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# Judging Terror in the "Zone of Twilight" Exigency, Institutional Equity, and Procedure After September 11

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# JUDGING TERROR IN THE “ZONE OF TWILIGHT”: EXIGENCY, INSTITUTIONAL EQUITY, AND PROCEDURE AFTER SEPTEMBER 11

PETER MARGULIES\*\*

INTRODUCTION .....	384
I. THREE VALUES FOR LAW IN CRISIS: EXIGENCY, EQUALITY, AND INTEGRITY .....	390
A. <i>Exigency</i> .....	391
B. <i>Equality</i> .....	394
C. <i>Integrity</i> .....	397
II. DEFERENCE AS DOMINANT NARRATIVE.....	398
III. INSTITUTIONAL EQUITY AS COUNTER-NARRATIVE.....	402
A. <i>Crisis and Institutional Power</i> .....	402
B. <i>Equity, Habeas, and History</i> .....	406
C. <i>Institutional Equity in Action: A Preliminary Perspective</i> .....	408
1. Likelihood of False Positives .....	408
2. Adequacy of Existing Remedies .....	410
3. Balance of Hardships.....	412
a. <i>Default Positions</i> .....	412
b. <i>Time Limits</i> .....	414
4. Summary .....	416
IV. APPLYING INSTITUTIONAL EQUITY IN THE AFTERMATH OF SEPTEMBER 11: THREE TOUGH QUESTIONS OF LAW AND TERRORISM.....	416
A. <i>The Detention of Alleged Enemy Combatants</i> .....	417
1. Likelihood of False Positives .....	418
2. Adequacy of Existing Remedies .....	418
3. Balancing the Hardships.....	421
4. Equitable Tailoring for Unlawful Combatants .....	425
B. <i>The Terrorism Defendant’s Rights to Investigate and       Present a Defense at Trial</i> .....	431
C. <i>Access to Evidence in Military Tribunals</i> .....	436

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\* See *Youngstown Sheet & Tube Co. v. Sawyer* [The Steel Seizure Case], 343 U.S. 579, 636 (1952) (Jackson, J., concurring).

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CONCLUSION.....	441
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*You're lucky your client isn't in Guantanamo!*<sup>1</sup>

## INTRODUCTION

Conventional wisdom suggests that deference is the primary judicial response to emergencies.<sup>2</sup> The dominant narrative of deference, however, has both normative and descriptive flaws. Addressing those flaws, this article offers an account of judicial responses to emergencies as the practice of institutional equity.

Since the attacks of September 11, the role of the courts has been at issue because the Executive has asserted its authority to craft extraordinary procedures. The President claims to possess the power to indefinitely detain United States citizens as enemy combatants without affording them an evidentiary hearing or access to counsel.<sup>3</sup> The Department of Justice ("DOJ") has argued in court that it need not allow a criminal defendant access to potentially exculpatory evidence—a position that, in the recent case of Zacarias Moussaoui (the accused "twentieth hijacker"), prompted a federal court to impose sanctions on the government.<sup>4</sup> Government sources have

<sup>1</sup> Bill O'Reilly, *The O'Reilly Factor* (FOX News television broadcast, June, 2003) (statement made to lawyers for a criminal defendant accused of a terrorism-related offense).

<sup>2</sup> See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 202 (1998) ("The traditional unwillingness of courts to decide constitutional questions unnecessarily also illustrates in a rough way the . . . maxim . . . : In time of war the laws are silent."); Mark Tushnet, *Defending Korematsu: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 274 (observing that the law historically remains silent concerning government actions in response to often-exaggerated national security concerns during wartime, which often results in substantial restrictions to civil liberties); cf. Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?*, 112 YALE L.J. 1011, 1019 (2003) ("Experience shows that when grave national crises are upon us, democratic nations tend to race to the bottom as far as the protection of human rights and civil liberties, indeed of basic and fundamental legal principles, is concerned.").

<sup>3</sup> See *Hamdi v. Rumsfeld*, 316 F.3d 450, 462-63, 467-68 (4th Cir. 2003) (conducting a deferential review of executive action and holding that the indefinite detention of enemy combatants during wartime can be justified under the Executive's broad Article II war-making powers), *reh'g and reh'g en banc denied*, 337 F.3d 335 (4th Cir. 2003), and *cert. granted*, 124 S. Ct. 981 (Jan. 9, 2004); *Padilla v. Bush*, 233 F. Supp. 2d 564, 598-99 (S.D.N.Y. 2002) (holding that the President has the authority to seize and indefinitely detain enemy combatants during a time of war), *cert. granted*, 124 S. Ct. 1353 (Feb. 20, 2004); cf. Anthony Lewis, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 257, 258 (discussing enemy combatant detention).

<sup>4</sup> See *United States v. Moussaoui*, 282 F. Supp. 2d 480, 486-87 (E.D. Va. 2003) (barring the government from seeking the death penalty and from offering evidence connecting Moussaoui to September 11 attacks after the government refused to allow the defendant to present potentially exculpatory evidence), *appeal dismissed*, 333 F.3d 509 (4th Cir. 2003), and *reh'g and reh'g en banc denied*, 336 F.3d 279 (4th Cir. 2003).

suggested that if civilian courts require such access, the government will try defendants affected by such rulings before military tribunals.<sup>5</sup> Taken together, these extraordinary procedures suggest a closed system, where executive will is facilitated by its ability to avoid judicial review and defy other sources of accountability, such as internal government watchdogs,<sup>6</sup> legislators,<sup>7</sup> and nongovernmental organizations.<sup>8</sup>

The Executive's institutional power-play has consequences for three core values of law and governance: exigency, equality, and integrity. Exigency compels responses to the operations of violent networks, who leverage transnational planning and recruitment,<sup>9</sup> secrecy,<sup>10</sup> and the selection of targets

<sup>5</sup> See Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1308-10 (2002) (describing the Bush administration's creation of a system of dispensing justice through military tribunals). During World War II, the Supreme Court authorized military tribunals to try Nazi saboteurs in *Ex parte Quirin*, 317 U.S. 1 (1942) (holding that an alien or a citizen charged with violating laws of war can properly be tried before a military tribunal); see also A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309, 310 (arguing that *Quirin*, coupled with modern developments in the law of habeas corpus, provides significant protection for defendants in military tribunals). But see Jonathan Turley, *Trials and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 735-39 (2002) (criticizing *Quirin* as improper and unconstitutional).

<sup>6</sup> Cf. Adam Liptak, *The Back Page: Palmer Raids in Redux; The Pursuit of Immigrants in America After Sept. 11*, N.Y. TIMES, June 8, 2003, § 4, at 14 (discussing the reaction to the Inspector General's report and recent antiterrorism prosecutions, and observing that the Inspector General's report may help limit the alleged abuse of power and violations of individual rights by the government in detaining aliens). See generally Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) [hereinafter Inspector General Report] (describing the Inspector General of the Department of Justice ("DOJ") as an "internal watchdog").

<sup>7</sup> See Eric Lichtblau, *Threats and Responses: The Justice Department; Ashcroft Seeks More Power to Pursue Terror Suspects*, N.Y. TIMES, June 6, 2003, at A1 (reporting on congressional questioning of the Attorney General in light of Inspector General Report).

<sup>8</sup> See Jonathan D. Glater, *A.B.A. Urges Wider Rights In Cases Tried By Tribunals*, N.Y. TIMES, Aug. 13, 2003, at A18 (describing the American Bar Association's call to Congress to ensure that all defendants brought before military tribunals have confidential access to civilian attorneys).

<sup>9</sup> See Brian M. Jenkins, *The Organization Men: Anatomy of a Terrorist Attack*, in HOW DID THIS HAPPEN? 1,2-3, 7-13 (James F. Hoge, Jr. & Gideon Rose eds., 2001) (describing how the September 11 attacks were planned and carried out).

<sup>10</sup> See Jenkins, *supra* note 9, at 1, 9 (describing compartmentalization in Al Qaeda operations, including the September 11 attacks); Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 197-200 (2003) [hereinafter Margulies, *Virtues and Vices*] (discussing communications within violent transnational networks).

in urban centers<sup>11</sup> to maximize violence against innocents. To achieve their goals, networks such as Al Qaeda must generate “false negatives”—people akin to the September 11 hijackers who avoid detection and apprehension.<sup>12</sup> The government has a legitimate interest in filling gaps that assist in the production of false negatives.<sup>13</sup> Unfortunately, heightened vigilance for false negatives can breed disproportionate increases in false positives—persons wrongly identified, detained, or adjudicated—among particular groups, such as Muslims, Arabs, or South Asians.<sup>14</sup> This unequal increase in false positives for some groups imposes opportunity costs by creating resentment at home and abroad, which, in turn, can frustrate efforts to combat terrorism.<sup>15</sup>

Distortions in the balance between exigency and equality in terrorism matters may also have broader negative effects on the integrity of the legal system.<sup>16</sup> Crude, categorical enforcement measures—such as those broadly

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<sup>11</sup> See Kanan Makiya & Hassan Mneimneh, *Manual for a 'Raid'*, N.Y. REV. BOOKS, Jan. 17, 2002, at 18 (discussing Al Qaeda training manuals, which suggest targeting population centers).

<sup>12</sup> See Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457, 469 (2002) (discussing aspects of violence by transnational networks that fit within both “war” and “crime” models).

<sup>13</sup> See Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000) (explaining the constitutional and policy bases for government regulation of transnational organizations practicing violence); Margulies, *Virtues and Vices*, *supra* note 10, at 203 (discussing how courts have found that “Congress could reasonably find that the transnational scale and serpentine accounting of terrorist organizations make it impossible to accurately trace human or financial capital,” permitting Congress to “bar all contributions as a prophylactic measure”); Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment after Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 330-32 (2000) (arguing that the inability to directly regulate unlawful activities of transnational violent networks justifies regulation of the networks’ access to capital). *But see* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957-58 (2002) (raising constitutional questions regarding regulation of transnational networks).

<sup>14</sup> See Inspector General Report, *supra* note 6 (discussing the lack of terrorist ties of over one-thousand aliens detained after September 11); Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy after September 11*, 2002 UTAH L. REV. 481, 499 [hereinafter Margulies, *Uncertain Rivals*] (“Governance by scapegoating does not serve security or democracy.”).

<sup>15</sup> See GRAHAM E. FULLER, *THE FUTURE OF POLITICAL ISLAM* 86 (2003) (arguing that “[t]he nature of the War Against Terrorism and subsequent U.S. policies in the Middle East . . . dispelled the considerable Muslim sympathies generated at the human level for the American public after the September 11 attacks”).

<sup>16</sup> See Gross, *supra* note 2, at 1134 (stating that crises and emergencies test people’s faith in political and legal institutions, and suggesting that implications from the war on terrorism may shake American faith in the integrity of the government); *cf.* Margulies, *Virtues and Vices*, *supra* note 10, at 210 (criticizing the government’s unilateral assertion of authority to monitor conversations between prisoners and their attorneys as “enforced solidarity with the state” that “impairs the lawyer’s usefulness to the client in pursuing entirely lawful

contained under the rubric “racial profiling”—may obtain a renewed legitimacy if they are used in anti-terrorism efforts.<sup>17</sup> The implicit threat of indefinite detention may allow the government to extract guilty pleas on equivocal evidence from defendants charged with terrorism-related offenses in civilian courts. Courts, which have been divested of the ability to meaningfully review executive decisions, will descend to the moral equivalent of “collection agency” status, more or less functioning as efficient instrumentalities of executive will.<sup>18</sup> Executive power, unchecked by the other branches of government, threatens to undermine the Constitution’s balance between immediate needs and abiding values.<sup>19</sup>

Discounting such costs to equality and integrity, the deferential approach privileges executive assertions. Invoking the judiciary’s lack of competence in war and foreign affairs, deferential courts downplay the adverse impact of extraordinary measures, such as indefinite detention of alleged enemy combatants, on equality and integrity,<sup>20</sup> as well as the opportunity costs that exacerbate rather than alleviate exigency.<sup>21</sup> The result, as one of the framers

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objectives”).

<sup>17</sup> See Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675, 724-26 (2002-2003) (discussing the harm to dignity and the alienation that results when the government targets particular groups in its law enforcement efforts); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1423-30 (2002) (same); see also Leonard M. Baynes, *Racial Profiling, September 11<sup>th</sup>, and the Media: A Critical Race Theory Analysis*, 2 VA. SPORTS & ENT. L.J. 1 (2002) (discussing racialized images in media portrayals of post-September 11 figures).

<sup>18</sup> See *Hamdi v. Rumsfeld*, 337 F.3d 335, 369, 373 (4th Cir. 2003) (Motz, J., dissenting) (criticizing the panel’s decision for allowing “deference to matters of Executive authority in matters of war to eradicate the Judiciary’s own Constitutional role[, which is the] protection of individual freedoms guaranteed to all citizens,” and for rubber-stamping the Executive’s unsupported designation without proper procedural or substantive review).

<sup>19</sup> See JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 168 (2000) (arguing that “[i]f democratic self-government involves a nation’s generation-spanning struggle to live under self-given foundational law over time, apart from or even contrary to popular will at any given moment, the counter-majoritarian difficulty collapses”); cf. Jon Elster, *Social Institutions*, in *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 147, 150 (1989) (observing that “[t]he parts of a constitution that make it more difficult to change the constitution than to enact ordinary legislation . . . force people to think twice before they change it”); Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 28-31 (1999) [hereinafter Margulies, *Democratic Transitions*] (discussing the “institutional repertoire” of branches of government and nongovernmental organizations that furthers deliberation and guards against domination by single individual or entity in democracy).

<sup>20</sup> *Hamdi*, 337 F.3d at 371 (Motz, J., dissenting) (criticizing the majority’s holding that providing an evidentiary hearing and access to counsel for an alleged unlawful combatant was unnecessary and unduly intrusive on executive branch prerogatives).

<sup>21</sup> FULLER, *supra* note 15, at 86 (asserting that the disproportionate enforcement policies in the United States that resemble racial profiling have dispelled sympathy for the

famously warned, is the worst of both worlds: governance that ensures neither democracy nor public safety.<sup>22</sup>

Fortunately, history and precedent reveal that courts responding to crises have often rejected deference in favor of a more pragmatic approach. In *Ex parte Milligan*, the U.S. Supreme Court held that a functional federal court system was the forum of first resort for the trial of persons charged with sedition and like crimes.<sup>23</sup> In the *Steel Seizure Case*, the Court held that the President's authority as Commander-in-Chief did not extend to seizing steel mills without congressional approval.<sup>24</sup> In *Zadvydas v. Davis*, the Court held that, without sufficient justification, the executive branch lacked authority to indefinitely detain aliens who had entered the United States and had already been ordered to be removed from the country.<sup>25</sup> This approach, which I call institutional equity, seeks to allocate the risk of uncertainty that crisis yields between the three branches. Analogizing the government's assertion of authority for emergency procedures to a party's plea for an extraordinary remedy such as an injunction,<sup>26</sup> a court practicing institutional equity will consider the importance of judicial review for limiting false positives, the adequacy of existing, non-emergency procedures for protecting the public, and the balance of hardships among the three branches.

One crucial hardship in the balance, identified by Justice Jackson in his *Steel Seizure Case* concurrence, is the impact of the court's decision on institutional checks and balances.<sup>27</sup> Exigent procedures rarely derive from express legislative authority, which places the clearest imprimatur of legitimacy on the executive's power to act.<sup>28</sup> Instead, courts must struggle to draw the ambit of

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Americans felt by many Muslim nations after September 11 and have potentially caused more people to act against the United States).

<sup>22</sup> See 147 CONG. REC. S11,019 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy) (quoting Benjamin Franklin as observing that "a nation that would trade its liberties for security deserves neither").

<sup>23</sup> 71 U.S. 2, 122 (1866) (holding that a long-time Indiana resident, who had no demonstrable ties to the Confederate military, could not be tried before a military tribunal).

<sup>24</sup> *Youngstown Sheet & Tube Co. v. Sawyer* [The Steel Seizure Case], 343 U.S. 579, 589 (1952) (holding that President Truman lacked the authority to seize steel mills during a labor dispute in order to prevent a shortage of steel during the Korean War).

<sup>25</sup> 533 U.S. 678, 702 (2001) (remanding the habeas petitions of two immigrants, who were detained indefinitely after an order of final deportation was entered, to determine if their continued detentions were unreasonable).

<sup>26</sup> See generally DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991) (analyzing equitable relief, its functions, and when such relief is appropriate).

<sup>27</sup> 343 U.S. at 635 (Jackson, J., concurring) (observing that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government," and that "[i]t enjoins upon its branches separateness but interdependence, autonomy but reciprocity").

<sup>28</sup> See *id.* (explaining that "[w]hen the President acts pursuant to an express . . . authorization of Congress, his authority is at its maximum, for it includes all that he



implied legislative authority where the legislature has neither expressly granted nor denied the executive branch the authority at issue.<sup>29</sup> Drawing this ambit too widely will result in executive overreaching.<sup>30</sup> By the same token, drawing the ambit too narrowly will require the legislature to expressly authorize a wide range of executive measures, making government action too cumbersome to be effective in crises.<sup>31</sup> Institutional equity strikes a balance by interpreting the scope of implied legislative delegation to the Executive in light of “the imperatives of events,”<sup>32</sup> avoidance of constitutional issues, and consistency with international law. Drawing on the freedom from formalism that courts have customarily demonstrated in fashioning remedies<sup>33</sup> and in habeas review,<sup>34</sup> institutional equity tailors exigent procedures to fit gaps in the legal system,<sup>35</sup> while requiring procedural safeguards, such as access to counsel for alleged enemy combatants, that preserve equality and integrity.

Institutional equity’s “latitude of interpretation for changing times”<sup>36</sup> may be disconcerting for both champions and critics of executive authority. Champions of executive power may blanch at institutional equity’s cabining of exigent procedures.<sup>37</sup> Critics of executive power may object to institutional

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possesses in his own right plus all that Congress can delegate”).

<sup>29</sup> See *id.* at 637 (describing the various spheres in which the President wields power either delegated from, concurrent with, or in opposition to the legislature, and the legitimacy of each).

<sup>30</sup> *Id.* at 650 (noting the appeal of exigent circumstances as a “ready pretext for usurpation” by the executive).

<sup>31</sup> *Id.* at 640 (warning against “doctrinaire textualism” in construction of legislative authority).

<sup>32</sup> *Id.* at 637.

<sup>33</sup> See, e.g., *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944) (explaining that throughout several hundred years of history, courts’ equity jurisdiction has been characterized by flexibility, not rigidity).

<sup>34</sup> See *Bryant & Tobias*, *supra* note 5, at 310 (discussing habeas corpus developments since *Quirin*); David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2512 (1998) (arguing that the 1996 immigration statutes do not limit but actually extend federal habeas jurisdiction to protect criminal aliens); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 963 (1998) (contending that, while Congress has attempted to insert finality into executive deportation orders of illegal aliens, the Supreme Court has continuously preserved habeas corpus jurisdiction to inquire into the authority of such removal).

<sup>35</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 695-96 (2001) (crafting a decision granting habeas to leave “no ‘unprotected spot in the Nation’s armor’” (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953))).

