <http://www.americanprogress.org/issues/2006/06/b1833225.html>.

356. See generally DORIS KEARNS GOODWIN, NO ORDINARY TIME: FRANKLIN AND ELEANOR ROOSEVELT: THE HOME FRONT IN WORLD WAR II (1995).

357. Lee A. Casey & David B. Rivkin, Jr., Op-Ed, *The law and war; U.S. right to detain combatants*, WASH. TIMES, Jan. 27, 2004, at A19 (quoting Alexander Hamilton, “The Examination, No. 1, 17 Dec. 1801,” reprinted in 3 THE FOUNDERS’ CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987)).

358. See *id.*

359. *Id.*

prioritized over particular constitutional guarantees. Even where, unlike the habeas corpus provision, the Constitution does not explicitly allow for exceptions, the Supreme Court has declined to view civil liberties in a radically absolute fashion—as though they existed in an abstract vacuum. For example, while our Bill of Rights guarantees that Congress will not abridge freedom of speech or of the press,<sup>360</sup> there is general agreement that these guarantees must, on occasion, be subordinated to considerations of the exigencies of national security.<sup>361</sup>

Despite the existence of instances in our history when the strict letter of one or other provision of the Constitution have been subordinated to national security considerations, some Americans nonetheless question the notion that the threats of today's War on Terror justify the careful and temporary subordination of some constitutional provisions to other values. As we describe below, such critics are in error.

*A. Trial by Military Commission Rather Than by the American Criminal Justice System is Vital to Preserving National Security.*

At the heart of the debate over holding detainees captive during the War on Terror is the need for a military court system at all. Many protest that the United States should try all suspected terrorists in the American criminal justice system and not in military courts that enforce the laws of war.<sup>362</sup> To do so, however, would in effect be an attempt to squeeze a round peg into

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360. U.S. CONST. amend. 1.

361. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (indicating that the principle that publications should be immune from prior restraint “is not absolutely unlimited” and stating that “[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publications of the sailing dates of transports or the number and location of troops.”); see also *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”).

362. See, e.g., Adam Liptak, *Tribunal System, Newly Righted, Stumbles Again*, N.Y. TIMES, June 5, 2007, at A21 (quoting Steven R. Shapiro, legal director of the American Civil Liberties Union, who contended that “[t]he time is long overdue for all these cases to be transferred to military courts-martial or civilian courts.”).

a square hole.<sup>363</sup> The criminal justice system is not only ill-suited for such wartime trials, but its rules and procedures would likely foster rather than thwart further terrorist attacks.<sup>364</sup>

The policy of detaining unlawful enemy combatants at Guantánamo and trying them before a military commission is vital to the effort to prevent further terrorist attacks. Contrary to the belief of some, “detention is not a penal sanction; it is the fortune of war.”<sup>365</sup> Indeed, detaining suspected unlawful enemy combatants serves a twofold purpose. First, in light of the Office of Homeland Security’s belief that al Qaeda operatives will plan other attacks, detaining those individuals who are capable of spearheading such an operation brings us one step closer to thwarting such an imminent attack.<sup>366</sup> Secondly, yet equally as important, detaining suspected terrorists enables American military personnel to obtain critical information from those with knowledge of future attacks on the United States.<sup>367</sup>

To achieve these ends, the laws of war, which are unlike our civilian criminal justice system in this regard, enable American military forces to attack enemies without notice and hold them captive until the end of hostilities.<sup>368</sup> While the American civilian criminal justice system would require the government to first indict suspects, arrest them without the use of excessive force, and

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363. Even some opponents of the administration’s detention policies recognize that the civilian criminal justice system is ill-suited for the trial of unlawful enemy combatants. For example, Professor Neal K. Katyal of Georgetown University Law Center has acknowledged that, “it’s not realistic to think that all people can be tried in an ordinary criminal court.” Shanker, *supra* note 340.

364. See Taranto, *supra* note 257 (noting that granting constitutional protections to detainees would (1) endanger the lives of American civilians, (2) afford preferential treatment to enemy fighters who defy the rules of war and (3) make a mockery of international humanitarian law).

365. David B. Rivkin, Jr. and Lee A. Casey, Op-Ed, *The law and war; Protecting the innocents*, WASH. TIMES, Jan. 29, 2004, at A23.

366. Brief for American Center for Law and Justice as Amicus Curiae Supporting Petitioners at 1, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027). See also William Glaberson, *Pentagon Study Sees Threat In Guantánamo Detainees*, N.Y. TIMES, July 26, 2007, at A15 (noting that a recent report by a terrorism study center at West Point revealed that many detainees held captive at Guantánamo during 2004 and 2005 were a proven threat to United States forces).

367. Glaberson, *supra* note 334; Rivkin, *supra* note 365.

368. David B. Rivkin, Jr. and Lee A. Casey, Op-Ed, *The law and war; Are we at war?*, WASH. TIMES, Jan. 26, 2004, at A19.



fully Mirandize them, “[t]he right to detain enemy combatants during wartime is one of the most fundamental aspects of the customary laws of war.”<sup>369</sup> Military officials need not establish probable cause nor do they need to secure an arrest warrant from a neutral and detached magistrate in order to capture perceived enemy fighters.<sup>370</sup> Significantly, the laws of war do not require the giving of *Miranda* warnings when capturing an enemy, nor do they require adherence to the legal niceties of the Federal Rules of Criminal Procedure.<sup>371</sup> As Professor Ruth Wedgwood quipped: “U.S. Marines may have to burrow down an Afghan cave to smoke out the leadership of al Qaeda. It would be ludicrous to ask that they pause in the dark to pull an Afghan-language *Miranda* card from their kit bag. This is war, not a criminal case.”<sup>372</sup>

While the laws of war are specially designed for all periods of armed conflict, they are particularly suited for the new-age warfare evidenced by the War on Terror. Al Qaeda’s suicide attacks have demonstrated that many of its members have an utter disregard for their own lives, thereby lessening the deterrent value of bloodshed inflicted by opponents. In their quest to destroy our nation, information is the only precious gem that al Qaeda members seek desperately to shield from American view.<sup>373</sup> It is that intelligence, relating to anticipated al Qaeda attacks, that the United States desperately needs.<sup>374</sup> Without the ability to capture enemy combatants and immediately interrogate them to obtain such intelligence, the likelihood of victory in the War on Terror would become substantially more remote.

369. Casey, *supra* note 357.

370. MCA, *supra* note 6, at § 949a (2)(B).

371. John Dean, *The Critics are Wrong: Why President Bush’s Decision to Bring Foreign Terrorists to Justice Before Military Tribunals Should Not Offend Civil Libertarians*, FindLaw, Nov. 23, 2001, at <http://writ.news.findlaw.com/dean/20011123.html>.

372. Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18.

373. See Winik, *supra* note 153 (“It is commonly agreed that our greatest breakthroughs in this war will most likely come not from military strikes or careful diplomacy – needed and important as they both are – but from crucial pieces of information: a lead about a terrorist cell; a confession from a captured bin Laden associate; reliable intercepts warning that a new attack is going to take place.”).

374. Ruth Wedgwood, *Lawyers at War*, WALL ST. J., Feb. 18, 2003, at A22. See also John Keegan, INTELLIGENCE IN WAR: KNOWLEDGE OF THE ENEMY FROM NAPOLEON TO AL-QAEDA 316-17 (2003).

Moreover, the procedural rules that are characteristic of our criminal justice system would further complicate the trial of suspected terrorists and could jeopardize our nation's security. Most notable are the rules of discovery, which mandate that the government disclose to a criminal defendant any information in its possession that can be deemed material to the accused, in addition to any potentially exculpatory evidence.<sup>375</sup> To provide a suspected terrorist with such extensive information could be deadly. Andrew C. McCarthy, the former federal prosecutor who tried twelve suspected terrorists following the 1993 attacks on the World Trade Center, reflected upon the repercussions of trying such individuals in federal court.<sup>376</sup> According to McCarthy, the broader an indictment is drawn, the more information that must be disclosed.<sup>377</sup> "This is a staggering quantum of information," he wrote, "certain to illuminate not only what the government knows about terrorist organizations, but the methods and sources used by intelligence agencies in obtaining that information as well."<sup>378</sup>

If anyone would know the consequences of adhering to the federal rules of discovery, it would be McCarthy, who served as a prosecutor at Omar Abdel Rahman's trial for participation in the 1993 World Trade Center bombings.<sup>379</sup> McCarthy complied with the discovery rules that govern criminal trials in the federal courts and produced to the defense counsel a list of 200 possible unindicted co-conspirators.<sup>380</sup> Within days of its production in court, the list—"a sketch of American intelligence on al Qaeda"—was delivered to Osama bin Laden in Sudan.<sup>381</sup> It is believed that bin Laden, by inspecting the list and determining who was not discovered, was able to deduce how American intelligence had obtained this information.<sup>382</sup> This disclosure—a mistake, which had the potential of impeding American intelligence operations—

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375. See *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

376. Andrew C. McCarthy, *The Legal Challenge to the War on Terror*, 9 J. OF INT'L SECURITY AFFAIRS 43 (2005).

377. *Id.* at 48.

378. *Id.*

379. *Id.* at 43.

380. Andrew C. McCarthy, *The Intelligence Mess: How it happened, what to do about it*, 117 COMMENTARY 11 (Apr. 1, 2004).

381. YOO, *supra* note 29, at 212.

382. *Id.*

should not occur again. At the same time, this mistake should teach us how “applying criminal justice rules to a national security problem not only provides terror organizations with precious intelligence they could never obtain on their own [but] also threatens public safety by retarding inputs to our intelligence community.”<sup>383</sup>

In this same vein, inherent in a military commission trial is a level of confidentiality that is absent from the criminal justice system. Our American criminal justice system recognizes the inherent value of open trials in ferreting out truth and preserving faith and trust in the judicial system.<sup>384</sup> Although certainly valuable in the normal criminal trial, affording public access to the military trials of suspected terrorists could jeopardize the nation’s security.<sup>385</sup> If classified information or the fruits of American intelligence efforts were disclosed in open court, those terrorists still at large would have the benefit of insight into our military and intelligence operations, enabling those who continue to plot against the United States to better disguise their plans and carry them to fruition.<sup>386</sup> For example, according to an anecdote referred to by President Bush in the 1990s, a newspaper learned that American intelligence had communicated with Osama bin Laden through his cell phone.<sup>387</sup> The President claimed that the newspaper’s publication of the fact prompted bin Laden to stop using his phone, thereby preventing United States intelligence from monitoring his activity.<sup>388</sup> Although the truth of the anecdote has since been disputed,<sup>389</sup> most notably, the story demonstrates the possible ramifications of the media’s disclosing confidential intelligence data. The potential effect of such publicity on American intelligence operations is reason alone to be

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383. McCarthy, *supra* note 376, at 48.

384. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

385. YOO, *supra* note 29, at 212 (“In an ongoing war, the costs of openly disclosing information can be very high.”).

386. See *id.*

387. George W. Bush, Press Conference (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>.

388. *Id.*

389. See, e.g., Glenn Kessler, *File the Bin Laden Phone Leak Under ‘Urban Myths’*, WASH. POST, Dec. 22, 2005, at A2 (describing the anecdote as an “urban myth”).

wary of trying detainees in the public federal court arena. While generally there is unquestionably tremendous value in public disclosure and media oversight of judicial processes, this value must be subordinated at a time when national security could be jeopardized.