<sup>36</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 640 (Jackson, J., concurring).

<sup>37</sup> The Supreme Court of Israel has developed a case-by-case approach to judicial review of military action that has much in common with the model advanced here. See Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 153-60 (2002) (discussing rulings on law and terrorism by the Israeli

equity's willingness to find implied legislative authority for enemy combatant detention and military tribunals. Moreover, as the district court's sanctions in *United States v. Moussaoui* demonstrate, attempts to chart a course of institutional equity may result in a facile compromise that discounts defendants' rights.<sup>38</sup> When applied with appropriate care, however, institutional equity can offer a framework for assessing judicial review of procedure in antiterrorism efforts that incorporates both the flexibility that government requires and respect for lasting values.

Part I of this article analyzes the values of exigency, equality, and integrity in the law and terrorism context, focusing on the risk to the rule of law that exigency presents in times of crisis. Part II depicts deference as the dominant narrative in both normative and descriptive accounts and uses a post-September 11 decision on access to information to illustrate how deference compounds the risk of executive assertions of exigency. Part III outlines the alternative account represented by institutional equity, which applies the tailoring methodology of equitable remedies jurisprudence and habeas review to resolve the separation of powers problems of law in times of crisis identified by Justice Jackson in the *Steel Seizure Case*. Part IV applies institutional equity to important procedural issues on the law and terrorism front, considering the indefinite detention of alleged enemy combatants, access of a criminal defendant such as Zacarias Moussaoui to exculpatory information within the government's control, and access to exculpatory information in the military tribunal context.

### I. THREE VALUES FOR LAW IN CRISIS: EXIGENCY, EQUALITY, AND INTEGRITY

Judicial review of procedure in law and terrorism cases should reflect three core concerns: exigency, equality, and integrity. Courts must reckon with exigency because of the grave consequences of a mass terror event.<sup>39</sup> Equality is always a concern in a democracy that values participation by all members of the polity and seeks to constrain the application of invidious criteria by the government to any person within the nation's borders.<sup>40</sup> Institutional integrity

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Supreme Court).

<sup>38</sup> 282 F. Supp. 2d 480, 486-87 (E.D. Va. 2003) (dismissing the death penalty charge and precluding all discussion of the defendant's connection to the September 11 attacks to protect him from governmental abuse, while simultaneously denying access to potentially exculpatory evidence and full confidential access to counsel).

<sup>39</sup> The nearly 3000 victims of the September 11 attacks included a wide spectrum of persons from diverse national, racial, ethnic, and socio-economic groups. See, e.g., Tahra Bahrapour et al., *A Nation Challenged: The Victims: Blunt Talker, Devoted Aunt, Russian Emigre, Young But Wise Man*, N.Y. TIMES, Feb. 3, 2002, § 1, at 15 (telling the stories of thirteen different people with very different backgrounds, all of whom were killed on September 11).

<sup>40</sup> RONALD DWORKIN, *LAW'S EMPIRE* 362 (1986) (arguing that the "dominant conviction

is a core value in a democratic system that depends on perceptions of legitimacy to elicit the consent of the governed.<sup>41</sup> This Part analyzes the interaction and conflict among these core values.

### A. *Exigency*

Courts often adjust standards of reasonableness to reflect the importance of perceived exigency. Across the legal spectrum, a showing that serious harm is possible in the near or foreseeable future will heighten requirements for private actors charged with preventing harm or will relax procedural requirements imposed on government action to prevent overreaching. For example, in a formula that has profoundly influenced the law of torts, Judge Learned Hand indicated that reasonableness might require a heightened standard of care when lack of due care could cause an injury of sufficient gravity despite a lower probability that the injury would in fact occur.<sup>42</sup> In the law of remedies, “irreparable harm” that cannot be redressed by a subsequent monetary award justifies the issuance of an injunction, a form of relief considered extraordinary because of its assertion of control over the future conduct of an individual or entity.<sup>43</sup> In the realm of criminal procedure, courts have also suggested that a

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[of the framers of the Fourteenth Amendment] was abstract: that the Constitution should require the law to treat all citizens as equals”); cf. T. ALEXANDER ALENIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 177-81 (2002) (asserting that many arguments regarding equality for citizens also apply to aliens present within the nation’s borders); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1130-37 (1994) (arguing that aliens should have first amendment protections substantially similar to those of citizens); Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 235-36 (1998) (arguing that traditional categories of citizen and alien reflect artificial distinctions); Margulies, *Uncertain Arrivals*, *supra* note 14, at 499 (arguing that allowing government unchecked authority to treat aliens differently encourages scapegoating that distracts from other pressing problems).

<sup>41</sup> See Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 260 (1997) (asserting that the “consolidation [of democracy] . . . occurs only when a society adheres to . . . [democratic] procedures”).

<sup>42</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (holding that reasonableness can be determined on a calculus that assesses liability when the burden of preventing the injury is less than the gravity of the harm caused multiplied by the probability of such injury occurring); see also William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920-1980*, 47 BUFF. L. REV. 117, 124 (1999) (discussing the evolution of tort law in New York). See generally CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW* 173-96 (2001) (discussing evolution of products liability law).

<sup>43</sup> See *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (stating that the remedy of an “injunction is ‘to be used sparingly, and only in a clear and plain case’” (quoting *Irwin v. Dixon*, 50 U.S. 10, 33 (1850))); DAN D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 2.1, at 27, § 2.5, at 57 (1973); cf. LAYCOCK, *supra* note 26, at 5-6 (arguing that irreparable harm is no longer a significant factor in awarding equitable relief).

more modest showing of probable cause than the usual might govern searches by law enforcement officers for a ticking bomb<sup>44</sup> and that the failure to give *Miranda* warnings would not compel the suppression of a defendant's statements made during interrogation in a situation posing an imminent danger to the officers' safety.<sup>45</sup>

After the horrific events of September 11, the risk of further mass violence against civilians by operatives of transnational networks such as Al Qaeda has become exigency's paradigm case. Even before September 11, the Supreme Court noted, in a case limiting the government's power to indefinitely detain aliens already adjudged to be deportable, that such limits on government might not extend to the terrorism context.<sup>46</sup> Since September 11, both courts and commentators have expressly or impliedly invoked Judge Learned Hand's torts trade-off between gravity and probability of harm to justify government responses to terrorism-related risks.<sup>47</sup>

Considerations of exigency related to the operations of transnational violent networks go beyond the prospect of mass casualties. The government's legitimate interest in preventing future attacks is matched by heightened

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<sup>44</sup> See *Florida v. J.L.*, 529 U.S. 266, 273-74 (2000) (suppressing, in a routine criminal case, the fruits of a search based on an anonymous informant's description of an individual's appearance, but suggesting that information about a bomb might present a different set of considerations).

<sup>45</sup> See *New York v. Quarles*, 467 U.S. 649, 657-58 (1984) (concluding that "the need for answers to questions in a situation posing a threat to the public safety" can outweigh the requirement that police read a suspect his *Miranda* warnings before questioning him).

<sup>46</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 696, 701 (2001) (requiring the government to release aliens from detention within six months after issuing a final deportation order, unless the government can show a "significant likelihood" that it will be able to effect deportation of the alien in the "reasonably foreseeable future," while observing that a detainee's potential link to terrorism may constitute a "special circumstance" justifying further detention).

<sup>47</sup> See *Kiareldeen v. Ashcroft*, 273 F.3d 542, 555-56 (3d Cir. 2001) (observing that the government, when making a decision to apprehend an individual suspected of plotting terrorist activity—namely, a pre-September 11 plan to bomb the World Trade Center—was entitled to consider not only the probability that an individual had engaged in such activity, but also the extent of the destruction that could have resulted); cf. ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 187-96 (2002) (discussing constitutional concerns with false positives and restrictions on civil liberties after September 11, while arguing that the challenges of terrorism complicate the issue and may necessitate certain restrictions); Laurence H. Tribe, *Trial By Fury: Why Congress Must Curb Bush's Military Courts*, NEW REPUBLIC, Dec. 10, 2001, at 18, 20 (arguing that public interest requires some revision of the balance between false positives and false negatives when people who turn out to be false negatives "slaughter innocent civilians, and may well have access to chemical, biological, or nuclear weapons"). But see Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. BOOKS, Feb. 28, 2002, at 44 (cautioning against lowering the standards of proof in terrorism cases brought in courts, military tribunals, or other venues).

difficulties in obtaining information about such attacks and deterring the planners and paymasters. As courts in the asylum and refugee law context have noted, obtaining information transnationally is an arduous and sometimes impossible task.<sup>48</sup> While the United States has formed international relationships to develop information, some governments have offered only grudging and guarded cooperation.<sup>49</sup> Legal, political, and practical barriers to reaching conduct that occurs transnationally, such as the planning of the September 11 attacks in Hamburg, Germany,<sup>50</sup> reinforce the exigency element.

In the months before September 11, the U.S. Supreme Court envisioned a pragmatic, interstitial approach that would fill gaps in national security and public safety and prevent exploitation of weak spots by sophisticated operatives of transnational networks.<sup>51</sup> On this view, courts are seeking to preserve a state of equilibrium, promoting the stability, safety, and security that foster democracy, while fashioning appropriate constraints on government.<sup>52</sup> Justice Jackson's familiar argument that the Constitution is not a "suicide pact" also speaks to the search for this kind of pragmatic balance between two dangerous extremes.<sup>53</sup> In pursuing that gap-filling enterprise, however, courts may discount movement toward a more ominous equilibrium, where accommodations of exigency swallow up the rules themselves, leaving the government unaccountable.<sup>54</sup>

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<sup>48</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987) (discussing how the difficulty of obtaining information transnationally and the gravity of risk to an asylum-seeker justify that the individual need only show a ten percent chance of persecution if she were to return to her country of origin when seeking to demonstrate a "well-founded fear of persecution").

<sup>49</sup> Cf. Neuman, *supra* note 13, at 331 (discussing difficulties in regulation of transnational networks).

<sup>50</sup> See ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* 104 (2002) ("To launch the 9/11 operation Al Qaeda used Germany, the UAE, and Malaysia as launchpads to enter the United States.").

<sup>51</sup> See *Zadvydas*, 533 U.S. at 695-96 (noting that the constraints imposed by the Court on the government's power to detain aliens still left the nation protected (quoting Kwong Hai Chew v. Colding, 344 U.S. 590, 602 (1953))).

<sup>52</sup> See *Hamdi v. Rumsfeld*, 337 F.3d 335, 373-74 (4th Cir. 2003) (Motz, J., dissenting) (observing that the majority failed to properly balance the Executive's need for discretion in waging war with the rights and liberties protected by the Bill of Rights).

<sup>53</sup> See *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., concurring) (asking that courts "temper . . . doctrinaire logic with a little practical wisdom" to maintain public order and safety while preserving individual liberty).

<sup>54</sup> See *Hamdi*, 337 F.3d at 373 (Motz, J., dissenting) (criticizing the majority for, in effect, precluding all meaningful judicial review of Hamdi's constitutional claim by rubber-stamping the Executive's practically unsupported designation of Hamdi as an enemy combatant).

## B. *Equality*

To disrupt this ominous equilibrium, courts must address the damage that exigent measures can do to equality. Exigency justifies an exponential increase in governmental power and discretion. The increase in governmental authority results in categorical judgments that disfavor groups on the basis of nationality, ethnicity, religion, and immigration status.<sup>55</sup> History and recent experience with government responses to September 11 indicate that the overwhelming number of people affected adversely by such categorical judgments are false positives, i.e., persons with no connections to terrorism.<sup>56</sup>

Increases in executive branch power that fuel inequality develop in two overlapping dynamics of crisis. First, exigency inevitably shapes perceptions of what is "reasonable" in the interpretation and enforcement of existing rules. Second, exigency impels the creation, increased use, or rediscovery of substantive and procedural vehicles, such as military tribunals or detention without criminal charges, that allow government wide discretion to make categorical judgments. Exigency's adverse impact on equality has a long pedigree in American history.<sup>57</sup> The suppression of civil liberties during World War I,<sup>58</sup> the "Palmer Raids" immediately following the war's conclusion, the internment of Japanese-American citizens during World War II,<sup>59</sup> and the excesses of the McCarthy Era<sup>60</sup> all imposed special suffering on immigrants or those perceived to be "other."<sup>61</sup> These disturbing episodes

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<sup>55</sup> See Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1582-83 (2002) (claiming that by engaging in racial profiling of Arab- or Muslim-looking men, the government bears a resemblance to private individuals who commit hate violence attacks).

<sup>56</sup> See Inspector General Report, *supra* note 6 (criticizing the DOJ for delays in serving notices of immigration charges, slow clearance processing, and abuses in detainees' treatment); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY AM. L. 295, 297-300 (2002) (describing marginalization of particular communities after September 11); Cole, *supra* note 13, at 955-57 (same); Volpp, *supra* note 55, at 1576 (same).

<sup>57</sup> Exigency's risks for equality accompany the risks to liberty, implicit in the discussion here and in the next section, dealing with threats to systemic integrity that often hinge on governmental overreaching. See discussion *infra* Part I.C.

<sup>58</sup> See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 104 (1977) (describing the legal profession's response to World War I).

<sup>59</sup> See *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (upholding government order authorizing internment of Japanese-American citizens on grounds that internment served a "compelling" government interest).

<sup>60</sup> See JAMES X. DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 4-5 (1st ed. 1999) (discussing the atmosphere of suspicion prevalent in the McCarthy Era).

<sup>61</sup> See Cole, *supra* note 13, at 955-57 (arguing that in the wake of September 11, the government has selectively sacrificed non-citizens' liberties to further citizens' security interests).

provide a convenient template for government officials who have initiated discriminatory policies in the wake of September 11.

The government's creation of false positives through categorical judgments is most apparent in the post-September 11 enforcement of immigration laws, an area where the government already has wide discretion.<sup>62</sup> After the attacks, the government, in what it called an anti-terrorist initiative, apprehended and detained on visa violation grounds approximately 1200 foreign nationals, most of whom were from countries in the Middle East or South Asia.<sup>63</sup> Although the government discovered virtually no terrorist connections in this group, the Immigration and Naturalization Service<sup>64</sup> detained most under unduly harsh conditions, hindered their access to attorneys, held deportation hearings in secret, and failed to prevent their abuse by other inmates and guards. Ultimately, the government deported most of the detainees after holding them for months longer than necessary, even given the time required for thorough investigation of any possible terrorist ties.<sup>65</sup>

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<sup>62</sup> See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (stating that many provisions of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") were aimed at protecting the Executive's discretion from judicial intervention).

<sup>63</sup> See Inspector General Report, *supra* note 6 (reporting the circumstances and nationality of 762 aliens classified as September 11 detainees); Akram & Johnson, *supra* note 56, at 331 (reporting that, within weeks after September 11, the government arrested and detained about 1000 people); cf. BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 33-38 (2001) (discussing "the politics of foreignness—the cultural symbolic organization of a social crisis into a resolution-producing confrontation between an 'us' and a 'them'"); Cole, *supra* note 13, at 959 (warning of scapegoating of aliens).

<sup>64</sup> The Immigration and Naturalization Service ("INS") ceased to exist as of March 1, 2003 as a result of restructuring pursuant to the creation of the Department of Homeland Security ("DHS"). The immigration service functions of the INS were transferred to a new bureau within DHS, Citizenship and Immigration Services ("CIS"). See Rules and Regulations: Department of Homeland Security, Immigration and Naturalization Service, 68 Fed. Reg. 10,922 (Mar. 6, 2003) (codified at 8 C.F.R. pts. 1, 2, 103, 239).

<sup>65</sup> Although the government has asserted that it has terminated this particular anti-terrorism initiative, it continued at least one other program requiring the "registration" of foreign nationals on temporary visas, prioritizing registration of nationals from the Middle East and South Asia, and authorizing the deportation of all those visitors found to be out of status. See Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003) (requiring specified nonimmigrant male aliens from Bangladesh, Egypt, Indonesia, Jordan, and Kuwait to register with the INS and provide requested information); see also Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67,578 (Dec. 2, 2003) (to be codified at 8 C.F.R. 264) (announcing DHS's intention to replace special registration with "a more tailored system in which it will notify individual aliens of future registration requirements"). While the apprehension of foreign nationals who violate the terms of their visas serves legitimate immigration goals, see David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning*

The combination of discretion and categorical judgments may be even more of a problem in the new or revived procedural vehicles that the executive branch has indicated it will use to combat terrorist threats. The government can hold someone as a material witness, detain him as an enemy combatant, or try him before a military tribunal.<sup>66</sup> The breadth of these alternative means of confinement and adjudication supplements the already wide substantive sweep of federal criminal law.<sup>67</sup> For example, the executive order issued by the President declares a broad jurisdictional ambit for military tribunals, including any member of Al Qaeda or person involved in international terrorism.<sup>68</sup> The order establishing the tribunals does not permit appeal to civilian courts of either jurisdictional issues or ultimate dispositions on the merits.<sup>69</sup> In addition, the procedures of the tribunals, which do not require a jury or a unanimous verdict, provide fewer protections for the accused than civilian fora.<sup>70</sup> While tribunals may be appropriate in a carefully limited set of circumstances replete with procedural protections,<sup>71</sup> the wide jurisdictional grant, lack of safeguards at trial, and absence of judicial review in the Bush administration's order

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of *Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 48-50, equality is not served by the extended detention of only one cohort in this group without any particularized showing of special need.

<sup>66</sup> See 18 U.S.C. § 3144 (2003) (allowing, under certain circumstances, detention of material witnesses); see also *Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (giving the Department of Defense authority to establish military tribunals that could, at the President's discretion, try captured members of Al Qaeda).

<sup>67</sup> See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 758 (1999) [hereinafter Richman, *Federal Criminal Law*] (discussing expansion of prosecutorial power yielded by expanding scope of federal criminal law); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability*, 83 VA. L. REV. 939 (1997) (analyzing the lack of accountability of federal prosecutors and the risk of enforcement based on stereotypes).

<sup>68</sup> See *Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism*, 66 Fed. Reg. at 57,835 (ordering that "military tribunals shall have exclusive jurisdiction"); Bryant & Tobias, *supra* note 5, at 310 (analyzing *Ex parte Quirin* and challenging the Bush administration's assertion that the *Quirin* precedent limits federal habeas corpus proceedings in the context of military commission's orders); Katyal & Tribe, *supra* note 5, at 1260 (arguing that without legislative involvement, Bush's executive order creating military tribunals for unlawful belligerents is unconstitutional); Turley, *supra* note 5, at 652-56 (examining the history of military justice and asserting that the military tribunals created by Bush are a threat to the military's core functions and to the tripartite system of government).

<sup>69</sup> *Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism*, 66 Fed. Reg. at 57,835-36 (establishing military tribunals' exclusive jurisdiction).

<sup>70</sup> *Id.* at 57,834-35 (establishing procedural rules governing military tribunals).

<sup>71</sup> See *infra* notes 263-267 and accompanying text (discussing the limited set of cases where the government can make a threshold jurisdictional showing that defendants have acted as "enemy belligerents").



trigger substantial concerns that inferences based on the ethnicity, nationality, or declared religion of the accused will play a significant role.