Conducting the trial of detainees in open court would also pose risks to those American citizens who would be called upon for jury service. In early 2001, a jury trial commenced to prosecute al Qaeda terrorists for conspiring in the bombings of two American embassies in East Africa.<sup>390</sup> Despite the grave security concerns with respect to the jurors' well-being and the court's guarantee to jurors of anonymity, two years later the *New York Times* published a lengthy article replete with personal identifiers of the jurors.<sup>391</sup> Although refraining from actually naming the jurors whom the *Times* interviewed on the condition of anonymity, the article detailed nine of the jurors' professions, race, and beliefs.<sup>392</sup> Surely if al Qaeda operatives can surreptitiously wreak mass destruction on the United States, they, like the *New York Times*, can ascertain the identity of the male city employee from India or the female born-again Christian art therapist working in the greater New York City area.

In addition to issues involving court access, there are also significant issues with respect to the use of the rules of evidence that are otherwise available in federal court.<sup>393</sup> In the typical criminal trial, numerous public policy concerns warrant the exclusion of much potential evidence, largely because our trial system does not entrust jurors with weighing the reliability of certain information.<sup>394</sup> The most oft-cited example of the stifling effect of these rigid rules of evidence is with respect to the admissibility of hearsay evidence. Consider, for example, if speculation is accurate that bin Laden phoned his mother shortly before the September 11th attacks to warn her that a major event

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390. Benjamin Weiser, *A Jury Torn and Fearful in 2001 Terrorism Trial*, N.Y. TIMES, Jan. 5, 2003, § 1, at 1.

391. *Id.*

392. *Id.*

393. *See* Fed. R. Evid.

394. YOO, *supra* note 29, at 218; Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 330 (2002).

was imminent.<sup>395</sup> If bin Laden's mother told a close friend about her son's telephone call, the admission of such evidence may be problematic in a federal trial against an enemy combatant.<sup>396</sup> Military commission trials, however, obviate the problematic nature of such evidence given that the MCA empowers judges to admit that testimony which they deem reliable and probative.<sup>397</sup> By contrast with civilian courts, military commissions are also staffed by military judges who are admitted to practice in federal court or before the highest court of a state,<sup>398</sup> and who are better suited than lay jurors to properly weigh the evidence before them.<sup>399</sup> Thus, much of the risk that would exist in a trial before a jury of laypersons is eliminated when admitting such evidence before a military commission.

In a similar vein, our federal court system is replete with protections, such as the exclusionary rule, which keeps out of court evidence that has been unlawfully seized by police.<sup>400</sup> Such a rule promotes proper adherence to police procedures that ensure the integrity of our law enforcement system.<sup>401</sup> This consideration, however, is irrelevant with respect to the means by which the American military obtains evidence. It makes sense that "[t]hese rules do not apply to war, because courtroom outcomes do not 'regulate' how the military does their job on the battlefield."<sup>402</sup>

Finally, also absent from the laws of war is the right of a criminal defendant to confront his or her accusers. The United States criminal justice system, as reflected in the Supreme Court's recent ruling in *Crawford v. Washington*,<sup>403</sup> affords defendants such a right, but it would be virtually impossible to afford the right of confrontation in the context of the current wartime climate. Requiring accusers to appear in court and testify live against unlawful enemy combatants would "substantially hinder military operations by removing front-line soldiers and officers

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395. YOO, *supra* note 29, at 218; Wedgwood, *supra* note 394, at 330.

396. See Fed. R. Evid. 801 and 802.

397. See MCA, *supra* note 6, at § 949a(b)(2)(E)(ii).

398. *Id.* at § 948j.

399. YOO, *supra* note 29, at 218.

400. *Weeks v. United States*, 232 U.S. 383, 393 (1914).

401. See WILLIAM LAFAYE, et al., CRIMINAL PROCEDURE § 3.1 (4th ed. 2004).

402. YOO, *supra* note 29, at 218.

403. *Crawford v. Washington*, 541 U.S. 36 (2004).

from the battlefield to prepare and to offer testimony before a tribunal.”<sup>404</sup> Additionally, intelligence agents and other sources could be required to appear in court despite the fact that the government has worked for so long to conceal their identity, let alone, their existence.<sup>405</sup> “Requiring these witnesses to appear in court heightens the possibility of their exposure, endangering the agent’s safety and compromising [the nation’s] access to vital intelligence concerning the location of terrorist cells and plans for future terrorist strikes.”<sup>406</sup>

Admittedly, these many procedural aspects of the American criminal justice system are absent from military commission trials conducted under the laws of war. Yet, under these circumstances, this is lawful. Unlawful enemy combatants are protected under Common Article 3 of Geneva III, which mandates that they be afforded “all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>407</sup> It in no way specifies that unlawful enemy combatants must be afforded all protections made available to American citizens under our Constitution. Rather, as Justice Stevens explained in *Hamdan*,<sup>408</sup> Article 75 of the Additional Protocol to the Geneva Conventions details many of the judicial guarantees that are deemed “indispensable by civilized peoples.”<sup>409</sup> A comparison of the MCA and these indispensable guarantees reveals that the two are strikingly similar.

Even some who are staunchly opposed to the Guantánamo military commissions agree that detainees need not be given the full panoply of criminal protections.<sup>410</sup> Georgetown law professor,

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404. Brief for Former Attorneys General of the United States et al. as Amici Curiae Supporting Respondent at 27-28, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184).

405. *Id.*

406. *Id.*

407. Morris D. Davis, Op-Ed, *The Guantánamo I Know*, N.Y. TIMES, June 26, 2007, at A21 (citing Geneva Convention Relative to the Treatment of Prisoners of War, Part I, art. III, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135).

408. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 (2006).

409. *Id.* (citing 1977 Geneva Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, arts. 75, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978)).

410. Goldsmith, *supra* note 354. Katyal represented Hamdan and persuaded the Supreme Court to strike down the Guantánamo tribunals. *Id.*

Neal Katyal, who represented Hamdan, has admitted that “[a] detainee may not be able to meet his lawyer right away if interrogation has just begun. A terrorist captured in Afghanistan should not be able to seek release because he was not read his Miranda rights.”<sup>411</sup> While Katyal would support the establishment of a national security court as a branch of the United States federal court system, there appears no persuasive reason for doing so.<sup>412</sup> The military commissions, as presently constituted, strike a proper balance between the rights of detainees and national security needs. In addition, detainees are afforded protections by all three branches of government. First, the military commissions themselves are constituted under the legislative and executive branches, which makes sense given that the laws of war operate under Articles I and II of our Constitution. Second, if these protections are insufficient, detainees are afforded a right of access to Article III courts. Katyal’s proposal would have little effect other than to confuse and further confound the separation of powers upon which our democracy is founded.

Importantly, in exchange for some of the protections available in the American civilian court system, the MCA otherwise affords detainees a full panoply of rights.<sup>413</sup> For example, detainees who are charged with crimes are provided a copy of those charges in their native language<sup>414</sup> and those accused have the right to challenge commission members.<sup>415</sup> Additionally, the MCA strictly prohibits outside influence on witnesses and trial participants.<sup>416</sup> During the trial itself an accused may represent himself or may be assisted by counsel.<sup>417</sup> Like those accused in our criminal justice system, detainees are presumed innocent until guilt is established beyond a reasonable doubt.<sup>418</sup> Finally, just as would be true in a civilian court pursuant to double jeopardy principles, a detainee may not be tried a second time for the same offense.<sup>419</sup>

The admissibility of hearsay evidence during a military

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411. *Id.*

412. *Id.*

413. Davis, *supra* note 407.

414. MCA, *supra* note 6, at § 948s.

415. *Id.* at § 949f.

416. *Id.* at § 949b.

417. *Id.* at § 949a(b)(C)-(D).

418. *Id.* at § 949l(c)(1).

419. *Id.* at § 349h.

commission trial has prompted the most debate, but it is important to note, as have some commentators, the existence of “robust safeguards”<sup>420</sup> that come into play when such evidence is at issue. Significantly, the parties are afforded not only the opportunity to challenge the introduction of such evidence but also the right to argue before the military judge the degree of weight that should be afforded to the evidence should it be deemed admissible.<sup>421</sup> A corresponding right such as this is absent from the American criminal justice system, which relies on the trier of fact to make independent credibility determinations.

Finally, one would be remiss to not recognize how much treatment of detainees has changed since September 11, 2001. Our government has confirmed that inflicting physical pain and torture on detainees is simply unacceptable.<sup>422</sup> While in the months following the terrorist attacks on our nation such methods were authorized, our government soon recognized the inhumanity of such treatment.<sup>423</sup> Congress’s passage of the DTA finally outlawed humiliating and degrading treatment of detainees.<sup>424</sup> The passage of the DTA makes untenable the position of those who contend that the former employment of torture on detainees justifies the Guantánamo Bay facility’s closure.

If the United States is truly committed to safeguarding the nation at this time of extreme peril, trial by military commission is not only prudent but is indeed necessary to achieve that goal. As one editorialist has noted, “By keeping terrorists out of America, Guantanamo protects Americans’ physical safety. By keeping them out of our justice system, it also protects our freedom.”<sup>425</sup>

*B. The MCA Delays, but Does Not Abrogate the Right to Judicial*

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420. Davis, *supra* note 407.

421. *Id.* (summarizing the provisions of the MCA, *supra* note 6, at § 949a(b)(2)(E)(i)-(ii)).

422. Graphic, *Evolution of Interrogation*, N.Y. TIMES, June 20, 2007, at A14.

423. *See id.*; *see also* Executive Order: Blocking Property of Certain Persons Who Threaten Stabilization Efforts in Iraq, July 17, 2007, available at <http://www.whitehouse.gov/news/releases/2007/07/20070717-3.html> (last visited Aug. 6, 2007).

424. Graphic, *supra* note 422.

425. Taranto, *supra* note 257.



*Review.*

Those who protest the Guantánamo trials and the Military Commissions Act do so under a decidedly false presumption.<sup>426</sup> Most of the act's critics focus on the fact that the MCA eliminates the right of detainees to petition for a writ of habeas corpus.<sup>427</sup> Such an interpretation ignores the multiple means of judicial review afforded under the act. Importantly, both the MCA<sup>428</sup> and the DTA<sup>429</sup> afford alien detainees the right to challenge their status as unlawful enemy combatants.<sup>430</sup> David B. Rivkin Jr., former White House counsel, has emphasized that detainees are still afforded multiple avenues of judicial review: "The government is saying, 'Look, we're not denying anyone's chance to get habeas,'" he said. "We're just providing a different way."<sup>431</sup> Together, the MCA and the DTA ensure that detainees receive a four-layered review process, replete with protections that otherwise are not required of Article 5 tribunals referenced by Geneva III and did not apply to the military commissions that Franklin Roosevelt convened during World War II.<sup>432</sup> According to Rivkin, the United States Supreme Court has itself recognized the constitutionality of substituting habeas corpus with an equivalent means of challenging the legality of one's detention.<sup>433</sup> Pointing to *Swain v. Pressley*,<sup>434</sup> he noted that the Supreme Court opined in that case that, "the substitution [for traditional habeas procedure] of a collateral remedy which is neither inadequate nor ineffective to

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426. Posting of David B. Rivkin, YES: The MCA Provides Habeas and Plenty of Process to Opening Argument, <http://openingargument.com/> (Feb. 2007).