### C. *Integrity*

Just as exigent measures threaten equality, they also endanger the integrity of legal institutions. Exigent measures can promote arbitrary and inaccurate outcomes. They can also undermine the separation of powers and diminish the accountability that produces fair and effective institutions in a democracy. The wide discretion and multiple fora characteristic of exigent procedures encourage arbitrary outcomes dictated more by the shifting agendas and turf battles within the executive branch than by the weight of the evidence.<sup>72</sup> Consider the case of Zacarias Moussaoui, the accused "twentieth hijacker," in which a civilian court has sought to impose safeguards against arbitrariness or unfairness.<sup>73</sup> In the face of such judicial efforts, the government has suggested that it will resort to exigent procedures such as charging Moussaoui before a military tribunal.<sup>74</sup> Civilian courts may then face two unattractive options. First, a court can reaffirm the applicability of recognized norms such as the Sixth Amendment right to a fair trial in civilian proceedings, knowing that the government can exit to a forum such as a military tribunal and effectively nullify the court's decision. Second, a court can interpret norms in a manner to the government's liking to avoid the embarrassment of the government's exit. Because the government can use exigent procedures to evade constitutional norms, it can also apply pressure on defendants to plead guilty to terrorism charges in civilian courts regardless of the defendants' level of culpability.<sup>75</sup>

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<sup>72</sup> Few principles are closer to the heart of constitutionalism than the mandate to treat like cases alike. Yet, no principled justification supports the disparate treatment accorded a United States citizen like Jose Padilla, apprehended in the United States and held in military custody for many months without charges, and a French national like Zacarias Moussaoui, duly charged in criminal proceedings with being the "twentieth hijacker." Justification also seems lacking for the disparate treatment accorded the "American Taliban," John Walker Lindh, charged and convicted in criminal proceedings, see *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002), compared with both Padilla and Yaser Esam Hamdi, an American citizen apprehended under similar circumstances to Lindh in Afghanistan and currently detained by the military. The Administration's decisions about the procedure and forum suitable for alleged terrorists seem driven increasingly by convenience and a wish to avoid accountability rather than by differences in the conduct of the alleged terrorists themselves. See generally Lewis, *supra* note 3 (discussing *Padilla* and *Hamdi*, the detention of the Guantanamo prisoners, and new immigration measures and the erosion of fundamental rights).

<sup>73</sup> *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003).

<sup>74</sup> See Philip Shenon, *White House Called Target of Plane Plot*, N.Y. TIMES, Aug. 8, 2003, at A7 (reporting that the dismissal of the criminal case against Moussaoui would lead to his trial before a military tribunal).

<sup>75</sup> See Eric Lichtblau, *1996 Statute Becomes the Justice Department's Antiterrorism Weapon of Choice*, N.Y. TIMES, April 6, 2003, at B15 (quoting a lawyer, who was

The prospect of indefinite military detention without control by the courts or consent by the legislature serves as a kind of "shadow penalty" that influences defendants' choices without control.

Moreover, these exigent procedures increase the government's ability to conduct its business in secret, avoiding scrutiny from the media and the public. The foreclosure of opportunities to question government action creates little incentive for the government to take into account the positions of others or to question itself.<sup>76</sup> This complacency can in turn lessen the government's alertness and debilitate its responses in the face of truly exigent circumstances. Secrecy and exigency can also promote inappropriate procedural moves by the government—such as the cultivation of ex parte contacts with courts—that compromise the adversarial underpinnings of the legal system.<sup>77</sup> These developments undermine the legitimacy of the legal system as a whole, both within the country and with external audiences whose cooperation is necessary to effectively combat terrorism.

## II. DEFERENCE AS DOMINANT NARRATIVE

Judicial deference is the dominant narrative in accommodating exigency, equality, and institutional integrity in terrorism cases. The deferential approach, which privileges the political branches' judgments concerning exigency, finds support in Supreme Court precedent,<sup>78</sup> in some post-September 11 cases,<sup>79</sup> and in the rhetoric of some commentators, who cite the deferential decisions as a basis for skepticism about the role of the courts in crises.<sup>80</sup>

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representing a defendant charged with providing "material support" to a terrorist organization, as claiming that his client "decided to plead guilty after prosecutors suggested that . . . [his client] could be declared an enemy combatant and be held indefinitely without a lawyer"). See generally Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999) (discussing the incentives a suspect has to speak both truthfully and falsely while detained and interrogated by federal law enforcement).

<sup>76</sup> Cf. William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 677-78 (2002) (discussing the importance of media coverage in promoting government accountability). See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30-43 (1970) (discussing the role of "voice" in preventing complacency within institutions).

<sup>77</sup> See Bryant & Tobias, *supra* note 5, at 317-32 (discussing the circumstances surrounding the Supreme Court's decision in the *Quirin* case).

<sup>78</sup> See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329 (1936) (confirming the broad discretion given to the President in the realm of foreign policy, especially in times of war).

<sup>79</sup> See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, 463-64 (4th Cir. 2003) (upholding the indefinite detention of an alleged unlawful combatant), *reh'g and reh'g en banc denied*, 337 F.3d 335 (4th Cir. 2003), and *cert. granted*, 124 S. Ct. 981 (Jan. 9, 2004).

<sup>80</sup> See REHNQUIST, *supra* note 2, at 221-23; Gross, *supra* note 2, at 1023 (arguing that under circumstances of grave national dangers, the right response is to go beyond constitutional principles); Tushnet, *supra* note 2, at 299 (arguing that executive officials

While in the next Part I suggest that precedent is more complex than the commentators' heuristic would suggest, I limit myself here to a very brief summary of the institutional arguments that support the deferential view, an illustration of the inadequacy of those arguments drawn from a post-September 11 decision, and a glance at deference's polar opposite: absolutism.

The deferential approach argues that concerns about institutional competence, separation of powers, and jurisdiction should constrain judicial scrutiny of military and law enforcement activity. Arguments from institutional competence suggest that second-guessing by courts of the decisions of other branches, particularly those driven by the changing landscape of law enforcement and national security priorities, may be futile or counter-productive.<sup>81</sup> For example, recent years have seen a marked diminution of cases imposing severe sanctions on prosecutors, such as dismissal of an indictment based on misconduct short of an outright constitutional violation, as part of the court's inherent authority.<sup>82</sup>

Courts have carved out an even more substantial zone of deference regarding military and foreign affairs decisions, again based on the fear that holding the government to a higher level of accountability will undermine the government's ability to respond to exigent circumstances.<sup>83</sup> In matters such as

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should be able to exercise extra-constitutional emergency powers, rather than have such powers judicially rationalized as consistent with the Constitution).

<sup>81</sup> See *United States v. Williams*, 504 U.S. 36, 46-47 (1992) (holding that federal judges lack supervisory power over grand juries other than to sanction misconduct); Nicki Kuckes, *Grand Jury Independence and Other Legal Fictions* (unpublished manuscript, on file with the author) (critiquing the Supreme Court's view in *Williams*); see also *In re Application of the United States for Material Witness Warrant*, 214 F. Supp. 2d 356, 363 (S.D.N.Y. 2002) (invoking the supervisory power to require an investigation of alleged improprieties in the interrogation of a terrorist suspect who turned out to be a "false positive"); cf. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 427-28 (1997) (urging limits on judicial use of inherent authority to sanction prosecutors conducting law enforcement investigations). See generally Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002) (discussing the proper scope of the supervisory power over federal prosecutors).

<sup>82</sup> See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 172-73 (2004) ("Indeed, few convictions are overturned by virtue of prosecutorial misconduct and, in the rare incidences of reversal, the appellate court opinions invariably neglect to identify the prosecutor by name . . . . Also, prosecutors . . . seldom, if ever, face criminal charges for their work on the job."); see also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (finding that prosecutorial misconduct often goes unpunished and that potential deterrents are rarely employed by courts).

<sup>83</sup> See *Curtiss-Wright Export Corp.*, 299 U.S. at 319 (deferring to the President's broad discretion to determine the benefit of enforcing a Joint Resolution of Congress on the prohibition of arms sales to foreign countries). Compare John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1681-84 (2002) (arguing that the Constitution

criteria for the admission or removal of immigrants, which precedent has linked with the prerogatives of sovereignty, defense, and the conduct of foreign affairs,<sup>84</sup> the courts have declined to impose direct substantive constraints on legislative authority. The Supreme Court has also held that it lacks jurisdiction over military proceedings involving prisoners held abroad<sup>85</sup> and has allowed the military substantial leeway in shaping the rules of military proceedings in the United States regarding both foreign nationals and citizens accused of violating the law of war.<sup>86</sup>

The flaws in the deference approach are apparent in recent appellate decisions upholding categorical closing of immigration proceedings for post-September 11 detainees<sup>87</sup> and the unavailability under the Freedom of Information Act ("FOIA") of information about these proceedings.<sup>88</sup> A majority of courts have accepted the government's theory, which argues that the release of any information would contribute to a "mosaic" of information helpful to international terrorist groups.<sup>89</sup> In both cases, the government failed to demonstrate the accuracy of its assertion, relying on a conclusory affidavit from one law enforcement official and, in the FOIA case, on unsupported assertions at oral argument.<sup>90</sup> The courts ignored equality concerns, failing to

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creates a flexible system of war powers under which Congress's appropriations power is a sufficient check to the Executive's broad authority to initiate military intervention abroad), with LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 271-81 (1972) (critiquing the broad assertion of executive authority regarding war and foreign affairs).

<sup>84</sup> See *Demore v. Kim*, 123 S. Ct. 1708, 1712 (2003) (holding that Congress may require mandatory detention of a deportable alien for a brief period necessary for his removal proceedings to be completed); cf. ALEINIKOFF, *supra* note 40 (critiquing the Court's deference to Congress's "plenary power" over immigration law); Kelly, *supra* note 40, at 187 (same); Margulies, *Uncertain Arrivals*, *supra* note 14, at 491-95 (arguing for a pragmatic interpretation of Congress's power).

<sup>85</sup> See *Johnson v. Eisentrager*, 339 U.S. 763, 777-81 (1950) (denying enemy aliens access to U.S. courts).

<sup>86</sup> See *Ex parte Quirin*, 317 U.S. 1, 48 (1942) (finding that the alleged unlawful belligerents were not entitled to a civil proceeding and could be constitutionally tried before a military court without a jury).

<sup>87</sup> Compare *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 221 (3d Cir. 2002) (holding that the Attorney General can order blanket closure of immigration hearings to the media and the public), with *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (holding that a particularized showing by the government is required for closure).

<sup>88</sup> See *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 920 (D.C. Cir. 2003) (holding that the detention information and the names of detainees and their attorneys are covered by Exemption 7(A) of the FOIA).

<sup>89</sup> See, e.g., *id.* at 928-29 (finding the "mosaic" argument persuasive, and observing that other courts have done likewise).

<sup>90</sup> See *id.* at 940 (Tatel, J., dissenting) (criticizing the "government's vague, poorly explained allegations," and asserting that the majority, "by filling in the gaps in the government's case with its own assumptions about facts absent from the record... converted deference into acquiescence").

acknowledge that the government's apparent targeting of groups such as immigrants on the basis of nationality, ethnicity, or religion without evidence of terrorist ties was a matter of significant public interest.<sup>91</sup> The courts also ignored the costs to the judiciary's institutional integrity sustained by allowing the government's minimalist proffers to trump accountability to the public.<sup>92</sup>

Deference may be so dominant because its polar opposite, absolutism, so persistently withholds the "latitude of interpretation [needed] for changing times."<sup>93</sup> Armed with the important insight that exigency can become a mantra for government overreaching, absolutists assert that the criminal justice system model is the *only* appropriate model for dealing with transnational violent networks.<sup>94</sup> In the process, absolutists cabin exigency so severely that the

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<sup>91</sup> See *id.* at 946 (discussing the defendants' lack of terrorist ties as a matter of public interest).

<sup>92</sup> The related area of the government's acquisition of information regarding terrorism has also excited controversy, largely beyond the scope of this article. For example, the Foreign Intelligence Surveillance Act ("FISA"), as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act, allows the government both to obtain a warrant on the ground that a subject is an "agent of a foreign power," 50 U.S.C. § 1801, and to use evidence obtained pursuant to that warrant in a criminal proceeding as long as procuring foreign intelligence was a "significant purpose" of the investigation. 50 U.S.C. § 1804(a)(7)(B); cf. *In re Sealed Case*, 310 F.3d 717, 719-20 (Foreign Int. Surv. Ct. Rev. 2002) (analyzing relevant standard). See also JEFFREY ROSEN, *THE NAKED CROWD* (2004) (discussing threats to privacy in antiterrorism measures, while recognizing legitimate national security interests); cf. Orin S. Kerr, *Internet Surveillance Law after the USA Patriot Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607, 636-37 (2003) (arguing that statutory changes simply updated principles applicable to surveillance of other forms of communication, such as telephone conversations, to include the Internet).

<sup>93</sup> See *Youngstown Sheet & Tube Co. v. Sawyer* [The Steel Seizure Case], 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

<sup>94</sup> See Richard Leiby, *An American Justice: Free-Spoken Judge Challenges the White House over 'Combatant' Rights*, WASH. POST, Sept. 6, 2002, at C01 (discussing a federal district judge's issuance of a set of interrogatories to the Executive regarding detention of alleged "unlawful combatant" Yaser Esam Hamdi, including a requirement that the government prove not merely that the detainee had carried a weapon when he was captured in Afghanistan, but that he had also fired the weapon); see also *Hamdi v. Rumsfeld*, 337 F.3d 335, 369, 373 (4th Cir. 2003) (Motz, J., dissenting) (dissenting from the majority's holding that continued detention of Hamdi did not require an evidentiary hearing or access to counsel, and praising the district judge's "courage," but acknowledging that the judge's demand for a forensic investigation had required a level of specificity of information from the Executive that showed insufficient consideration for the imperatives of combat). One court has displayed a similarly quixotic brand of courage and rigidity in finding that federal law authorizes detention of material witnesses at trial but not before grand juries. See *United States v. Awadallah*, 202 F. Supp. 2d 55, 76 (S.D.N.Y. 2002) (holding that a grand jury proceeding is not a "criminal proceeding" within meaning of the material witness statute). But see *In re Application of the United States for Material Witness Warrant*, 213 F. Supp. 2d 287, 300 (S.D.N.Y. 2002) (holding that the federal material witness statute applied

government is left with virtually no flexibility at all.<sup>95</sup>

### III. INSTITUTIONAL EQUITY AS COUNTER-NARRATIVE

There is another path, which I term institutional equity. Institutional equity requires that the government justify exigent measures—such as detention of alleged enemy combatants—by demonstrating in court that existing legal remedies are inadequate and that the balance of hardships tilts in its favor. This inquiry is equitable in character because it tracks the pragmatic test for extraordinary relief in remedies jurisprudence. It is also institutional in character because it seeks to cultivate a form of judicial “practice [that] will integrate” the prerogatives, interests, and agendas of the three branches into a “workable government.”<sup>96</sup>

#### A. *Crisis and Institutional Power*

The starting point for institutional equity is the uncertainty that crisis yields for the roles of the three branches. In Justice Jackson’s classic analysis of institutional prerogatives, “presidential powers . . . fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>97</sup> Courts should

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to grand jury proceedings).

<sup>95</sup> See DWORKIN, *supra* note 40 (rejecting any role for military tribunals or detention of unlawful combatants). Compare Cole, *supra* note 13, at 967-69 (criticizing efforts to regulate the financing of transnational violent networks as unconstitutional, while acknowledging that Al Qaeda may be an exception), with Margulies, *Virtues and Vices*, *supra* note 10, at 200-12 (arguing that regulation of transnational violent networks is an appropriate exercise of congressional power).

Another recent commentator has provocatively called for an “Extra-Legal Measures” model, which allows the Executive to act outside commonly accepted legal norms in extraordinary circumstances when the Executive candidly states the basis for the action and secures ratification from the court, the legislature, or the electorate. See Gross, *supra* note 2, at 1096-1102 (proposing such a model). While the Extra-Legal Measures model presents a healthy challenge to assumptions about the unitary nature of the rule of law, it does not adequately acknowledge the degree to which perceptions of exigency inevitably stack the deck in favor of ex post ratification of executive action. Inevitably, the result will be a “common law of exigency” that mimics the results of the deferential approach.

<sup>96</sup> See *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring); cf. Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373, 374 (2002) (discussing the *Steel Seizure Case*’s relevance for contemporary issues of separation of powers, including those raised by anti-terrorism measures). For a working definition of the concept of a “practice” that is consistent with this account, see BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 164 (2001) (“A social practice involves an activity that contains integrated aspects of both meaning and behavior, linked together by a loosely shared body of . . . norms and patterns of action.”).

<sup>97</sup> See *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring); see also Patricia L. Bellia, *Executive Power in Youngstown’s Shadow*, 19 CONST. COMMENT. 87, 90 (2002) (arguing that the importance of the *Steel Seizure Case* lies not in its doctrinal value,

accord the greatest deference to the actions of the Executive when the Executive acts pursuant to express or implied legislative authority.<sup>98</sup> The scope of implied delegation from Congress to the President is broadest in the arenas of war and foreign policy, where excessive judicial supervision would intrude on the flexibility and flow of information that permit the nation to control its sovereign affairs.<sup>99</sup> In the absence of express or implied authority from Congress, the executive and the courts operate in a "zone of twilight" governed by pragmatic improvisation.<sup>100</sup> Where the President's actions appear

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but in its symbolism, i.e., the notion that "actions do not achieve the status of law . . . because they are the actions of government").

<sup>98</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . .").

<sup>99</sup> *Id.* at 636 n.2 (noting that "narrowly definite standards," such as those a court might impose, are inappropriate in a "matter intended to affect a situation in foreign territory").

<sup>100</sup> *Id.* at 637 (stating that this area of concurrent authority exercised by Congress and the President features highly fluid and contingent boundaries). The pragmatism of Justice Jackson, who had served as President Franklin D. Roosevelt's Attorney General prior to his appointment to the Court, was a hallmark of the public servants who came to Washington at that time. See Stephen Breyer, *The Legacy of the New Deal: Problems and Possibilities in the Administrative State: Afterword*, 92 YALE L.J. 1614, 1620 (1983) (discussing the pragmatic perspective of New Deal administrators); Sanford Levinson, *Introduction: Why Select a Favorite Case?*, 74 TEX. L. REV. 1195, 1197 (1996) (observing Justice Jackson's reliance on "experience" as opposed to formalist "logic"); see also ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 93-103 (John Q. Barrett ed., 2003) (discussing Justice Jackson's analysis that President Roosevelt had independent authority to negotiate and implement the "Lend-Lease" program that provided assistance to the British war effort prior to America's entry into World War II).