427. *Guilty Until Confirmed Guilty*, *supra* note 300; *The Democrats' Pledge*, *supra* note 302; Hafetz, *supra* note 302; Posting of Richard Epstein, NO: The MCA Denies Habeas and Due Process, <http://openingargument.com/> (Feb. 2007).

428. MCA, *supra* note 6.

429. DTA, *supra* note 16.

430. See MCA, *supra* note 6; see also DTA, *supra* note 16.

431. Neil A. Lewis, *Appeals Court Weighs Prisoners' Right to Fight Detention*, N.Y. TIMES, Nov. 7, 2006, at A15.

432. See *Detainees: Hearing Before the S. Comm. on Armed Services*, 110th Cong. Apr. 26, 2007 (testimony of David B. Rivkin, Jr., Partner, Baker & Hostetler LLP), available at <http://armed-services.senate.gov/statemnt/2007/April/Rivkin%2004-26-07.pdf> [hereinafter Rivkin Testimony].

433. *Id.*

434. *Swain v. Pressley*, 430 U.S. 372 (1977).

test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."<sup>435</sup> According to the Supreme Court in *Swain*, the sole remaining inquiry therefore is whether the substituted remedy is inadequate or ineffective.<sup>436</sup> Certainly, one cannot seriously argue that the MCA and DTA with their four levels of review before four separate bodies of jurists are in any way inadequate or ineffective. The United States government has stood firmly committed to affording "full and fair" trials before military commissions.<sup>437</sup>

Strikingly, the critics of these acts also ignore the point that these protections are well in "excess of what our soldiers would be afforded as prisoners of war."<sup>438</sup> If an American soldier were to be taken into custody as a prisoner of war by nations harboring terrorists, it is highly unlikely that he or she would receive civil treatment of any kind.<sup>439</sup>

Detainees are already afforded rights far greater than prisoners of war would receive under Geneva III.<sup>440</sup> Because it is typical for military officials to interrogate prisoners of war immediately upon their capture to "exploit their knowledge concerning tactical positions," the Geneva Convention did not expressly provide for counsel during such interrogation, let alone the right of access to the courts to challenge their detention.<sup>441</sup> Furthermore, the Geneva Convention does not afford prisoners any right to release prior to the end of hostilities.<sup>442</sup> To naively

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435. Rivkin Testimony, *supra* note 432 (quoting *Swain*, 430 U.S. at 381).

436. *Swain*, 430 U.S. at 381.

437. See Gonzales, *supra* note 169 ("The suggestion that these commissions will afford only sham justice like that dispensed in dictatorial nations is an insult to our military justice system.").

438. Warner, *supra* note 303; see also Taranto, *supra* note 257; John Yoo, Op-Ed, *Congress to Courts: 'Get Out of the War on Terror,'* WALL ST. J., Oct. 19, 2006, at A18 (explaining that the writ of habeas corpus has never been understood as a right of prisoners of war).

439. See Mortimer B. Zukerman, *New Rules for a New Age*, U.S. NEWS & WORLD REPORT (Feb. 13, 2005), available at <http://www.usnews.com/usnews/opinion/articles/050221/21edit.htm> (last visited Aug. 5, 2007).

440. Department of Defense Fact Sheet, Feb. 2004, available at <http://useu.usmission.gov/Article.asp?ID=05DEDD29-C637-47728923541CCD3687DB>.

441. *Id.*

442. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 118, 6 U.S.T. 3316, 3406, 75 U.N.T.S. 135, 224; see also Rivkin Testimony, *supra* note 432 (noting that "the notion of enabling

imagine that nations harboring terrorists would afford American prisoners of war rights on a par with our constitutional right of habeas corpus is to deny the real threat such individuals face abroad.<sup>443</sup>

### 1. *Constitutional Basis for Suspending Habeas in the Current Wartime Climate*

It is the position of these authors that the Bush administration, with the concurrence of Congress, has chosen a prudent, acceptable course. The United States Constitution explicitly allows for the complete suspension of habeas corpus rights during wartime, but the current administration recognized that the more judicious approach would be to delay, not eliminate the right of Article III court review. Nevertheless, what some commentators fail to recognize is that, even if the President and Congress were to suspend the right of habeas corpus and offer no alternative means of Article III court review, such an action would still be constitutional.

With respect to alien detainees, the suspension clause need not even be invoked. As early as 1950, the United States Supreme Court recognized that the writ never has been granted for an alien enemy who has at no relevant time been within the territorial jurisdiction of the United States.<sup>444</sup> The Circuit Court's opinion in *Boumediene* emphasized this fact noting that, even referring back to English common law, the writ of habeas corpus was not intended to be available to aliens "beyond the Crown's dominions."<sup>445</sup> Discussions taking place at the time the framers drafted the habeas corpus suspension clause confirms that that the framers considered the writ a right afforded to American

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captured enemy combatants to be released 'on parole' fell out of practice by the late 19th Century" and that "the current U.S. practice of releasing captured enemy combatants before the end of hostilities is historically unprecedented."). It appears that many of the issues surrounding the Guantánamo Bay facility involve the length of time individuals are detained. However, as Geneva III makes clear, even prisoners of war can be held until the end of hostilities.

443. Warner, *supra* note 303; see also Taranto, *supra* note 257.

444. Johnson v. Eisentrager, 339 U.S. 763, 768 (1950).

445. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478, *cert. granted*, Boumediene v. Bush, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).

citizens, not all individuals. Consider, for example, James McHenry's report back to the Maryland legislature about the compromises made at the convention, which reflects his great concern for the protection of citizens.<sup>446</sup> To McHenry, unless public safety required a suspension of habeas corpus, "the virtuous *Citizen* [would] ever be protected in his opposition to power."<sup>447</sup> While these discussions emphasized habeas corpus rights of citizens, they did not include any consideration of the habeas corpus rights of non-citizens, let alone alien enemy combatants.

The Circuit Court's *Boumediene* decision, charts a historical and contemporaneous course that plausibly the Supreme Court could follow to hold that the MCA does not unconstitutionally deny alien detainees the opportunity to seek a writ of habeas corpus.

With respect to American citizens, however, the issue is admittedly more delicate and invokes consideration of the suspension clause. The framers of our Constitution foresaw the clash that would arise between personal liberties and national security when the security concerns are genuine and immediate. They believed that, when forced to weigh the value of the two, personal liberties must recede. It was no accident that the suspension clause was included in the Constitution. Our founding fathers, while committed to affording civil liberties to American citizens, recognized that in times of war, such a commitment was not absolute. Significant debate regarding this proposition in relation to the War on Terror relates to whether the United States is, in fact, currently at war.

Many critics chide the MCA's removal of habeas corpus jurisdiction, contending that the Constitution's explicit language requires a "rebellion or invasion" before suspension is authorized. Thus, they argue that more than the current War on Terror is required to invoke this power.<sup>448</sup> Such criticism is largely fueled

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446. FREEDMAN, *supra* note 41, at 17 (citing Speech of James McHenry to the Maryland House of Delegates (Nov. 29, 1787), as reprinted in Eric M. Freedman, *Milestones in Habeas Corpus: Part I: Just Because John Marshall Said It, Doesn't Make It So: Ex parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531 (2000)).

447. *Id.* (emphasis added).

448. YOO, *supra* note 29, at 2 (citing PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 20 (2003); Joyce Appleby &

by the commentators' inability to reconcile traditional warfare with the War on Terror.<sup>449</sup>

The war America is fighting today is indisputably against a different type of enemy and looks nothing like the battlefields of yesterday. The impossibility of designating a particular nation with whom to engage in battle does not make this conflict any less a war.<sup>450</sup> Al Qaeda operatives cannot shield themselves from engagement in a formal war simply by not having uniformed soldiers or a standing army. Nor can they cloak themselves with innocence simply because there is not a "theater of battle in the traditional sense. Rather, the battlefield stretches from Asia through Africa and Europe and into the United States."<sup>451</sup> As such, it is understandably difficult to pinpoint our enemy. Only two days after the September 11th attacks, White House Press Secretary Ari Fleischer addressed reporters' concerns that the inability to define a specific enemy means we are not at war.<sup>452</sup> Fleischer cogently described the situation:

[T]his is a different type of enemy in the 21st century. . . .  
 [T]his enemy is nameless; this enemy is faceless; this enemy has no specific borders. This enemy does not have airplanes sitting on tarmacs and it does not have ships

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Gary Hart, *The Founders Never Imagined a Bush Administration*, George Mason University's Hist. News Network, Aug. 27, 2006, available at <http://hnn.us/articles/23297.html>.

449. See ACKERMAN, *supra* note 8, at 13-15.

450. Some commentators suggest that the Bush administration has erred in generalizing our current conflict as a War on Terror rather than targeting particular groups against whom we are fighting. See, e.g., Power, *supra* note 157. Hilary Benn, the British secretary of state for international development, warned against utilizing the catch-all umbrella term, War on Terror, to describe various terrorist groups. Benn explained, "What these groups want is to force their individual and narrow values on others, without dialogue, without debate, through violence. And by letting them feel part of something bigger, we given them strength." *Id.* Despite Benn's concerns, it is irrelevant whether the government labels its military efforts a War on Terror or specifically names each Islamic fascist group. What matters is that individuals have deliberately calculated to terrorize America, requiring us to respond with a global war to safeguard our nation.

451. Brief for Washington Legal Foundation et al. as Amici Curiae Supporting Petitioners at 2, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027).

452. Ari Fleischer, Press Briefing (Sept. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010913-12.html>.

that move from one port city to the next. It is a different kind of enemy.<sup>453</sup>

Nevertheless, Congress made great efforts to define the enemy of the United States by its authorization of the President's use of military force to combat the September 11, 2001 terrorist attacks.<sup>454</sup> As specifically as possible, Congress authorized 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 that occurred on September 11, 2001, or harbored such organizations or persons."<sup>455</sup>

Arguably this was a formal declaration of war. But, even assuming that the joint resolution did not constitute a formal declaration of war against Iraq or the entities against which we are fighting, the viability of the suspension clause would not be affected. Indeed, in an age when wars are not always fought on battlegrounds and often involve covert underground intelligence operations, to assume that we are not at war because the government has difficulty defining those entities against which we are fighting would surely transform the suspension clause into a hollow provision. There is no basis for believing that the framers of the Constitution intended that habeas corpus be suspended only after a formal declaration of war or during a civil war. Lending further support to this contention is the fact that Article I, Section 9, Clause 2 contains no reference to a formal declaration of war.<sup>456</sup> Indeed, in its history the United States has only formally declared war five times.<sup>457</sup> It strains credulity to believe that a nation that is reacting militarily and otherwise to the horrific attacks of September 11, 2001 is not at war.