Pragmatism, on this account, focuses on the consequences of human action and the development of institutions to refine lessons of experience through dialogue among participants in the polity. See John Dewey, *The Problem of Method*, in *THE POLITICAL WRITINGS* 184, 186-87 (Debra Morris & Ian Shapiro eds., 1993) (commenting that "[t]he man who wears the shoe knows best that it pinches and where it pinches," criticizing sole reliance on "expert judgement" as "oligarchy managed in the interests of the few," and stressing the importance of "consultation and discussion which uncover social needs"); William James, *Pragmatism's Conception of Truth*, in *PRAGMATISM AND FOUR ESSAYS FROM THE MEANING OF TRUTH* 131, 145 (Ralph Barton Perry ed., 1943) ("[W]hat meets expediently all the experience in sight won't necessarily meet all farther experiences . . . Experience . . . has ways of *boiling over*, and making us correct our present formulas."). See also LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 360 (2001) (describing Dewey's "hypothesis that thinking and acting are just two names for a single process—the process of making our way as best we can in a universe shot through with contingency"); Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523, 558 (1996) (arguing that striving to refine understanding of consequences in the face of uncertainty is central to a pragmatist conception of law); Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1031 (1991) ("[P]ragmatist practice . . . notices characteristic kinds of errors or biases that recur when practitioners [are] caught in specific

incompatible with legislative intent, judicial scrutiny should be most intense so as to dissipate the "ready pretext for usurpation"<sup>101</sup> occasioned by the Executive's profligate proclamations of emergency. The novel demands placed on government by the risk of transnational mass terror add to the complexities acknowledged in Justice Jackson's analysis.<sup>102</sup> Justice Jackson's framework implicitly acknowledges the centrality of reading the often faded tea leaves known as legislative intent in situations where legislative signals are not express or uniform.<sup>103</sup> In the absence of express or uniform grants of authority from Congress on an issue such as the detention of alleged "enemy combatants," courts must discern the existence and limits of implied authority in an array of oblique and sometimes conflicting legislative pronouncements.

Interpretive devices such as "clear statement" rules further compound the challenges faced by courts considering issues at the intersection of law and terrorism. Courts construe textual silence or ambiguity in statutes in order to minimize conflicts with important values.<sup>104</sup> Unfortunately, since important values often clash in the legal arena, clear statement rules have a nasty habit of

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cultural environments."); cf. PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 328-30 (1992) (distinguishing Dewey's pragmatism from stark conception of instrumental rationality embodied in the maxim, "[t]he end justifies the means").

<sup>101</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 650; cf. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1763-71 (1996) (discussing the evolution of pragmatic conception of separation of powers in American history).

<sup>102</sup> See *Youngstown Sheet & Tube Co.*, 343 U.S. at 634 (acknowledging that broad presidential powers may have enduring consequences on the power structure balance).

<sup>103</sup> See Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 227 (1998) (discussing contrasting schools of statutory interpretation, including the "purposivist" school, which seek to interpret statutes consistently with Congress's overarching aims and objectives; the "textualist" school, which purports to focus solely on statutory language; and the "intentionalist" school, which looks for evidence of Congress's specific intent); cf. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 37-38 (2004) (discussing latent ambiguities in congressional authorizations of exigent measures); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 718-21 (1997) (arguing that interpretation ostensibly focused on the text of statutes, rejecting aids to interpretation such as legislative history, may push Congress to give clear directives to courts and agencies).

<sup>104</sup> Courts reason that Congress should make its objective clear if it wishes to enact a statute that conflicts with such values. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 282-83 (1994) (discussing the benefits and limitations of a clear statement rule for judicial interpretation); William N. Eskridge, Jr. & Philip N. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (describing the creation of "super strong" clear statement rules); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 326-27 (2000) (discussing how clear statements may help give guidance to courts deciding cases of executive discretion).



producing conflicting results.<sup>105</sup> Generally, courts are more willing to find an implied legislative grant of authority to the Executive in the domain of defense and foreign affairs than in domestic law.<sup>106</sup> However, courts analyzing an issue such as implied legislative authority for detention of alleged enemy combatants may also inform their interpretive efforts by consulting constitutional mandates such as due process<sup>107</sup> or provisions of international law such as the Geneva Convention, which could limit the scope of executive action outside the domestic realm.<sup>108</sup> The hybrid nature of transnational mass terror attacks such as the events of September 11, which include elements of both the “crime” (domestic) and “war” (transnational) paradigms,<sup>109</sup> only deepens the complexities confronted by institutional equity. In sum, construing the existence and limits of implied legislative authority for the Executive’s implementation of exigent procedures regarding terrorist threats lands the courts in a murky realm closely resembling Justice Jackson’s “zone of twilight.”

Institutional equity wrestles with “the imperatives of events and contemporary imponderables” that populate this domain because the stakes are too high to abandon the task.<sup>110</sup> It recognizes, as Justice Jackson did in the *Steel Seizure Case*, that any judicial approach is imperfect.<sup>111</sup> A decision to second-guess administrative decisions may unduly discount the exigency

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<sup>105</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950) (observing that different canons of construction can lead to multiple interpretations of similar language).

<sup>106</sup> See *Youngstown Sheet & Tube Co.*, 343 U.S. at 635-36 (Jackson, J., concurring) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

<sup>107</sup> See *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958) (holding that, in order to avoid tension with the First Amendment, the Court must interpret legislative authority to bar the Secretary of State from withholding a passport based on petitioner’s refusal to submit an affidavit regarding membership in the Communist Party); see also Sunstein, *supra* note 104, at 331 (arguing that interpretation based on constitutional values trumps deference otherwise due to administrative agencies under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)). But see William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 880-91 (2001) (arguing that construing statutes to avoid constitutional questions distorts the separation of powers).

<sup>108</sup> See Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1105 (1990) (arguing that “United States statutes should be read ‘where fairly possible’ so as not to violate international law”); cf. *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (citing *Dudgeon v. United Kingdom*, 3 Eur. H.R. Rep. 60-61 (1981), which held that anti-sodomy laws were invalid under the European Convention on Human Rights, in support of a holding invalidating sodomy laws).

<sup>109</sup> Cf. Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL’Y 457, 463-66, 477-79 (2002) (discussing the uneasy fit of both terrorism and anti-terrorism enforcement within “war” or “crime” paradigms).

<sup>110</sup> See *Youngstown Sheet & Tube Co.*, 343 U.S. at 636 (1952) (Jackson, J., concurring).

<sup>111</sup> *Id.* at 635 (noting that any judicial approach would be “indecisive”).

requiring difficult choices. By the same token, a decision to defer to administrative decisions may short-change equality and compromise the integrity of the legal system. Fortunately, the intertwined traditions of equity and habeas corpus offer guidance in meeting this challenge.

### B. *Equity, Habeas, and History*

Equity developed as a vehicle that permitted courts to do justice to the demands of a particular situation where legal doctrine might not provide the necessary flexibility.<sup>112</sup> A court of equity views values like exigency, equality, and integrity not as mutually exclusive, but as elements that the court must integrate through the exercise of reflective judgment.<sup>113</sup> As an illustration of the deliberative process that equity entails, consider *Hecht Co. v. Bowles*, where the Supreme Court held that a district court had discretion to decline to issue an injunction for violations of a World War II executive order on pricing despite statutory language directing that an injunction "shall be granted" upon proof of a violation.<sup>114</sup> The *Hecht* court viewed equitable discretion regarding the imposition of remedies as a virtue in a democracy, observing:

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . . .<sup>115</sup>

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<sup>112</sup> See LAYCOCK, *supra* note 26, at 19-22 (1991) (discussing the history of equity and remedies jurisprudence); see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292-96 (1976) (describing the use of equitable relief by courts to remedy violations of civil rights and other norms by governmental institutions); cf. Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. REV. L. & SOC. CHANGE 487, 489-91 (1999) [hereinafter Margulies, *New Class Action*] (critiquing the lack of participation and deliberation within public interest class actions that hinder their effectiveness in reforming institutions and proposing reforms). But see ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 113-17 (2003) (critiquing public law remedies as unduly disruptive to political branches).

<sup>113</sup> Cf. ARISTOTLE, *NICHOMACHEAN ETHICS* 142 (Martin Ostwald trans., 1962) (observing that an equitable "decree is adapted to a given situation"). For a modern account of judgment with an Aristotelian turn, see ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 66-74 (1993) (discussing the dialectic between "sympathy" and "detachment" in legal representation). Cf. Mustafa Emirbayer & Ann Mische, *What Is Agency?*, 103 AM. J. SOC. 962, 976-78, 995-96 (1998) (discussing the continuum between Aristotle and modern schools of thought including pragmatism); Margulies, *Virtues and Vices*, *supra* note 10, at 176-79 (discussing importance of both empathy and independent judgment in lawyering).

<sup>114</sup> 321 U.S. 321, 330-31 (1944) (upholding judicial discretion under the statute).

<sup>115</sup> See *id.* at 329-30; see also SANDLER & SCHOENBROD, *supra* note 112, at 194-95

The flexibility of equitable discretion therefore served an institutional purpose, allowing Congress to focus on setting overarching norms free from the paralysis that might ensue from an *ex ante* obligation to resolve all hard cases.<sup>116</sup> For the *Hecht* Court, the institutional virtues of equitable discretion survived the exigencies of war-time.<sup>117</sup> Indeed, the exercise of equitable discretion harmonized with exigent circumstances by moderating an executive tendency toward harshness that could have alienated important players in the war effort.<sup>118</sup>

The origins and workings of the writ of habeas corpus parallel the development of equity. Courts and scholars have noted that the writ began as a creature of the English equity courts,<sup>119</sup> functioning as a collateral remedy for individuals confined by the government when standard remedies such as direct appeals were unavailing or exhausted. The command in the federal habeas corpus statute, to award the relief that “law and justice require,”<sup>120</sup> dovetails

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(praising the exercise of equitable discretion in *Hecht*); *cf.* *TVA v. Hill*, 437 U.S. 153, 193-95 (1978) (holding that the Endangered Species Act abrogated equitable jurisdiction, requiring issuance of an injunction against construction of a dam to save the endangered snail darter fish).

<sup>116</sup> See ARISTOTLE, *supra* note 113, at 143 (“[T]he very nature of the equitable . . . [is] a rectification of law where law falls short by reason of its universality.”); William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1001 (2001) (discussing gap-filling in statutory interpretation guided by the Aristotelian principle that “equity is the correction of the general words when the matter falls outside their sense”). The downside of equitable discretion is the risk that exceptions can ultimately undermine the rule. See Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 182-85 (discussing the virtues and flaws of administrative discretion in implementation of federal law).

<sup>117</sup> *Hecht Co.*, 321 U.S. at 329 (discussing the history of equitable discretion, and refusing to ignore its flexibility without specific authorization from the legislature).

<sup>118</sup> *Id.* at 328 (stating that a court does not have to issue an injunction “merely because the Administrator asks [for] it”).

<sup>119</sup> *Fay v. Noia*, 372 U.S. 391, 438 (1963) (“[H]abeas corpus has traditionally been regarded as governed by equitable principles.”); Brian M. Hoffstadt, *Common-Law Writs and Federal Common-Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, 1453 (2002) (“The writ itself was a creation of the English courts of equity, fashioned back in the fourteenth century.”); David McCord, *Visions of Habeas*, 1994 BYU L. REV. 735, 782-83 (1994) (discussing Justice Stevens’s view that the term “justice” in the habeas statute should be defined with reference to “equity and equitable principles”). But see 1 JAMES LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.1 (1988) (asserting that habeas developed as a legal, not equitable, remedy, while acknowledging that habeas has typically been viewed as collateral relief available only when direct legal relief such as appellate review was inadequate). See generally Neuman, *supra* note 34 (analyzing the history of writ and applicability in situations implicating the foreign affairs power).

<sup>120</sup> 18 U.S.C. § 2243 (2003); *Padilla v. Bush*, 233 F. Supp. 2d 564, 602 (S.D.N.Y. 2002) (citing *Harris v. Nelson*, 394 U.S. 286, 300 (1969)), *cert. granted*, 124 S. Ct. 1353 (Feb. 20,

with the fluid authority provided by equity jurisdiction.<sup>121</sup> Indeed, a court finding that an alleged enemy combatant detained after September 11 had a right to be heard and to be assisted by counsel praised the “flexibility” found within the “blend of procedures” authorized under habeas corpus, noting that the Great Writ “‘is not now and never has been a static, narrow, formalistic remedy.’”<sup>122</sup> The pragmatic turn in both remedies and habeas jurisprudence offers a bracing antidote to deference’s abdication.

### C. *Institutional Equity in Action: A Preliminary Perspective*

The pragmatic character of institutional equity makes it an effective vehicle for integrating potentially conflicting values such as exigency, equality, and integrity in law and terrorism cases.<sup>123</sup> Three elements are crucial: (1) the likelihood of false positives; (2) the adequacy of existing remedies; and, (3) the balance of hardships. The next three subsections discuss each in turn.

#### 1. Likelihood of False Positives

Courts recognize that the creation of false positives through the state’s sanctioning or restraining of a blameless or nondangerous person undermines constitutional governance with its promise that the state will act fairly and with due regard for individual rights. Rules of procedure, such as burdens and standards of proof, reflect this concern.<sup>124</sup> Assertions of exigency dull concern about false positives, focusing attention on the grave risks posed by false negatives.<sup>125</sup> Mindful of this dynamic, courts adjudicating exigent procedures have usually assessed the likelihood that the procedure would yield inaccurate results for individuals that may be subjected to government power.<sup>126</sup>

Habeas corpus has been the prevailing judicial method for testing the

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2004). See Bryant & Tobias, *supra* note 5, at 349-55 (discussing habeas doctrine); McCord, *supra* note 119, at 783 (same).

<sup>121</sup> Exercise of a judicial “supervisory power” over prosecutorial practices and litigation in federal courts springs from similar roots. See Green & Zacharias, *supra* note 81, at 405-13 (discussing appropriate use of supervisory power).

<sup>122</sup> *Padilla*, 233 F. Supp. 2d at 600 (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)).

<sup>123</sup> For an analysis reflecting a parallel perspective, see Donald Downs & Erik Kinnunen, *A Response to Anthony Lewis*, 2003 WIS. L. REV. 385, 399 (discussing the need for pragmatic analysis that constrains executive power but preserves flexibility in responses to exigent situations).

<sup>124</sup> See *In re Winship*, 397 U.S. 350, 361-65 (1970) (holding that due process requires that the prosecution show a defendant’s guilt beyond a reasonable doubt); see also *id.* at 372 (Harlan, J., concurring) (viewing the Court’s holding as “bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”); cf. *Mathews v. Eldridge*, 424 U.S. 319, 344-45 (1976) (establishing “risk of error” as one element of procedural due process analysis).

<sup>125</sup> See Tribe, *supra* note 47, at 20.

<sup>126</sup> See *supra* note 110 and accompanying text.

likelihood of false positives. Courts have held that the writ lies even in cases where the Executive has fashioned rules for exigent procedures, such as military tribunals, that failed to provide for habeas review.<sup>127</sup> The Supreme Court has interpreted statutes to permit habeas review of deprivations of liberty such as deportation even when the statutory language and legislative history are silent.<sup>128</sup> Habeas corpus encourages an individualized brand of judicial review that disfavors categorical judgments and minimizes false positives. Even at the apex of judicial deference toward the political branches' exigent measures, the Court, in its adjudication of the Japanese internment program during World War II, indicated that categorical measures were appropriate only for an exceedingly limited time.<sup>129</sup> In a companion case, the Court effectively terminated the internment program, holding that the Executive exceeded its statutory authority in detaining a concededly "loyal and law-

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<sup>127</sup> See, e.g., *Ex parte Quirin*, 317 U.S. 1, 24-25 (1942) (allowing a petition for writ to civil courts even in cases of military tribunals).

<sup>128</sup> See *INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001) (requiring a clear statement from Congress in order to repeal a writ). Indeed, even courts that ultimately express deference to executive branch determinations acknowledge the role of habeas in promoting accountability. In *Hamdi v. Rumsfeld*, for example, the Fourth Circuit, while ultimately holding that the detention of the petitioner as an unlawful combatant required neither an evidentiary hearing nor access to counsel, also observed that "the power to detain could easily become destructive" if exercised without judicial oversight. 316 F.3d 450, 464 (4th Cir. 2003), *reh'g and reh'g en banc denied*, 337 F.3d 335 (4th Cir. 2003), *and cert. granted*, 124 S. Ct. 981 (Jan. 9, 2004).

<sup>129</sup> See *Korematsu v. United States*, 323 U.S. 214, 219-20 (1944) (limiting the scope of the ruling to times of "direst emergency and peril"). For further discussion of the limits on the duration of exigent measures, see discussion *infra* Part III.C.3.b. Of course, limited duration does not excuse or conceal the abuse of government power based on stereotypical fears like those that drove the Japanese internment program. See Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1942-44 (2003) (discussing Justice Robert's dissent over the "artificial" nature of the limited duration framework); Natsu Taylor Saito, *Symbolism under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"*, 8 ASIAN L.J. 1, 4-6 (2001) (describing the effect of anti-Asian sentiment and politics on the internment policy). Justice Jackson dissented in *Korematsu* but did not find that the government had acted unconstitutionally. See *Korematsu*, 323 U.S. at 243-44 (Jackson, J., dissenting) (arguing that although the order would violate the Constitution in peacetime, it may nevertheless be a valid military order). While Justice Jackson was concerned that upholding the government's measures could compromise both equality and integrity by lending such measures the Court's imprimatur, he was also wary of encroaching on the Executive's prerogatives in wartime. As a result, he suggested, in an opinion that satisfied virtually no one, that the Court should have declined to hear the case. *Id.*; see also Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455, 493 (criticizing Justice Jackson's position on grounds that "judicial abstention may popularly and even formally be understood as tacit approval").

abiding citizen" of Japanese-American descent.<sup>130</sup>

Another World War II decision, *Ex parte Quirin*, illustrates the durability of the Court's concern with the likelihood of false positives in a highly charged environment.<sup>131</sup> In *Quirin*, which upheld the constitutionality of military tribunals to try Nazi saboteurs, the Court relied on the petitioners' stipulation that they had embarked on a mission at the behest of the German High Command that involved their surreptitious entry into the United States with explosives "to destroy war industries and war facilities in the United States."<sup>132</sup> While members of the Court engaged in a troubling series of ex parte contacts with the executive branch prior to issuing their decision,<sup>133</sup> commentators criticizing those contacts have not questioned the Court's core factual finding.<sup>134</sup>

## 2. Adequacy of Existing Remedies

In the law of remedies, courts consider the adequacy of remedies at law, including damages, when a party seeks an extraordinary remedy, such as an injunction.<sup>135</sup> Injunctive relief is an interstitial remedy, available to fill gaps

<sup>130</sup> See *Ex parte Endo*, 323 U.S. 283, 294, 297 (1944), discussed in REHNQUIST, *supra* note 2, at 201-03; Gudridge, *supra* note 129, at 1947-53 (outlining the Court's holding).

<sup>131</sup> 317 U.S. 1 (1970).

<sup>132</sup> *Id.* at 20-22, cited in *Hamdi v. Rumsfeld*, 337 F.3d 335, 369 (4th Cir. 2003) (Motz, J., dissenting); see also REHNQUIST, *supra* note 2, at 136 (recounting the undisputed facts in *Quirin*); Turley, *supra* note 5, at 734-35 (same).

<sup>133</sup> See Turley, *supra* note 5, at 735-39 (reporting the Executive's meetings and communications with members of the *Quirin* Court).

<sup>134</sup> Two of the *Quirin* petitioners adduced substantial evidence at their subsequent trial that they had withdrawn from the conspiracy by contacting the Federal Bureau of Investigation. *Id.* at 735. While withdrawal mitigates guilt, it is not completely exculpatory. Under the law of conspiracy, withdrawal is an affirmative defense to liability for subsequent acts committed by co-conspirators but not a complete defense to the charge of conspiracy itself. See *United States v. Robinson*, 217 F.3d 560, 564, 565 n.3 (8th Cir. 2000) (holding that abandonment is only a limited defense once the conspiracy has passed the attempt stage); cf. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1379 (2003) (arguing that withdrawal is appropriately only a partial defense because public interest favors deterrence of initial entry into a conspiracy). The efforts of the two defendants, while not sufficient to convince the finder of fact to acquit, ultimately resulted in pardons dispensed by the President. See Turley, *supra* note 5, at 739 (describing the political aftermath of the *Quirin* decision).

<sup>135</sup> See OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* 6, 91 (1978) (arguing for a contextual approach to granting relief for civil rights violations); LAYCOCK, *supra* note 26, at 8-9 (discussing adequacy and arguing that this factor is essentially equivalent to the requirement that a party seeking equitable relief demonstrate "irreparable injury" in the absence of relief); Doug Rendleman, *Irreparability Revisited? Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343, 1373-80 (2002) (cautioning against restriction of remedies for constitutional violations); see also Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L.

when ordinary remedies do not adequately address possible harm.<sup>136</sup> In the institutional equity context, a court considers whether the government, when it asserts authority to implement exigent procedures such as detention of unlawful combatants, has adequate remedies at its disposal within the existing legal framework that would obviate the need for exigent procedures.<sup>137</sup>

The adequacy of the existing remedies inquiry tempers the tendency of the executive branch to overreach in emergencies. In *Ex parte Milligan*, the Court noted that civilian courts were available to try the petitioner, a long-time resident of Indiana, apparently acting independently of Confederate forces, whom the government had put on trial before a military tribunal on charges of sedition.<sup>138</sup> In the *Steel Seizure Case*, the Court held that the President lacked authority to seize steel plants during the Korean War to ensure continued steel output during a labor dispute, citing a range of express legislative remedies already available in order to demonstrate that Congress had not intended to impliedly authorize additional measures.<sup>139</sup> In *Hecht Co. v. Bowles*, the Court held that a merchant's good-faith efforts to comply with war-time price regulations were adequate to address the public interest in compliance, rendering unnecessary the curtailment of the court's equitable discretion,

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Rev. 1577, 1603-04 (2002) (analyzing adequacy in restitution context). *But see* Grupo Mexicano De Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 332-33 (1999) (holding that a freeze of a debtor's assets sought by a bondholder to preserve those assets was beyond the scope of federal equity jurisdiction in a diversity case because it was outside the jurisdiction of traditional English courts of equity); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 234-35 (2003) (criticizing the *Grupo Mexicano* decision). *See generally* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978) (analyzing the elements, and concluding that courts have interpreted standards flexibly to respond to compelling cases).

<sup>136</sup> *See* DOBBS, *supra* note 43, § 2.10 (stating that courts will only grant injunctions if no other legal remedy is adequate to address the harm).

<sup>137</sup> *Cf.* Gross, *supra* note 2, at 1107 (quoting Thomas Jefferson's observation that "[t]here are extreme cases where the laws become inadequate even to their own preservation" and that "on great occasions every good officer must be ready to risk . . . going beyond the strict lines of law"). Of course, the tailoring contemplated by the adequacy of remedies standard finds analogs in other areas, such as constitutional law. *See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000) (observing that, in determining that the statutory prohibition on "material support" for terrorist organizations is a permissible incidental restriction that does not violate the First Amendment, one factor to consider is Congress's determination that other remedies would not achieve the legislative goal of diminishing transnational violent networks' access to human and financial capital).

<sup>138</sup> 71 U.S. 2, at 107-08, 140 (1866) (stating the facts of the case and that federal courts were open even after the declaration of a military state).

<sup>139</sup> *Youngstown Sheet & Tube Co. v. Sawyer* [The Steel Seizure Case], 343 U.S. 579 (1952). These existing remedies included a statutory cooling-off period, the ability to shut down noncompliant plants, and, pursuant to the Fifth Amendment, use of the government's eminent domain power. *Id.* at 639 (Jackson, J., concurring).

which the government had sought.<sup>140</sup> The touchstone of each decision is judicial attentiveness to the “reasonable, practical implications” of institutional relationships dedicated to harmonizing exigency, equality, and the integrity of the legal system.<sup>141</sup>

### 3. Balance of Hardships

The balance of hardships is another fixture of remedies jurisprudence. Balancing hardships enables courts to allocate the risks of uncertainty prior to awarding relief and to tailor relief to minimize those risks, which include not merely potential harm faced by the parties but also harm faced by third parties and the public.<sup>142</sup> Institutional equity manages the balance of hardships through two vehicles: first, the tailoring of interpretive devices known as “clear statement rules” that supply default positions on implied legislative intent, and second, in cases where legislative intent is cloudy or conflicted, durational limits on exigent procedures.

#### a. *Default Positions*

Possible hardships abound on all sides in law and terrorism cases. Harm to national security and public safety are the most salient adverse consequences. To mitigate the risk of these harms, courts have always indicated that executive action outside the territory of the United States may obtain the requisite legislative authority from broad legislative pronouncements, such as resolutions authorizing the use of force.<sup>143</sup> This strand of precedent, dating from early in the republic’s history, has recognized that insisting on a declaration of war effectively deprives the nation of the flexibility required to cope with an uncertain and contingent world.<sup>144</sup> This is also true where, as in

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<sup>140</sup> 321 U.S. 321, 325-26, 329-30 (1944) (discussing the district court’s finding of good faith, and supporting its use of discretion).

<sup>141</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 640; see also *Ex parte Endo*, 323 U.S. 283, 300 (1944) (“In interpreting a wartime measure we must assume that . . . [the political branches’] purpose was to allow for the greatest possible accommodation between those liberties [of the citizen] and the exigencies of war.”).

<sup>142</sup> See LAYCOCK, *supra* note 26, at 268-69 (proposing tentative rules for choosing between legal and equitable remedies). Balancing is also a fixture of constitutional law. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972-95 (1987) (analyzing the virtues and drawbacks of balancing approach).

<sup>143</sup> See *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40-42 (1800) (Moore, J., concurring) (arguing that the existence of a declaration of war was irrelevant in the case of undeclared naval war with France); *Padilla v. Bush*, 233 F. Supp. 2d 564, 598-99 (S.D.N.Y. 2002) (allowing for the detention of citizens under military authorities when Congress has passed only a “Military Force Authorization” and not a declaration of war), *cert. granted*, 124 S. Ct. 1353 (Feb. 20, 2004).

<sup>144</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 640 (Jackson, J., concurring) (counseling against “doctrinaire textualism” in discerning legislative authority for executive action). But see *Katyal & Tribe*, *supra* note 5, at 1266 (arguing for express congressional authorization



the case of the September 11 attacks, the source of the danger strikes at targets *within* U.S. territory.<sup>145</sup> As the September 11 attacks demonstrated, attacks within U.S. territory pose an even greater risk to innocents than do attacks abroad. Courts have declined to interpose unreasonable restrictions on the Executive's ability to move with dispatch to protect persons and property within the United States from such exigencies.<sup>146</sup>

If this were the only default rule, deference would have its way. Courts have also recognized, however, that the executive power can erode equality and the integrity of the legal system as well as create opportunity costs through international reaction against overreaching by the U.S. Executive.<sup>147</sup> As cases like *Endo* and the *Steel Seizure Case* demonstrate, courts will often deploy constitutional principles aggressively to yield a narrower construction of statutory authority when executive action "comes home" through attempts to impinge on the freedom of persons, groups, or organizations within the United States.<sup>148</sup>

Of course, the separation of foreign from domestic assertions of executive authority can become unduly facile. The United States is part of an international framework of law and governance.<sup>149</sup> Reflecting this interdependent relationship, courts have long sought through default rules to harmonize American and international law.<sup>150</sup> Indeed, the Court has recently referred to European law as a resource for defining the contours of the American law of privacy forbidding government intrusion on choices about sexuality made by consenting adults.<sup>151</sup> In the law and terrorism arena, the safety and security of the United States depends in large part on promulgating

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of military tribunals).

<sup>145</sup> See *The Brig Amy Warwick*, 67 U.S. (2 Black) 635, 668 (1862) (holding that the President could impose a blockade on the Confederacy during the Civil War absent a declaration of war, and noting that "if a war be made by invasion . . . the President is not only authorized but bound to resist force by force[; h]e . . . is bound to accept the challenge without waiting for any special legislative authority").

<sup>146</sup> *Id.* at 670 (holding that questions of defense should be left to the Executive and not the courts).

<sup>147</sup> See Harold Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 342 (2002) (arguing that the United States should provide international "moral leadership" through dedication to the principles underlying international law).

<sup>148</sup> See *Youngstown Sheet & Tube Co.*, 343 U.S. at 585-89 (arguing that the Constitution did not give the President authority to take possession of steel mills); *Ex parte Endo*, 323 U.S. 283, 298-300 (1944) (invoking the Fifth and Sixth Amendments in allowing a writ of habeas corpus for an internment prisoner).

<sup>149</sup> See Koh, *supra* note 147, at 338-39.

<sup>150</sup> See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>151</sup> See *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (referencing with approval both a European Court of Human Rights holding that laws forbidding consensual homosexual conduct are "invalid under the European Convention of Human Rights" and a British Parliamentary Act repealing laws punishing homosexual conduct).

policies that generate a transnational constituency for a global transition toward stable, nonviolent, and democratic governance.<sup>152</sup> Achieving this goal may require even more vigorous use by courts of international law to shape the contours of matters such as criteria for the removal of immigrants, hitherto thought to be within the virtually exclusive domain of the political branches.<sup>153</sup> Consistency with international law such as the Geneva Convention should also inform judicial interpretation of the scope of legislative authority for executive decisions regarding the treatment of alleged enemy combatants.<sup>154</sup>

b. *Time Limits*

When courts have believed it necessary to tailor executive action to the default rules described above, they have often turned to time limits. Time limits affect the balance of hardships on both the individual and institutional level. Most obviously, they promote equality by mitigating the deprivation the government can impose on individuals or vulnerable groups. In addition, time limits promote systemic integrity, in effect building into exigent procedures a sunset clause that obliges the legislature or the executive to engage in further public conversation if they wish to extend the authority at issue. Time limits come in two varieties. First, courts have often, at least implicitly, assumed that the *occasion* for the exercise of exigent authority by the government is temporally limited, for example, by the duration of a war.<sup>155</sup> Second, courts

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<sup>152</sup> See generally Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (discussing the need for reciprocity in transnational legal doctrine and practice).

<sup>153</sup> See *Beharry v. Reno*, 183 F. Supp. 2d 584, 595-601 (E.D.N.Y. 2002) (citing International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 23(1), 999 U.N.T.S. 171, 179 (discussing the fundamental nature of the family) and Convention on the Rights of the Child, Nov. 20, 1989, art. 3, 1577 U.N.T.S. 3, 46 (asserting that best interests of child should be "a primary consideration" of courts, agencies, and legislatures)), *rev'd on other grounds sub nom. Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003); see also *Maria v. McElroy*, 68 F. Supp. 2d 206, 219-20, 231-34 (E.D.N.Y. 1999) (discussing the role of international law in determining whether immigration legislation that expanded the grounds for deportation should be retroactive); Peter Margulies, *Making "Regime Change" Multilateral: The War on Terror and Transitions to Democracy*, 32 DENV. J. INT'L L. & POL'Y (forthcoming 2004) [hereinafter Margulies, *Regime Change*]; Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 262-65 (2003) (discussing the *Beharry* and *Maria* district court opinions). See generally Steinhardt, *supra* note 108 (discussing a canon of interpretation counseling harmonization of statutes with international law).

<sup>154</sup> See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention]; see also Preliminary Report, ABA Task Force on Enemy Combatants (2002), available at <http://www.abanet.org/poladv/letters/exec/enemycombatantreport.pdf> (last accessed Mar. 17, 2004).

<sup>155</sup> See, e.g., *Ex parte Milligan*, 71 U.S. 2, 121-22 (1866) (holding that the use of a military tribunal against a citizen of Indiana is inappropriate when civilian courts are functioning).

have frequently held, at least in situations where the element of exigency is less pronounced, that the detention of specific individuals is subject to time limits.<sup>156</sup>

The cases on limiting the occasion for deployment of exigent procedures are mixed. The strongest case is *Ex parte Milligan*, which barred resort to military tribunals in a case where civilian courts were functioning and there was no evidence that the detained individual, a citizen and resident of Indiana, had acted in concert with Confederate forces.<sup>157</sup> The Court, ruling after the conclusion of the Civil War, noted the “fixed period”<sup>158</sup> taken up by the crisis as if to explain decisions issued during the conflict that reflected greater deference to the executive.<sup>159</sup> The Court’s infamous decision in *Korematsu*, announced after the government had already agreed under court pressure to end the Japanese internment program,<sup>160</sup> also depended heavily on a temporal perspective that assumed the government always intended the program to be a short-lived reaction to the emergency climate following the attack on Pearl Harbor.<sup>161</sup>

Courts have more frequently imposed express or functional time limits on the detention of specific individuals in various contexts. In a combination of functional and express limits that bring a measure of accountability to the immigration arena, the Court has recently set a presumptive limit of six months on the time available to immigration authorities to arrange for the physical removal of an alien from the United States after entry of a final order of

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<sup>156</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 678 (2001) (holding that alien detained after entry of final order of deportation must be released after six months if the government has no reasonable prospect of effecting deportation); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that a criminal defendant found unfit to proceed to trial must be released if there is no reasonable prospect that he will be restored to competence).

<sup>157</sup> 71 U.S. at 121-22.

<sup>158</sup> *Id.* at 115.

<sup>159</sup> See, e.g., *Ex parte Vallandigham*, 68 U.S. (1 Wall) 243, 248 (1864) (upholding use of military commissions during Civil War by General Burnside).

<sup>160</sup> See *Gudridge*, *supra* note 129, at 1935.

<sup>161</sup> See *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (approving the decision to intern Japanese-Americans “as of the time it was made”); *Gudridge*, *supra* note 129, at 1941 (noting the impact of time in the *Korematsu* decision); see also *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003) (expressing an expectation that, “25 years from now,” the remedy of affirmative action “will no longer be necessary”); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547 (1924) (holding that a proceeding in equity is an appropriate vehicle for determining the validity of a rent control ordinance passed to respond to war-time pressure on the housing market in the District of Columbia; the Court notes that a “law depending on the existence of an emergency . . . may cease to operate if the emergency ceases or the facts change”); cf. *Ex parte Endo*, 323 U.S. 283, 294, 303 (1944) (expressing constitutional doubts about continued detention of concededly loyal Japanese-Americans and interpreting statute authorizing program to prohibit such detention).

deportation.<sup>162</sup> Asserting that the hearing provided a natural end-point to the period of detention, the Court has also upheld the mandatory detention prior to immigration hearings of aliens who are presumptively deportable because they have committed certain criminal offenses.<sup>163</sup> In a parallel line of cases with a functional limit, the Court has indicated that the state must dismiss criminal charges against defendants who have no reasonable prospects for attaining competence to stand trial.<sup>164</sup> Moreover, the Court has required states to consider foregoing efforts to restore defendants to competence through the administration of psychotropic medication when the time taken to restore competence will exceed the maximum sentence the defendant could serve for the offense charged.<sup>165</sup> The Court has indicated that a heightened element of exigency might change the contours of these functional and express time limitations but would not necessarily eliminate them altogether.<sup>166</sup>

#### 4. Summary

In sum, institutional equity, with its three-pronged test of likelihood of false positives, adequacy of existing remedies, and balance of hardships, offers an account of courts during crisis to compete with the dominant narrative of deference. Cases like the *Steel Seizure Case* and *Ex parte Endo* reflect a pragmatic judiciary that understands exigency but does not lose sight of the values of equality and integrity that assertions of exigency can obscure. The following Part considers whether institutional equity can resolve salient issues emerging since September 11, 2001.

### IV. APPLYING INSTITUTIONAL EQUITY IN THE AFTERMATH OF SEPTEMBER 11: THREE TOUGH QUESTIONS OF LAW AND TERRORISM

The aftermath of September 11 is a fitting crucible for institutional equity. Assertions of executive authority abound, including blanket closure of immigration proceedings to the public and the press,<sup>167</sup> heightened surveillance

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<sup>162</sup> *Zadvydas v. Davis*, 533 U.S. 678, 678 (2001).

<sup>163</sup> See *Demore v. Kim*, 123 S. Ct. 1708, 1712 (2003). Under this scheme, an alien would also be able to demonstrate, prior to her hearing, that she was likely to prevail on a defense to removal and thus secure her release. *Id.* After entry of a final deportation order, the Court's decision in *Zadvydas* would limit the time of detention.

<sup>164</sup> See *Jackson v. Indiana*, 406 U.S. 715, 717 (1972).

<sup>165</sup> See *Sell v. United States*, 123 S. Ct. 2174, 2187 (2003).

<sup>166</sup> See *Zadvydas*, 533 U.S. at 696 (2001) (observing that in cases of "terrorism or other special circumstances . . . special arguments might be made . . . for heightened deference to the political branches with respect to matters of national security"). But see *infra* notes 217-218 and accompanying text (arguing that the language in *Zadvydas* is dicta that should not preclude time limits in cases of alleged enemy combatants).

<sup>167</sup> Compare *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 221 (3d Cir. 2002) (holding that the Attorney General can order blanket closure of immigration hearings to the media and the public), with *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 707 (6th Cir.

of religious groups,<sup>168</sup> detention of material witnesses,<sup>169</sup> and monitoring of attorney-client communications.<sup>170</sup> Three practices raise particularly stark conflicts with the usual assumptions of the legal system: 1) indefinitely detaining alleged enemy combatants; 2) precluding a criminal defendant's access to potentially exculpatory evidence; and 3) withholding access to such evidence in military tribunals. Moreover, these three practices overlap, since the government's success on even one issue would allow it to circumvent judicial rejection of its arguments on the other two, perpetuating a closed system largely free from accountability. These interrelated issues, analyzed in turn in this Part, therefore constitute a crucial arena for the dialogue of exigency, equality, and integrity played out in law and terrorism cases.

### A. *The Detention of Alleged Enemy Combatants*

The Executive's assertion of untrammelled authority to detain people classified as enemy combatants triggers tension with the likelihood of false positives, adequacy of existing remedies, and the balance of hardships embodied in institutional equity. The government's refusal to accept limits or procedural safeguards presents a significant threat to the integrity of adjudication and to the embattled equipoise between government and government's targets that usually works to preserve equality.<sup>171</sup> In contrast, limited power to detain unlawful combatants accompanied by substantial procedural safeguards would address exigencies in anti-terrorism enforcement, uphold core values such as judicial review, and dovetail with default rules

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2002) (holding that a particularized showing by the government is required for closure).