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453. *Id.*

454. Pub. L. No. 107-40, 115 Stat. 224 (2001).

455. *Id.*

456. See Brief for Citizens for the Common Defence as Amicus Curiae Supporting Respondents at 6, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334, 03-343) ("The state of war does not depend on formalities such as a declaration by Congress. The majority of wars fought by the United States have not involved such a declaration.").

457. There were declarations of war with respect to the War of 1812, the Mexican-American War, the Spanish-American War, World War I, World War II. *Congress' role in war*, U.S.A. TODAY (May 18, 2005), available at <http://www.usatoday.com/news/nation/2002-10-08-congress-war.htm>.

In a tone that seems to reflect an insufficient appreciation of the gravity of the September 11, 2001 attacks, Professor Bruce Ackerman of Yale University Law School has instructed that “we shouldn’t lose all historical perspective: terrorism is a very serious problem, but it doesn’t remotely suggest return to the darkest times of the Civil War or World War II.”<sup>458</sup> Indeed, it is an egregious over-generalization to declare that we have not returned to the darkest times of the Civil War or World War II. The victims of September 11th, their families, and the men and women of our country who came forward to aid those in peril following the devastating events of that day deserve more than that. Nothing short of prevailing in the war against us by Islamic fascists who threaten our nation’s security will do them justice as well as secure peace.

Others contend that the problem is not with the suspension of habeas itself, but rather with the extent of such suspension. Only weeks after the September 11, 2001 attacks, columnist Tony Blankley stated that “[t]he danger to our liberties does not lie in their temporary, legal suspension, but in the persistence of such a suspension beyond the time needed to defeat the enemy.”<sup>459</sup> Certainly, the United States has not yet defeated its enemy, and it is wholly probable that releasing captured enemy combatants will only make the war last longer as they return to fight against our nation.<sup>460</sup> Indeed, some have already returned to fight us.<sup>461</sup> The continuation of the War on Terror indicates that we have not yet accomplished this vital mission. We remain a nation at war, and as a nation at war we must do what is necessary to protect the safety of our country and its citizens.

Finally, while the text of the Constitution makes it abundantly clear that the suspension of habeas corpus during the War on Terror is authorized, for those still not persuaded, President Thomas Jefferson’s thoughts, in reference to other

458. ACKERMAN, *supra* note 8, at 20.

459. Tony Blankley, Op-Ed, *Trade civil liberties for better security; Congress should broaden government’s powers immediately*, WASH. TIMES, Sept. 26, 2001, at A21.

460. William Taft, Comment, *Guantanamo detention is legal and essential*, FINANCIAL TIMES, Jan. 12, 2004, at 19.

461. Press Release, Embassy of the United States, *Releasing Guantanamo Detainees Would Endanger World*, U.S. Says (May 25, 2006), available at <http://london.usembassy.gov/terror670.html>.

political turmoil in our nation's infancy, should prove convincing:

A strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means.<sup>462</sup>

Perhaps President Lincoln saw the prescience in his predecessor's advice. Over fifty years later, Lincoln too remarked on the risk of reading the Constitution in a myopic manner at the risk of the nation's survival. In Lincoln's words: "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"<sup>463</sup>

As we continue to fight the War on Terror, the need to temporarily suspend the habeas corpus rights of some citizens is even greater than it was during the Civil War or World War II given the availability of nuclear, biological, and chemical weapons of mass destruction. Furthermore, al Qaeda has quickly recognized that, by recruiting American citizens to support their cause, these individuals can utilize the United States Constitution to shield themselves from lengthy detention without court review and from excessive interrogation.<sup>464</sup> We must not allow our Constitution to be utilized in such a way.

## 2. *History's Lessons*

Unlike the 1860s, the United States exists in a different global village<sup>465</sup> today. Yet, the parallels between President

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462. Thomas Jefferson, Letter to J. B. Colivn (Sept. 20, 1810), as reprinted in IV MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 149-50 (Thomas Jefferson Randolph, ed., F. Cars & Co. 1829).

463. Abraham Lincoln, Speech to Special Session of Congress (July 4, 1861), as reprinted in 4 COLL. WORKS, *supra* note 2, at 430.

464. Wedgwood, *supra* note 374; Ruth Wedgwood, *The Enemy Within*, WALL ST. J., June 14, 2002, at A12.

465. Global village is a term coined by Wyndham Lewis in *America and Cosmic Man*; the term was later popularized by Marshall McLuhan's *The Gutenberg Galaxy: The Making of Typographic Man*, where it is used to



Lincoln's suspension of habeas corpus during the Civil War and the current executive and legislative branch's delay of Article III court review during the War on Terror are remarkable. What is shocking is the failure by many to put the current crisis, including war making in historical perspective. As always, there is much to be learned from history.<sup>466</sup>

Like Lincoln, President Bush refused to be a passive actor at a time when the nation's security was jeopardized. Instead, both men acted prudently, taking the action they deemed both necessary and proper under the circumstances.<sup>467</sup> Lincoln responded to the exigencies of war with the widespread suspension of habeas corpus. Faced with similar exigencies, Bush responded by delaying the time during which detainees, non-U.S. citizens, could seek Article III court review. Despite the fact that the threat to national security today is at least as great as Lincoln encountered during the Civil War, the Bush administration has come nowhere as close as Lincoln in affecting civil liberties afforded by the Constitution. During the Civil War under the aegis of the Lincoln administration there were 75,961 Union army trials.<sup>468</sup> Of these, 5,460 were trials before military commissions and most were trials of civilian United States citizens.<sup>469</sup> One commentator described Lincoln as having exercised "a wide range of extraordinary powers . . . as a matter of necessity to insure the survival of the state."<sup>470</sup> Although it was necessary, President

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describe a historical period. See WYNDHAM LEWIS, *AMERICA AND COSMIC MAN* (1949); see also MARSHALL McLUHAN, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* (1962).