<sup>168</sup> See Linda Fisher, *Political Profiling: Government Surveillance after September 11* (unpublished manuscript, on file with the author) (analyzing dangers of surveillance of religious groups).

<sup>169</sup> Compare *In re Application of the United States for Material Witness Warrant*, 213 F. Supp. 2d 287, 288 (S.D.N.Y. 2002) (holding that the federal material witness statute applied to grand jury proceedings), with *United States v. Awadallah*, 202 F. Supp. 2d 55, 61-62 (S.D.N.Y. 2002) (holding that federal law does not authorize detention of a material witnesses before grand juries).

<sup>170</sup> See Margulies, *Virtues and Vices*, *supra* note 10, at 207-10 (criticizing monitoring).

<sup>171</sup> See *Morrison v. Olson*, 487 U.S. 654, 697, 728 (1988) (Scalia, J., dissenting) (citing Robert Jackson, *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 31 J. AM. INST. L. & CRIMINOLOGY 3, 5 (1940)). Scalia quotes Justice Jackson at length:

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. [T]he most dangerous power of the prosecutor [is] that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone . . . the real crime becomes that of being unpopular with the predominant or governing group.

*Id.*

governing the scope of implied legislative authority.<sup>172</sup>

### 1. Likelihood of False Positives

In the enemy combatant cases, the government has done little to accommodate concern about the likelihood of false positives. The government has argued that a detainee has no right to present evidence to counter the government's allegations<sup>173</sup>—such as the claim that enemy combatant detainee Jose Padilla took steps on behalf of Al Qaeda to secure a “dirty bomb”<sup>174</sup>—and is not entitled to consult with counsel. Particularly given the government's acknowledgment that the basis for its allegations may be “misinformation” disseminated by other detainees,<sup>175</sup> the government's position frustrates institutional equity's effort to ensure that the detainee is not a false positive wrongfully confined.

### 2. Adequacy of Existing Remedies

Analysis of the adequacy of existing remedies is more complex. One long-term remedy involves a “transition-centered” re-framing of global strategy to promote the investment of human capital in democratic, non-violent institutions. Over time, re-framing policy in this fashion will do much to marginalize transnational networks such as Al Qaeda.<sup>176</sup> A second alternative to indefinite detention of alleged enemy combatants is prosecution in civilian courts under the provision of the Antiterrorism and Effective Death Penalty Act (“AEDPA”) of 1996 that bars “material support” of groups such as Al

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<sup>172</sup> Cf. Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 548-49 (1990) (arguing that courts have used statutory interpretation to infuse immigration doctrine with constitutional principles).

<sup>173</sup> See *Padilla v. Bush*, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002) (“Padilla . . . has no ability to make fact-based arguments because . . . he has been held incommunicado at the Consolidated Naval Brig . . .”), *cert. granted*, 124 S. Ct. 1353 (Feb. 20, 2004).

<sup>174</sup> A “dirty bomb” is a conventional explosive device containing radioactive material. When the device is detonated, the radioactive material spreads. Although a dirty bomb lacks the destructive power of a nuclear weapon, which uses radioactive material to produce the explosion itself, even a conventional device containing radioactive material can produce significant physical harm and a substantial emotional and psychological impact on a population. *Id.* at 573.

<sup>175</sup> See Steve Fainaru, *Padilla's Al Qaeda Ties Confirmed, Prosecutors Say*, WASH. POST, Aug. 28, 2002, at A4 (quoting the government as acknowledging that “some of the sources who provided information on Padilla may be trying to mislead the government . . .”).

<sup>176</sup> Cf. JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE* 35 (2002) (arguing that a multilateral approach by the United States is the most effective approach to antiterrorism efforts); Koh, *supra* note 147, at 342 (recommending multilateral approach); Margulies, *Regime Change*, *supra* note 153 (same).

Qaeda that the Secretary of State has designated as terrorist organizations.<sup>177</sup> Violations of the AEDPA are punishable by a sentence of up to fifteen years.<sup>178</sup> The prospect of such a sentence is a substantial incentive for a defendant to plead guilty and cooperate with the government.<sup>179</sup> In other cases, particularly those involving persons captured on a foreign battlefield, the Executive also has the option of detaining such individuals as prisoners of war ("POWs") pending the termination of hostilities. A fourth alternative is prosecution of an individual before a military tribunal for violations of the laws of war.<sup>180</sup>

The transition policy, civilian prosecution, and POW options leave a residual cohort of cases in which the "special circumstances"<sup>181</sup> of transnational violent networks' recruiting, discipline, and structure create enduring danger to the public. Leaders such as Osama bin Laden exploit sentiments of powerlessness and humiliation. They motivate their recruits with a vision of authenticity that combines a yearning for a triumphalist past with a call to exterminate people perceived as the "other."<sup>182</sup> The apocalyptic

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<sup>177</sup> See Antiterrorism and Effective Death Penalty Act, 18 U.S.C. § 2339A(b) (2002) (defining "material support").

<sup>178</sup> See 18 U.S.C. § 2339A(a).

<sup>179</sup> See generally Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (analyzing the dynamics of plea bargaining); Peter Margulies, *Battered Bargaining: Domestic Violence and Plea Negotiation in the Criminal Justice System*, 11 S. CAL. REV. L. & WOMEN'S STUD. 153 (2001) [hereinafter Margulies, *Battered Bargaining*] (same); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995) (same). Cf. Padilla v. Rumsfeld, 243 F. Supp. 2d 42, 52 (S.D.N.Y. 2003) (observing, in connection with a ruling that Padilla is entitled to an evidentiary hearing and assistance of counsel regarding his unlawful combatant status, that extending process to Padilla might, as with many criminal defendants facing trial, promote a realistic perspective, leading him to "seek to better his lot by cooperating").

<sup>180</sup> See *infra* Part IV.C (discussing judicial review of military tribunal determinations).

<sup>181</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) (discussing special circumstances that justify the government's restraint of dangerous individuals).

<sup>182</sup> See Ladan Boroumand & Roya Boroumand, *Terror, Islam, and Democracy*, J. DEMOCRACY, Apr. 2002, at 5, 7-8 (tracing the ideological debt owed by theorists of violent Islamism to western totalitarian movements, such as fascism and communism); cf. JOHN ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM 20, 32 (2002) (referencing Islamic strictures against killing noncombatants and Osama bin Laden's disregard of these rules); KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW 205-09 (2001) (analyzing arguments of jurists that persons who kill innocents in pursuit of political goals lose entitlement to the consideration accorded rebels under Islamic teaching); FULLER, *supra* note 15, at 60 (explaining that, along with the modern Islamics' individual interpretations of religion, "erroneous and distorted understandings of Islam can emerge that can serve to justify violence or even terror"). See generally CHARLES TILLY, THE POLITICS OF COLLECTIVE VIOLENCE 34 (2003) (discussing the role of "political entrepreneurs" who "promote violence . . . by activating boundaries, stories, and relations that have already accumulated histories of violence; by connecting already violent actors with previously

perspective instilled by such "authenticity entrepreneurs"<sup>183</sup> generates operational commitments potentially more enduring than the venality or impulse that motivates ordinary wrongdoing. A transition-centered global strategy will erode, but not eliminate, the ability of authenticity entrepreneurs to recruit followers committed to sabotaging reform efforts through acts of violence.<sup>184</sup> Moreover, for such committed operatives, a fifteen-year sentence pursuant to a conviction in a civilian court may be insufficient for rehabilitation. Similarly, the POW option, which expires upon the termination of overt hostilities, fails to deal with the problems of operatives' intractability or the geographic dispersion of command that further frustrates efforts to reach and enforce peace agreements.<sup>185</sup> A construction of the war paradigm that limited confinement to prisoner of war status would unfairly impose the risks of such uncertainty on targets of transnational violence.

At this juncture, in consideration of alternative remedies, a bounded, interstitial form of enemy combatant detention begins to seem plausible. For the hardened cohort described above, where the evidence permits,<sup>186</sup> trial before a military tribunal for violations of the law of war may be the most appropriate alternative. In many cases, however, before commencing a prosecution for violations of the law of war or turning to a civilian tribunal, the transnational nature of the conduct alleged may require more time for investigation. In addition, the public interest in preventing further attacks may counsel the need for a period of time devoted solely to interrogation regarding future threats.<sup>187</sup> An appropriately cabined form of enemy combatant detention will provide the government with the flexibility necessary for meeting such exigencies.<sup>188</sup> However, the Administration's assertion of unrestricted

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nonviolent allies; by coordinating destructive campaigns; and by representing their constituencies through threats of violence").

<sup>183</sup> See Margulies, *Regime Change*, *supra* note 153.

<sup>184</sup> See Andrew Kydd & Barbara F. Walter, *Sabotaging the Peace: The Politics of Extremist Violence*, 56 INT'L ORG. 263, 264-65 (2002) (discussing extremist violence as a means for discrediting moderates who wish to pursue nonviolent alternatives).

<sup>185</sup> Cf. Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 559 (1999) (discussing strategic advantages exploited by violent transnational networks as compared with states).

<sup>186</sup> See discussion *infra* Part IV.C. (discussing access to evidence by defendants before military tribunals).

<sup>187</sup> See *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 49-51 (S.D.N.Y. 2003) (acknowledging the government's interest in interrogating an alleged "unlawful combatant").

<sup>188</sup> The same pragmatic analysis would apply in the context of the detention of material witnesses before a grand jury. Federal law clearly provides for the detention of material witnesses at trial. See *Bacon v. United States*, 449 F.2d 933, 936 (9th Cir. 1971). The *Bacon* court noted that the unavailability of witnesses during a criminal investigation can undermine the justice system just as surely as a witness's unavailability at trial. *Id.* at 940. Prior to authorizing detention, however, the court should ascertain whether a less intrusive remedy, such as a noticed deposition, is appropriate in detention's stead. *Id.* at 943.



authority to detain alleged enemy combatants undermines the gap-filling rationale, threatening to transform such detention from the exception to the rule.

### 3. Balancing the Hardships

The same pragmatic result emerges from the balance of hardships' allocation of the costs of seeking clear statements from Congress. The government's ability to address the exigencies of transnational violence requires that courts read Congress's Joint Resolution authorizing force in the aftermath of September 11 as providing a measure of implied authority to the executive.<sup>189</sup>

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The mobility of transnational actors suggests the need for finding implied legislative authority for the detention of material witnesses before a grand jury when no less restrictive alternative serves the government's objectives. Transnational mobility makes it more difficult for the government to fully investigate a pattern of wrongdoing. In addition, a witness's transnational mobility allows him to evade a subpoena to testify by leaving the territorial bounds of a particular nation when authorities commence an investigation.

Consider in this regard the case of Maher Hawash, whom the government held as a material witness for five weeks prior to filing charges against him based on his arranging with others to travel to Afghanistan to assist the Taliban and Al Qaeda. *See Associated Press, Oregon Man Pleads Guilty to Aiding the Taliban*, N.Y. TIMES, Aug. 7, 2003, at A12. Hawash pleaded guilty to conspiring to provide services to the Taliban and agreed to assist the government if other charges were dropped. *Id.* In Hawash's case, the government had to seek evidence from China regarding the defendants' stay in a hotel room with co-defendants also allegedly en route to Afghanistan. *Id.* Confirming this information from China surely took more time than investigating most domestic events. Hawash's trip to China also demonstrated that he had both the capability and the inclination to leave the country when the occasion arose. If the government represents to a court that information from the witness is material to a grand jury investigation, it should have authority to detain the witness for a limited period rather than risk his flight.

Courts considering statutory authority for detention of material witnesses before grand juries after September 11 have split, with one court upholding the practice based on precedent and experience and another making a somewhat strained semantic argument to support a holding that the government lacked authority. *Compare In re Application of the United States for Material Witness Warrant*, 213 F. Supp. 2d 287 (S.D.N.Y. 2002) (holding that the federal material witness statute applied to grand jury proceedings), *with United States v. Awadallah*, 202 F. Supp. 2d 55, 76 (S.D.N.Y. 2002) (asserting without reference to the statute or legislative history that the statutory term, "criminal proceeding" governing detention could only refer to an adversarial proceeding, not to an ex parte grand jury proceeding). Legislative history supports the availability of detention in the grand jury context. *See* S. REP. NO. 98-225, at 28 n.88, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211 (citing *Bacon*, 449 F.2d at 939, for the proposition that "[a] grand jury investigation is a 'criminal proceeding' within the meaning of this section").

<sup>189</sup> *See Padilla*, 233 F. Supp. 2d at 598 (S.D.N.Y. 2002) (holding that joint resolutions have "the force of law" under Article I of the Constitution (citing *Bowsher v. Synar*, 478 U.S. 714, 756 (1986))); *cf. Ex parte Quirin*, 317 U.S. 1, 31 (1942) (observing, in a decision

The Joint Resolution is sufficiently broad to encompass a quantum of implied authority, authorizing the President to

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.<sup>190</sup>

Congress's authorization of "all necessary and appropriate force" to prevent future acts of terrorism against the United States logically includes some kind of restraint of persons such as the alleged "unlawful combatant" Jose Padilla, whom the government asserts planned at Al Qaeda's command to obtain and explode in the United States a "dirty bomb" containing radioactive material.<sup>191</sup>

However, the Joint Resolution does not stand alone but exists in conjunction with an earlier enactment that cabins the Executive's implied authority. The earlier statute, known as § 4001(a), provides that, "no citizen shall be imprisoned or otherwise detained. . . by the United States except pursuant to an Act of Congress."<sup>192</sup> While the earlier statute does not mention war or foreign

upholding the use of military tribunals, that "unlawful combatants are likewise subject to capture and detention").

<sup>190</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541).

<sup>191</sup> See *Padilla v. Rumsfeld*, 352 F.3d 695, 726 (2d Cir. 2003) (Wesley, J., dissenting) (arguing in favor of executive power to detain suspected enemy combatants, even if U.S. citizens, in the interest of national security). *But see id.* at 722 (Pooler & Parker, JJ.) (majority holding that the Joint Resolution does not provide authorization for detention of alleged unlawful combatants). Cf. William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 679-80 (2003) (discussing "customary constitutional authority" for exigent measures based on inferences drawn from legislative inaction or ambiguity).

<sup>192</sup> See 18 U.S.C. § 4001(a), discussed in Stephen I. Vladeck, Policy Comment, *A Small Problem of Precedent: 18 U.S.C. 4001(a) and the Detention of United States Citizen "Enemy Combatants"*, 112 YALE L.J. 961 (2003). Bryant and Tobias find other support in the omission by Congress in enacting the USA PATRIOT Act of authority sought by the Attorney General to indefinitely detain aliens without immigration or other charges upon a finding that national security called for such a measure. See Bryant & Tobias, *supra* note 96, at 386-91. The USA PATRIOT Act allows the Attorney General to detain an alien without charges for up to seven days. See 8 U.S.C. § 1226A(a)(5). However, as Judge Mukasey notes in *Padilla*, this omission is of limited interpretive significance. *Padilla*, 233 F. Supp. 2d at 596. It certainly reflects Congress's wariness about wholesale *Korematsu*-style detentions. Courts, however, should not read legislative inaction here as precluding the exercise of executive authority under the Joint Resolution to detain unlawful combatants where the government has made a particularized proffer supporting its contention that the detainee sought on behalf of a foreign power or entity to injure persons and property in the United States. See *id.* ("The cited portion of the Patriot Act applies to persons as to whom there is alleged to be far less reason for suspicion than there is as to Padilla.").

affairs, the abuse of the government's authority to prevent espionage or sabotage was a driving factor in the promulgation of the law.<sup>193</sup>

Courts should read § 4001(a) as cabining, but not absolutely precluding, the detention of alleged unlawful combatants. Section 4001(a) does not require *express* authorization by Congress of future detentions and, therefore, does not preclude a subsequent implied authorization such as that arguably provided by Congress in the Joint Resolution. In the main, the legislative deliberations about § 4001(a) looked backward, condemning the internment of Japanese-Americans during World War II.<sup>194</sup> One can read the statute as barring such wholesale detentions, while still permitting a future Congress to impliedly authorize a more limited form of detention based on a particularized fear of a catastrophic attack. The close relationship between preventing such an attack and the Executive's obligation to protect the safety of people within the United States also distinguishes the unlawful combatant case from the more "attenuated" claim of necessity underlying President Truman's failed attempt to seize the steel mills in the *Steel Seizure Case*.<sup>195</sup>

Buttressing this reading is the effect of time and experience. Section 4001(a) was passed in 1971, reflecting the conventional wisdom of the more than 150 years when civilians within the continental United States were safe from foreign attack.<sup>196</sup> Tragically, the events of September 11, 2001 made that assumption obsolete. In their more sanguine world, the sponsors of § 4001(a) believed that government surveillance of possible wrongdoers would suffice to avert catastrophic attacks.<sup>197</sup> They did not have the benefit of viewing the world after September 11, which showed that the presence of a number of the

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<sup>193</sup> See H.R. REP. NO. 92-116, at 1 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435 (expressing "doubt about the constitutionality of the old act because it called for detention if there were reasonable grounds to believe that such persons probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage").

<sup>194</sup> See, e.g., 117 CONG. REC. H31,537 (daily ed. Sept. 13, 1971) (remarks of Rep. Railsback); see also *Padilla*, 352 F.3d at 721-22 (listing remarks of other sponsors).

<sup>195</sup> See *Padilla*, 352 F.3d at 727 (Wesley, J., concurring in part, dissenting in part) (arguing that the tenuous link between President Truman's action and conduct of the war in Korea contrasts with the facts in *Padilla*, in which "the President's authority is directly tied to his responsibilities as Commander in Chief"); cf. Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. 985, 1025-30 (2002) (discussing judicial efforts to reconcile exigency and due process).

<sup>196</sup> See YALE CTR. FOR THE STUDY OF GLOBALIZATION, *THE AGE OF TERROR* vii, x (Strobe Talbott & Nayan Chanda eds. 2001) (The losses from the September 11 attacks were "nearly thirty times greater than what Timothy McVeigh, a homegrown madman, had inflicted on Oklahoma City in 1995, and about double what three hundred Japanese bombers left in their wake at Pearl Harbor. . . . This was something new under the sun.").

<sup>197</sup> See 117 CONG. REC. H31,551-52 (daily ed. Sept. 13, 1971) (remarks of Rep. Railsback) (quoting former FBI Director J. Edgar Hoover).

attackers' names on a "watch list" had not derailed their plans.<sup>198</sup> Surveillance standing alone can be both over- and under-inclusive, affecting people and groups who are innocent of wrongdoing,<sup>199</sup> while failing to deter those determined to injure innocents. The obsolescence of the assumptions made by the sponsors of § 4001(a) counsels against reading the statute in an absolutist fashion to preclude any form of unlawful combatant detention.<sup>200</sup> Section 4001(a), however, continues to stand for the proposition that any detention must be carefully tailored.