466. Editorial, *What would Abe do?: Lincoln's presidency is a lesson for today*, SACRAMENTO BEE, Feb. 20, 2006; McClerren, *supra* note 67.

467. Mackubin Thomas Owens, *War and Peace: Lincoln and Bush on Vigilance and Responsibility*, THE WEEKLY STANDARD, Dec. 21, 2005 ("The means to preserving the end of republican government are dictated by prudence, which according to Aristotle is, the virtue most characteristic of the statesman.").

468. E-mail from Thomas P. Lowry, Historian and Author (Dec. 8, 2005, 17:33 EST) (on file with authors) (reporting his research in National Archives Record Group 153).

469. *Id.*

470. CUTLER, *supra* note 95, at 146. See also JAMES G. RANDALL, *LINCOLN: THE LIBERAL STATESMAN* 123 (1947) ("No president has carried the power of presidential edict and executive order (independently of Congress) so far as he did."). President Lincoln's authorization of a blockade of the South and expansion of the army were among the extraordinary steps he took to protect

Lincoln's suspension of the writ of habeas corpus was radical in comparison with provisions of the Military Commissions Act, which merely supplants the right of habeas corpus with an intricate appellate review process, including eventual review by an Article III court. Indeed, "[e]very previous wartime president imposed far more Draconian security restrictions than any now contemplated—without any corrosive, long term effect on society."<sup>471</sup>

Despite Lincoln's acts, the Supreme Court's decision in *Milligan*, although ultimately ruling that Milligan had the right to habeas corpus, validates the principle that Congress may suspend the Great Writ. Although the Court concluded that the suspension did not apply to Milligan, who was not a member of the Confederate forces and was not captured on the battlefield, the decision paved the way for the suspension of habeas corpus with respect to alien enemy combatants today. Complicating the suspension clause and *Milligan's* holding is that warfare today is markedly different from that employed during the Civil War and even in World War II. Today we are fighting a global war on multiple battlegrounds, spanning several continents that is largely driven by intelligence operations, and not lines of battle. It is therefore difficult to define who, under *Milligan*, has been captured on battlefields. Further complicating the problem is the arduous task of determining who is a member of the Taliban or of al Qaeda, thereby making it difficult to define who falls within *Milligan's* category of individuals whose habeas rights can be suspended. Although these inquiries are difficult, such difficulty is by no means a reason to justify jeopardizing national security.

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the Union. MCPHERSON, *supra* note 69, at 210 (noting that both actions were "an apparent violation of the Constitution").

471. Winik, *supra* note 153 (noting that the Bush administration's restriction on liberties pales in comparison to the restrictions that occurred under Presidents John Adams, Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt). See also POORE, *supra* note 97, at 210 (describing the Lincoln administration's suspension of two newspapers—the *Chicago Times* and the *New York World*—during the Civil War).

## VII. CONCLUSION

*“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”*<sup>472</sup>

Two hundred and thirty one years later the unalienable rights cherished by our founding fathers have not vanished. We are still a nation firmly committed to affording civil liberties. But, in the current wartime climate, amidst the terror that has jeopardized our country and many other nations, we have increased our commitment to national security. Indeed, it has been recognized that “without a strong defense, there’s not much expectation or hope of having other freedoms.”<sup>473</sup>

As tension continues among our three branches of government during the War on Terror it is imperative that the Supreme Court recognizes the value in the constitutional balance achieved by the MCA when the Court considers that issue in *Boumediene v. Bush* this fall. Although the majority party in Congress has vowed to revisit the MCA,<sup>474</sup> it is important that the judiciary respond by upholding its constitutionality. As the War on Terror continues without any end in sight, the primary goal of protecting and defending our country should remain a priority. While civil liberties unquestionably are of great importance to America’s viability, such liberties would be worthless without the assurances of a secure nation.

Unquestionably, a society that prizes some civil liberties more than its personal security will eventually fall, as it will be without a means of thwarting those who seek to destroy it.<sup>475</sup> The United States government’s efforts would undoubtedly be hindered without the full, unrestricted ability to protect its citizens. We must accept temporary<sup>476</sup> infringements on certain civil liberties

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472. U.S. CONST. art. II, § 1, cl. 7 (prescribing the oath to be recited by every President upon entering office).

473. Jane Mayer, *The Hidden Power: The legal mind behind the White House’s war on terror*, THE NEW YORKER, July 3, 2006, at 47.

474. See, e.g., S.4060, Effective Terrorists Prosecution Act of 2006, Nov. 16, 2006; S.185, The Habeas Corpus Restoration Act of 2007, Jan. 7, 2007.

475. Mayer, *supra* note 473.

476. These infringements are, in fact, temporary. Even during the Civil

to curb future acts of terrorism on our soil.<sup>477</sup> Our nation's survival depends on it.

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War, when Abraham Lincoln saw the end of the war in sight, he advised his generals to lighten up and restore habeas corpus. Numerous letters expressing these sentiments are reprinted in 6 COLL. WORKS, *supra* note 87, at 210-15.

477. POSNER, *supra* note 40, at 88-89. Posner makes the comparison between the infringement on civil liberties and the Fourth Amendment search and seizure requirements. By requiring that searches be based on probable cause, which was an invention of the Supreme Court, the Fourth Amendment ensures protection from "unreasonable search and seizure." *Id.* This is, of course, analogous to the balance between an individual's need for privacy and the public's need for security. *Id.*