Further support for constraining the government's authority flows from concerns for equality, integrity, and the reduction of opportunity costs built into the default rules for statutory interpretation. Depriving an alleged unlawful combatant of the right to be heard and to assistance of counsel would spark tensions with both due process guarantees and the commitment to justice and fairness embodied in the statutes conferring jurisdiction over petitions for habeas corpus.<sup>201</sup> The threat to institutional integrity is magnified by the *in terrorem* effect of the detentions on defendants in the criminal justice system, who cannot discount the possibility that, unless they plead guilty, the government will also detain them indefinitely as enemy combatants.<sup>202</sup> The likelihood that such a free-floating detention warrant will be used largely against Muslims also prompts equality concerns.<sup>203</sup> Finally, courts should consider the tension between the executive's assertion of untrammelled authority and the provisions of the Geneva Convention that suggest a presumption of POW status for detainees pending a determination by a

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<sup>198</sup> See Patrick J. McDonnell & Russell Carollo, *An Easy Entry for Attackers; Immigration Flaws Garner Attention as Authorities Track the Sept. 11 Hijackers' Movements Through the United States*, L.A. TIMES, Sept. 30, 2001, at A1 (observing that, even though two of the September 11 hijackers' names were on a government watch list, they were able to enter the United States and carry out their plans for attack).

<sup>199</sup> See Fisher, *supra* note 168 (arguing for high standard regulating government surveillance of religious groups).

<sup>200</sup> For useful discussions of statutory obsolescence, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 131-35 (1982); ESKRIDGE, *supra* note 104, at 50-57; cf. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 917-20 (2003) (discussing empirical questions regarding choice between judges and legislatures in responding to problems of statutory obsolescence).

<sup>201</sup> See *Padilla v. Bush*, 233 F. Supp. 2d 564, 602 (S.D.N.Y. 2002) (citing *Harris v. Nelson*, 394 U.S. 286, 300 (1969), and quoting 28 U.S.C. §§ 2243, 1651(a) (2000)), *cert. granted*, 124 S. Ct. 1353 (Feb. 20, 2004).

<sup>202</sup> See Lichtblau, *supra* note 75 (discussing how Shafal Mosed decided to plead guilty to offering "material support" to Al Qaeda after the government suggested he could be declared an enemy combatant and detained indefinitely or be charged with treason and executed).

<sup>203</sup> See Akram & Johnson, *supra* note 56, at 328-29 (discussing the government's authority to detain suspected terrorists under the USA PATRIOT Act).

“competent tribunal.”<sup>204</sup> This tension with international law creates opportunity costs for the United States’s efforts to elicit international cooperation in anti-terrorism efforts.<sup>205</sup> In light of these fundamental concerns, courts should construe the authority to detain under the Joint Resolution narrowly.

#### 4. Equitable Tailoring for Unlawful Combatants

Equitable tailoring of executive authority to detain alleged unlawful combatants is the most appropriate way to minimize false positives, balance hardships, and fit exigent procedures into the gaps in existing remedies. Considerations of institutional competence favor courts performing this tailoring function, instead of leaving a void for the legislature to fill. As the Supreme Court noted in *Hecht Co. v. Bowles*, courts have the ability to draw exceptions narrowly to respond to “the necessities of the particular case” without undermining overarching norms.<sup>206</sup>

In the unlawful combatant situation, courts can tailor the scope, manner, and duration of detention to reflect both the exigencies of national security and the transcendent values of due process. In contrast, Congress, if required to legislate expressly, may be tempted to fashion an overbroad authorization that will grant the Executive excessive authority.<sup>207</sup> Such a broad grant may require subsequent tailoring by the Court to comply with due process

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<sup>204</sup> See Geneva Convention, *supra* note 154, art. 5, 6 U.S.T. at 3322-25, 75 U.N.T.S. at 141 (requiring a trial before a competent tribunal for suspected combatants); *cf.* Lewis, *supra* note 3, at 261 (discussing the Geneva Convention); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 520-27 (2003) (discussing international law basis for judicial review of detention).

<sup>205</sup> *Cf.* Paust, *supra* note 204, at 512-13 (stating that the Geneva Convention allows a state to detain persons within its own territory when such persons are “definitely suspected of . . . [engaging] in activities hostile to the security of the State,” such detention is “absolutely necessary,” and the detaining authority provides for judicial review) (citing Geneva Convention, *supra* note 154, 6 U.S.T. at 3322-25, 75 U.N.T.S. at 141).

<sup>206</sup> 321 U.S. 321 (1944).

<sup>207</sup> This was the case with the Espionage Act of 1917, ch. 30, 40 Stat. 217, 219 (1917), enacted after the United States’ entry into World War I, which, *inter alia*, made it illegal to “make or convey false reports or false statements with intent to interfere” with the military effectiveness of the United States or “to promote the success of its enemies.” *Cf.* Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003) (discussing Judge Hand’s development of the basis for modern First Amendment doctrine in his construction of the Espionage Act in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev’d*, 246 F. 24 (2d Cir. 1917), which was not followed until decades later). The same overbreadth characterized the Act of March 21, 1942, ch. 191, 56 Stat. 173, which made it illegal to “enter, remain in, leave, or commit any act in a military area or military zone prescribed . . . by the Secretary of War,” which the government used, along with an Executive Order, as authority for the internment of Japanese-Americans during World War II.

guarantees.<sup>208</sup> Alternatively, Congress may experience paralysis, finding itself unable to act despite the exigency of the questions involved. The more efficient path to institutional dialog would be to permit the Court to take an initial assay at the matter, which Congress can then modify if it sees fit.

The prudence of this path fits the pragmatic account of institutional architecture offered by Justice Jackson in the *Steel Seizure Case*.<sup>209</sup> In grappling with the needs posed by a particular situation, courts can exercise equitable discretion to promote a "workable government."<sup>210</sup> Absent a clear statement from Congress that constrains equitable discretion, courts should read a legislative enactment such as the Joint Resolution to reflect legislative acknowledgment of the courts' tailoring role.<sup>211</sup>

This equitable tailoring would embody the Court's observation that "strong procedural protections" typically accompany grants of authority to detain individuals for substantial periods.<sup>212</sup> In the enemy combatant context,

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<sup>208</sup> See *Ex parte Endo*, 323 U.S. 283, 297 (1944) (interpreting the Act of March 21, 1942 in light of constitutional concerns to prohibit the detention of Japanese-Americans who were concededly not security risks).

<sup>209</sup> See *Youngstown Sheet & Tube Co. v. Sawyer* [The *Steel Seizure Case*], 343 U.S. 579, 584-85 (1952) (exercising equitable discretion in deciding that the President had overstepped his executive war powers).

<sup>210</sup> See *id.* at 635 (Jackson, J., concurring) (finding that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government").

<sup>211</sup> See *Hecht Co.*, 321 U.S. at 329-30 (holding that ambiguities in statutes should be resolved in favor of exercising equitable discretion). Cf. DWORKIN, *supra* note 40, at 348-49 (arguing that a court should retain discretion to interpret a statute in light of the shifting "story" of people, processes, and institutions affecting the statute's implementation); Sunstein & Vermeule, *supra* note 200, at 932-35 (arguing that the inference of a legislative grant of interpretive discretion to courts should hinge on an empirical view of institutional competence in each case).

<sup>212</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (limiting preventative detention only to the most dangerous detainees and only when coupled with additional procedural protections); cf. Martin, *supra* note 65, at 123-25 (discussing the importance of using judicial review in tailoring assertions of governmental authority to detain immigrants).

In light of the exigency of the unlawful combatant cases, courts should allow the government to meet its burden by presenting "some evidence" that the detainee was "like the German saboteurs in *Quirin*, engaged in a mission against the United States on behalf of an enemy with whom the United States is at war." *Padilla v. Bush*, 233 F. Supp. 2d 564, 608 (S.D.N.Y. 2002), *cert. granted*, 124 S. Ct. 1353 (Feb. 20, 2004). To satisfy this standard, the government should be able to introduce affidavits by officials with knowledge of the basis for detaining the petitioner, even if that knowledge is not first-hand. *Id.* at 609 (considering the Declaration of Defense Department official Michael Mobbs). Producing witnesses with first-hand information at a hearing contesting the detention of an alleged enemy combatant could require the appearance of combat personnel, which the Supreme Court has indicated would interfere with executive prerogatives. See *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950) (detailing the costs to command prestige and military

protections provided either by statute or via habeas corpus should include an individualized evidentiary hearing and the right to representation by counsel.<sup>213</sup> An institutional equity court should also impose limits on the duration of detention.<sup>214</sup> The imposition of a time limit reflects institutional equity's debt to both the flexibility of habeas jurisprudence and the "public law" tradition of injunctive relief against overreaching agencies of government.<sup>215</sup> A time limit

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resources of requiring first-hand information). Although permitting the government to rely on hearsay should engender concern, the probability and gravity of false positives are diminished by safeguards, such as the ability of the detainee, assisted by an attorney, to present evidence to counter the government's allegations and the presumptive six-month time limit institutional equity would impose on unlawful combatant detention. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (analyzing procedural due process by considering the state's interest, the interest of the individual, and the risk of error).

<sup>213</sup> Without these rights, the detainee effectively loses the "opportunity to present and contest facts" ensured by the habeas corpus statute. See *Padilla*, 233 F. Supp. 2d at 601-02. The Fourth Circuit distinguished *Padilla* in the case of Yaser Esam Hamdi, another alleged unlawful combatant. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *reh'g and reh'g en banc denied*, 337 F.3d 335 (4th Cir. 2003), and *cert. granted*, 124 S. Ct. 981 (Jan. 9, 2004). It viewed the evidence in the case as entailing Hamdi's concession that he had been apprehended on the battlefield. *Id.* at 460. Armed with this putative concession, the Fourth Circuit asserted that no relevant facts remained in dispute. *Id.* at 471. Unfortunately, as Judges Luttig and Motz argued in their separate dissents to the Fourth Circuit's denial of a rehearing, the majority's characterization of the facts reflects judicial convenience more than accuracy. See *Hamdi*, 337 F.3d at 358, 369-70 (4th Cir. 2003) (Luttig, Motz, JJ., dissenting). Because of the respondent's refusal to make Hamdi available, neither the district court nor the Fourth Circuit heard from Hamdi at all. *Id.* at 361 (observing that the court relied solely on the petition of Hamdi's next friend as the basis for its dismissal). They heard only from his attorneys and next friend, who made ambiguous representations to the court about Hamdi's whereabouts at the time of his capture. *Id.* at 346 (interpreting attorneys and next friend as conceding at most that Hamdi was in Afghanistan). It is furthermore far from clear that any statements by attorneys or a next friend should bind Hamdi himself, especially when the government has also refused *them* access to Hamdi. *Id.* Thus, the Fourth Circuit's reasoning is of questionable applicability.

<sup>214</sup> Jose Padilla, for example, should have the opportunity to contest the government's assertions that he was seeking to assemble a "dirty bomb," access to an attorney to help him in this task, and—upon an appropriate proffer—access with reasonable conditions to persons, such as the Al Qaeda upper-echelon figure Abu Zubaydah, who may be able to confirm Padilla's lack of involvement in such a scheme.

<sup>215</sup> See generally FISS, *supra* note 135 (discussing injunctions against prisons, psychiatric hospitals, school systems, etc.); Chayes, *supra* note 112 (same); Margulies, *New Class Action*, *supra* note 112 (discussing issues of democracy and dialogue within plaintiff class in public law proceedings). But see SANDLER & SCHOENBROD, *supra* note 112 (criticizing public law relief as impinging on the prerogatives of state and local governments). Faced with school desegregation, foster care, and other cases with a "polycentric" configuration of interests, agendas, and social facts—including demagogic politicians, recalcitrant legislatures, and conflicting budget priorities—courts sought to enforce legal rights by fashioning specific remedies. See Chayes, *supra* note 112, at 1310-13. Relief included

on enemy combatant detentions serves a public law purpose by balancing the political and bureaucratic momentum of exigency<sup>216</sup> with increased accountability for both the executive and legislative branches of government. Time limits also accommodate the special demands of transnational investigation and negotiation,<sup>217</sup> while ensuring that government uses detention

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bussing and the creation of magnet schools in the desegregation context, standards for hygiene and medical care in prisons, and community placement for persons in psychiatric hospitals and developmental centers. In some cases, the efforts of courts were successful. See Margulies, *New Class Action*, *supra* note 112, at 516-17 (discussing litigation to provide community placements for persons with mental retardation that skillfully marshaled family involvement, political support for increased community expenditures, and efficacious technology such as motorized wheelchairs and assistive communication devices); *cf.* N.Y. State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 768-70 (E.D.N.Y. 1973) (issuing a preliminary injunction requiring Willowbrook Developmental Center to raise the level of care to meet national standards). In other areas, success was incomplete, stymied in part by the polycentric agendas courts had hoped to master. See Margulies, *New Class Action*, *supra* note 112, at 514-15 (discussing failures of remedies seeking community placement for persons with mental illness, including homelessness and "transinstitutionalization" from psychiatric hospitals into more restrictive institutions such as jails and prisons). In most cases, however, judicial decrees provided concrete improvements in institutions that had previously run by administrative fiat. See MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING IN THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 365-79 (1998) (discussing successes of judicial decrees in improving hygiene, medical care, and other aspects of institutional life). See generally Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993) (analyzing successes and challenges of institutional reform litigation).

<sup>216</sup> See REHNQUIST, *supra* note 2, at 188-92 (describing how pressure to intern Japanese-Americans on the west coast in the weeks after the attack on Pearl Harbor started at the state and local level and soon won over federal officials).

<sup>217</sup> See *Zadvydas*, 533 U.S. at 701. While some element of arbitrariness is inevitable in determining the appropriate amount of time allowed for transnational investigation, one can resort to Supreme Court precedent as a guide. In *Zadvydas*, the Court observed that a period of six months was appropriate as a presumptive maximum period of detention for aliens with final orders of deportation. *Id.* According to the Court, the six-month period gave the government sufficient time to do the transnational work involved in securing the cooperation of another country in accepting the alien in order to effect the alien's removal. *Id.* The transnational work involved in ascertaining an individual detainee's terrorist connections could be performed within a comparable period. *Id.* Indeed, the government's experience in ruling out terrorist connections among the aliens detained in the aftermath of September 11 suggests that in many cases it could perform the work in a shorter period. Inspector General Report, *supra* note 6. As in *Zadvydas*, the government would be able to seek an extension of the six-month period in cases where reasonable progress was being made toward achieving an objective relevant to the purposes of the detention, such as interrogation of the detainee regarding plans for future violence. *Zadvydas*, 533 U.S. at 701 (admitting that six months is a brief period, and allowing courts to grant extended detention when appropriate). But see *Padilla*, 233 F. Supp. 2d at 607 (asserting that the Administration's detention of alleged unlawful combatants matched Justice Jackson's first



as an interstitial measure, not as a permanent escape-hatch from fora with greater procedural safeguards.<sup>218</sup>

Moreover, time limits reduce the impact of the lack of coherent standards for release from enemy combatant detention. This lack of standards would otherwise transform enemy combatant detention into a de facto life sentence, triggering substantial due process concerns.<sup>219</sup> A delegation of such scope

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*Steel Seizure* scenario of congruence between executive and legislative authority; declining to impose a time limit on detention, while requiring an evidentiary hearing and assistance of counsel).

<sup>218</sup> While the Court also suggested that persons suspected of terrorism might present special challenges to this model, see *Zadvydas*, 533 U.S. at 695, in enemy combatant cases, the government would have other avenues available upon the expiration of time limits that were not applicable in *Zadvydas*. In *Zadvydas*, the government was “out of options” regarding legal bases for exerting control over the petitioners. The petitioners had already been convicted of criminal offenses and had served their time. See *id.* at 680. In enemy combatant cases, in contrast, the government still has the option of trying the detainees in civilian court, bringing detainees before military tribunals, or commencing immigration proceedings. See, for example, the case of the one current alien detainee, Ali Saleh Kahlah Al-Marri. *Al-Marri v. Bush*, 274 F. Supp. 2d 1003, 1008-09 (C.D. Ill. 2003) (dismissing petition for habeas corpus on venue grounds).

<sup>219</sup> In cases authorizing indefinite detention, such as those involving sex offenders, see, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997), decisionmakers could apply standards of clinical and professional judgment to measure a detainee’s progress toward release. See also *Kansas v. Crane*, 534 U.S. 407, 411-14 (2002) (discussing the importance of a sex offender’s ability to control his behavior). But see *id.* at 423-24 (Scalia, J., dissenting) (arguing that the majority’s standard is too amorphous). Cf. Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 367 (2003) (discussing the *Crane* Court’s heightened scrutiny of the fit between the rationale for and the results of confinement). See generally Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113 (1996) (discussing empirical and legal bases for predictions of dangerousness underlying detention that is largely preventive in nature); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984) (same). Clinicians and peers of the sex offender could gauge changes in behavior, such as a lack of interest in child pornography demonstrated consistently over time. In addition, in the sex offender context, indefinite detention was incidental to the workings of established adjudicatory regimes, such as the criminal justice system, and was initiated either after the filing of criminal charges or upon the completion of a sentence after a conviction.

Neither of these factors hold true in the enemy combatant context. Clinicians and other professionals face methodological, normative, and institutional obstacles in developing and implementing reliable criteria for enemy combatants’ progress toward release. Attention will inevitably focus not merely on the detainee’s day-to-day interactions, but also on the detainee’s expressed ideology. Even if evidence existed that professionals could “treat” ideology as they would a typical clinical disorder, the training transnational networks give their recruits on “gaming the system” would create substantial doubts about the reliability of expressed ideology as a guide. See Makiya & Mneimneh, *supra* note 11, at 18. In addition, seeking to alter a political and religious ideology as an aspect of confinement elicits images

should require express legislative authority, given the constitutional problems raised by indefinite detention<sup>220</sup> and the existing legislation purporting to limit the federal government's use of the practice.<sup>221</sup> To require any less would, as Justice Jackson noted in the *Steel Seizure Case*, license legislative lassitude and executive "usurpation."<sup>222</sup>

By failing to impose time limits, the Fourth Circuit in *Hamdi* committed the error the Supreme Court avoided in the *Steel Seizure Case* when it enjoined the Executive from seizing the steel mills;<sup>223</sup> it treated the war power as unitary and authorized sweeping executive action at home to match the scope of executive action abroad.<sup>224</sup> In contrast, imposing a time limit remands the matter to Congress,<sup>225</sup> obliging legislators to consider whether breaking alleged terrorists justifies bending long-standing commitments to fairness. By granting the Executive a measure of flexibility, but requiring express legislative authority for more drastic departures from due process norms, institutional equity preserves the balance between the three branches and promotes the

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of a *Clockwork Orange* brand of behavior modification that is perilously incompatible with commitments to freedom of thought in a constitutional democracy. Cf. *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992) (invalidating the detention of a person diagnosed as having an "antisocial personality," but not mental illness, and warning against indefinite "confinement for dangerousness"). The prospect of blame for harm caused by a released detainee would also impede implementation of any protocol professionals could devise. Cf. Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LIT. 11, 29-30 (1998) (discussing "hindsight bias" that makes harm, such as a terrorist attack, more predictable in retrospect). These issues dovetail with enemy combatant detention's lack of anchoring in established, legislatively authorized frameworks of adjudication to create a unique set of dangers to accountability.

<sup>220</sup> See Sunstein, *supra* note 104, at 338 (highlighting the nondelegation doctrine's role in assigning Congress sole power to authorize the compromise of fundamental rights and interests). Indeed, in contexts not involving the war and foreign affairs implications of terrorism, the Court has struck down indefinite detention based on dangerousness. See *Foucha*, 504 U.S. at 82; see also *United States v. Salerno*, 481 U.S. 739, 747 (1987) (upholding pretrial detention under the federal Bail Reform Act of defendants accused of racketeering, drug trafficking, and other serious offenses, predicated in part on a functional time limit on detention); *Schall v. Martin*, 467 U.S. 253, 266-69 (1984) (upholding the pretrial detention of juveniles based on the state's *parens patriae* interest in protecting juveniles from the consequences of all criminal activity, including their own).

<sup>221</sup> 18 U.S.C. § 4001(a) (2000); see also *supra* notes 192-200 and accompanying text (discussing § 4001(a)); cf. Vladeck, *supra* note 192 (same).

<sup>222</sup> See *Youngstown Sheet & Tube Co. v. Sawyer* [The *Steel Seizure Case*], 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

<sup>223</sup> *Id.* at 589.

<sup>224</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450, 474-75 (4th Cir. 2003), *reh'g and reh'g en banc denied*, 337 F.3d 335 (4th Cir. 2003), and *cert. granted*, 124 S. Ct. 981 (Jan. 9, 2004).

<sup>225</sup> See ESKRIDGE, *supra* note 104, at 283-84 (discussing clear statement rules as devices for remand to the legislature for further guidance).

deliberation and debate at the core of constitutionalism.<sup>226</sup>

B. *The Terrorism Defendant's Rights to Investigate and Present a Defense at Trial*

The harmonization of values reflected in institutional equity also played a large role in *United States v. Moussaoui*,<sup>227</sup> in which the U.S. District Court for the Eastern District of Virginia weighed the right of a criminal defendant accused of terrorist acts to a fair trial against the government's interest in interrogating Al Qaeda detainees. In *Moussaoui*, the district court struck a compromise between fair trial rights and national security interests that, at first blush, seems to embody the reconciliation of interests contemplated by institutional equity.<sup>228</sup> Closer analysis demonstrates, however, that the district court's decision achieves a surface harmony between interests by unduly discounting the defendant's rights.

The district court's starting point is unimpeachable: criminal defendants have rights, guaranteed by the Sixth Amendment, to investigate the factual basis for the government's charges.<sup>229</sup> The government cannot impair that right through unreasonable restrictions on the activities of the defendant or his representatives.<sup>230</sup> When the defendant's investigation leads to possible witnesses in the government's custody or under its control, the government is generally obliged to make those witnesses available under appropriate conditions.<sup>231</sup> The court may sanction the government for hindering investigation necessary to the defendant's presentation of a case at trial.<sup>232</sup>

Zacarias Moussaoui was arrested prior to September 11, 2001 while attending a flight school in Minnesota and charged with six counts of conspiracy.<sup>233</sup> Four of those counts reflect the government's claims that Moussaoui was the "twentieth hijacker" slated to participate in the September

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<sup>226</sup> See generally Sunstein, *supra* note 104 (discussing the rationale of canons of statutory interpretation). Notwithstanding a Supreme Court decision tailoring the scope and circumstances of unlawful combatant detention, subsequent legislative action codifying these safeguards would be appropriate to promote predictability in the legal system.

<sup>227</sup> 282 F. Supp. 2d 480, 487 (E.D. Va. 2003).

<sup>228</sup> *Id.* at 481 (accepting as well reasoned the national security interests argued by the Executive, and balancing them against the interests of the accused).

<sup>229</sup> See *id.*; see also *Grievance Comm. v. Simels*, 48 F.3d 640, 651 (2d Cir. 1995) (expounding on the defendant's Sixth Amendment right to zealous representation).

<sup>230</sup> *Simels*, 48 F.3d at 651.

<sup>231</sup> See *Roviaro v. United States*, 353 U.S. 53, 64-65 (1957) (requiring the government to disclose the identity of its informant).

<sup>232</sup> Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1452 (1984) (arguing that the use of a federal court's supervisory power is appropriate to address violations of specific constitutional provisions).

<sup>233</sup> *Moussaoui*, 282 F. Supp. 2d at 483.

11 attacks.<sup>234</sup> Moussaoui, who is representing himself but also has stand-by counsel, asserts that he is a member of Al Qaeda and that he was attending flight school in connection with plans for a future action abroad.<sup>235</sup> Moussaoui has submitted a factual proffer supporting his contention that Ramzi bin al-Shibh, his contact with Al Qaeda who was captured in Pakistan in the second half of 2002, can provide evidence confirming his story.<sup>236</sup> The government, which has been interrogating bin al-Shibh since his capture, has declined to produce him despite the court's order that it do so.<sup>237</sup> To sanction the government for its ongoing refusal to produce bin al-Shibh, the district court dismissed the four counts in the indictment related to the September 11 attacks, precluded the presentation of any evidence or argument regarding the attacks, and barred the government from seeking the death penalty.<sup>238</sup>

The district court's opinion, while not expressly citing the elements of the institutional equity standard, nonetheless tracks those elements closely. Avoiding false positives is a central concern of the court, which notes the "need for reliability" in death penalty cases.<sup>239</sup> Moussaoui's proffer demonstrated to the court's satisfaction that bin al-Shibh could provide evidence demonstrating that Moussaoui was at best a "minor participant" in the charged offenses without "direct involvement in, or knowledge of, the planning or execution" of the September 11 attacks.<sup>240</sup> For the court, allowing Moussaoui's trial on charges related to September 11 without offering Moussaoui a genuine opportunity to rebut those charges would create an unacceptable risk that the jury's verdict on both culpability and penalty would "be predicated [not] on what the defendant, himself, actually did, . . . [but] on what he may have wanted to do or on what his alleged co-conspirators were able to accomplish on their own."<sup>241</sup>

The court's ruling, together with its earlier decisions directing the

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 481; United States v. Moussaoui, No. Cr-01-455-A, 2003 WL 21263699, at \*1 (E.D. Va. Mar. 10, 2003).

<sup>236</sup> *Moussaoui*, 2003 WL 21263699, at \*1.

<sup>237</sup> *Moussaoui*, 282 F. Supp. 2d at 482.

<sup>238</sup> *Id.* at 486-87.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 485. In addition, the government's own filings in other terrorism cases demonstrate some doubt about its evidence, acknowledging the possibility that some of the information it has received from Al Qaeda higher-ups may be misinformation. See Fainaru, *supra* note 175 (quoting the government as acknowledging that "some of the sources who provided information . . . may be trying to mislead the government"). Moreover, the Administration's recent record on issues it considers to be related to terrorism, such as intelligence justifying military intervention in Iraq, does not inspire confidence. See, e.g., Christopher Marquis, *How Powerful Can 16 Words Be?*, N.Y. TIMES, July 20, 2003, § 4, at 5 (discussing the controversy over the unsubstantiated claim in the President's State of the Union address that Saddam Hussein sought to buy uranium in Africa).

government to produce bin al-Shibh for depositions to be taken by the defendant, also implicitly addresses the adequacy of remedies in this case from the standpoint of both the government and the defendant. The government asserted that precluding Moussaoui's access to bin al-Shibh was necessary to avoid interference with antiterrorism efforts.<sup>242</sup> The district court, however, aided by technology, fashioned conditions on defendant's access to bin al-Shibh that safeguarded the public interest. For example, it suggested using a video connection to question bin al-Shibh so as to avoid transporting him to the United States,<sup>243</sup> which might be burdensome and disruptive.<sup>244</sup>

In addressing the adequacy of remedies from the defendant's perspective, however, the court's analysis seems more convenient than convincing. Sanctions imposed by the trial court should be both proportionate to the nature and scope of the government's misconduct<sup>245</sup> and sufficient to counter the risk of prejudice to the defendant.<sup>246</sup> In *Moussaoui*, the court's dismissal of certain charges and exclusion of evidence related to the attacks of September 11, coupled with its decision to eliminate the availability of the death penalty, appear to be a proportionate response to the unfairness of forcing the defendant to respond to charges without needed evidence. However, the court's sanctions leave a substantial residue of prejudice for the defendant to confront at trial regarding the remaining counts. In the post-September 11 climate of fear and mistrust, the government may need only enough evidence to pass the test of legal sufficiency to persuade a jury to convict. The reams of publicity

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<sup>242</sup> See *United States v. Moussaoui*, 333 F.3d 509, 513 (4th Cir. 2003) ("[A]ccess to the enemy combatant witness will have devastating consequences for national security and foreign relations."), *appeal dismissed*, 333 F.3d 509 (4th Cir. 2003), and *reh'g and reh'g en banc denied*, 336 F.3d 279 (4th Cir. 2003).

<sup>243</sup> See Philip Shenon, *Justice Department Seeking to Disallow Terrorist Interview*, N.Y. TIMES, July 11, 2003, at A12 (reporting on the judge's order providing for video conferencing).

<sup>244</sup> See *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950) (detailing the costs and difficulties of having the government produce witnesses connected to security operations).

<sup>245</sup> See *United States v. Garrett*, 238 F.3d 293, 301 (5th Cir. 2000) (finding preclusion of twenty-five government witnesses as sanction for the untimely submission of documents constituted an abuse of discretion).

<sup>246</sup> Cf. *United States v. Brown*, 327 F.3d 867, 872 (9th Cir. 2003) (holding that a curative instruction given by the court was inadequate to address prejudice created by the prosecutor's improper closing argument). See generally *United States v. Burr*, 25 F. Cas. 30, 32 (C.C.D. Va. 1807) (No.14,692d). In *Burr*, Chief Justice Marshall, presiding over the trial of Aaron Burr for treason during the administration of Thomas Jefferson, analyzed Jefferson's attempts to withhold portions of a letter material to the case but allegedly containing material that was sensitive from a national security standpoint. Marshall observed that, "either party may require the other to produce books or writings in their possession or power, which contain evidence pertinent to the issue. In this respect courts of law are invested with the power of a court of chancery [i.e., equity], and if the order be disobeyed . . . judgment . . . may be entered against [the noncomplying party]." *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694).

about Moussaoui, some of which has been inaccurate,<sup>247</sup> along with Moussaoui's own admissions of Al Qaeda membership and sympathies may in effect shift the burden of proof to the defendant.

In light of these concerns, only specific and concrete evidence of innocence of the kind the district court found that bin al-Shibh may have been able to provide regarding the dismissed charges<sup>248</sup> offers Moussaoui a decent chance at a fair trial on the remaining counts. The court's treatment of these concerns seems perfunctory at best. The court's sole reference to the problem is its assertion that, having dismissed the counts that could trigger the death penalty, it was "no longer satisfied that testimony . . . [from bin al-Shibh] would be material to the defense."<sup>249</sup> The court, however, offered no analysis to support its conclusion,<sup>250</sup> which seems inconsistent with the overall logic of the ruling stressing the importance of bin al-Shibh's testimony.<sup>251</sup>

The court's balance-of-hardships analysis is similarly incomplete. The adverse effects to institutional integrity of permitting the government to limit the evidence gathered by the defense extend well beyond the Moussaoui case. For example, courts would be hard pressed to deny the government a similar dispensation in the burgeoning number of prosecutions for "material support" of terrorist organizations under the AEDPA.<sup>252</sup> Here, as elsewhere, even the

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<sup>247</sup> See Baynes, *supra* note 17, at 16 (discussing some popular misconceptions, such as the widely-held view that Moussaoui expressed interest in learning to fly an aircraft, but not in taking off or landing).

<sup>248</sup> See *United States v. Moussaoui*, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003) (observing the unfairness of requiring Moussaoui to defend himself against charges while the government denied him "the ability to present testimony from witnesses who could assist him in contradicting those accusations").

<sup>249</sup> *Id.*

<sup>250</sup> See *id.* (giving no rationale for disregarding the defendant's need for the witness's testimony).

<sup>251</sup> The court's reasoning may have been that bin al-Shibh's testimony would be exculpatory only on the counts relating to the September 11 attacks and not on the remaining counts. As to the remaining counts, bin al-Shibh may have provided *inculpatory* information, for example, by confirming that Moussaoui was working with Al Qaeda on future terrorist missions. Since such information would not buttress Moussaoui's ability to rebut the remaining charges, it is arguably not "material" to the defense.

This analysis ignores the advantage a competent defense lawyer could gain from using bin al-Shibh's testimony regarding Moussaoui's lack of involvement in the attacks to undermine the government's case on the remaining charges. Suppose, for example, that bin al-Shibh testified that Moussaoui was not selected for the September 11 attacks because he was not deemed sufficiently stable to cope with the complexity of the mission. A competent defense lawyer would argue that a jury could infer from bin al-Shibh's testimony that Al Qaeda would not trust Moussaoui with a future mission of any importance. This inference would undermine the government's case on the remaining charges, rendering bin al-Shibh's testimony material in that context as well.

<sup>252</sup> See Antiterrorism and Effective Death Penalty Act, 18 U.S.C. § 2339A(b) (2000) (defining material support as "currency or other financial securities, financial services,

possibility that the government might effectively veto access to relevant evidence would exert an *in terrorem* effect on defendants, encouraging guilty pleas on weak prosecution evidence and reducing courts to the ministerial role of rubber-stamping charging decisions by prosecutors.

The government's hardships are far less compelling than the prejudice to the defendant or the threats to the integrity of the legal system that could result from continuing the prosecution. Requiring the defendant, as in *Moussaoui*, to make a specific proffer regarding the relevance of the information sought<sup>253</sup> minimizes the ability of a defendant to secure strategic advantage by frivolously seeking access to a witness in government custody. Moreover, given the conditions the court imposed on the defendant's access to bin al-Shibh, the government need only make a generic argument about disrupting interrogation.<sup>254</sup> Finally, dismissal would not be unduly harsh on the facts here, since the government acknowledged it had notice that this remedy would be a possible consequence of its decision to decline to make bin al-Shibh available.<sup>255</sup> Deciding against dismissal, the court cited its unwillingness to require the government to write off the "unprecedented investment of both human and material resources in this case."<sup>256</sup> Such reluctance ignores what the court found abundantly clear with respect to the charges carrying the death penalty: the government's predicament was a product not of necessity but of its own intransigence.<sup>257</sup>

Moreover, the sanctions imposed by the court do not sufficiently reflect the balance of hardships for the defendant. Although barring the death penalty in the case does reduce the gravity of harm, potential hardships persist, particularly because the remaining charges carry the possibility of a life sentence.<sup>258</sup> As noted above, the court fails to explain why bin al-Shibh's

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lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials").

<sup>253</sup> See *Moussaoui*, 282 F. Supp. 2d at 286 (finding that the defense made "sufficient showings" of the relevance of bin al-Shibh's testimony).

<sup>254</sup> Indeed, at least one other court, discussing access of a military detainee in the United States to his attorney, has characterized as "conjecture" the government's contention that consultation with an attorney would compromise interrogation of the detainee. See *Padilla v. Bush*, 233 F. Supp. 2d 564, 603-04 (S.D.N.Y. 2002), *cert. granted*, 124 S. Ct. 1353 (Feb. 20, 2004).

<sup>255</sup> See *United States v. Moussaoui*, 333 F.3d 509, 515-16 (4th Cir. 2003) (holding that the district court's sanction of the government was necessary to confer subject matter jurisdiction on the appellate court).

<sup>256</sup> See *Moussaoui*, 282 F. Supp. 2d at 483.

<sup>257</sup> *Id.* at 486-87 (striking the government's notice of intent to seek the death penalty, and observing that the government's "refusal to comply" with court orders regarding access to witnesses triggered the court's sanction).

<sup>258</sup> *Id.* at 487 (acknowledging that "[t]he defendant remains exposed to possible sentences of life imprisonment").

testimony is any less relevant to these charges. Taking the death penalty off the table does not obviate the hardship caused by a life sentence based upon an erroneous conviction.

An analysis closer to the heart of institutional equity would have focused on two factors in determining the balance of hardships. First, the defendant must make a specific proffer regarding the relevance of the evidence sought. Second, the imposition of reasonable conditions on access to the detained witness must be sufficient to vindicate the government's legitimate national security concerns. In *Moussaoui*, both standards were met. At that juncture, permitting the government to bar access to evidence irremediably taints subsequent proceedings whether the maximum sentence attendant upon conviction is death or life.

Considering the likelihood of false positives, the adequacy of existing remedies for both the government and the defendant, and the balance of hardships, the government's failure to provide access to a crucial witness requires dismissal of *all* of the government's charges against Moussaoui.<sup>259</sup> By stopping short of this remedy, the district court in *Moussaoui* goes through the motions of institutional equity but misses its core. A less equivocal commitment is necessary to put exigency in its place.

### C. Access to Evidence in Military Tribunals

The district court's compromise in *Moussaoui* may have been in part a response to the government's hints that dismissal of all charges against Moussaoui would have led to proceedings against Moussaoui in a military tribunal.<sup>260</sup> The Supreme Court has indicated in *Ex parte Quirin* that the

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<sup>259</sup> The government also has argued that the court has no jurisdiction to rule on Moussaoui's access to bin al-Shibh, whom the government is holding outside United States territory. This argument, however, is also unpersuasive. Precedent makes clear that the relevant jurisdictional fact here is not the location of the *witness*, but the location of the *defendant*. See *Johnson v. Eisentrager*, 339 U.S. 763, 790 (1950) (holding that the Court lacked jurisdiction over habeas petition brought by individuals apprehended and tried by military commissions outside the United States); see also *Gherebi v. Bush*, 262 F. Supp. 2d 1064, 1073 (C.D. Cal. 2003) (holding that the court lacked jurisdiction over habeas petition brought on behalf of detainees at the Guantanamo Bay Naval Base in Cuba); cf. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 459-73 (2002) (arguing that the jurisdictional distinction between cases within U.S. territory and cases outside that territory has been rendered obsolete by technology's eclipse of geography). The defendant in *Moussaoui* is concededly within the territorial United States—indeed, the government apprehended him here and kept him here with immigration and, ultimately, criminal charges. 282 F. Supp. 2d at 483. The court may lack jurisdiction to order the government to produce the witness held extraterritorially on pain of contempt. The location of the defendant and the proceeding, however, confer jurisdiction upon the court to take appropriate measures, including dismissal of the charges, to avoid prejudice to the defendant resulting from the government's position.

<sup>260</sup> See Shenon, *supra* note 74 (indicating judicial awareness that dismissal of



framers did not intend to disturb the specialized set of procedures relating to prosecutions of violations of the law of war.<sup>261</sup> Under *Quirin*, therefore, the Sixth Amendment does not apply to proceedings in military tribunals, which are conducted without a jury.<sup>262</sup> Without safeguards to serve in the Sixth Amendment's stead, a dismissal of the charges against a terrorism defendant in a civilian court would become merely an occasion for the government to conveniently exit to another tribunal where it could work its will more effectively.

Institutional equity would not preclude the establishment of military tribunals for the adjudication of alleged violations of the laws of war.<sup>263</sup> Military tribunals of appropriately tailored jurisdiction are not necessarily inconsistent with a constitutional regime. Constitutional democracies such as the United States are signatories to international instruments setting out the laws of war that prohibit the killing of innocents and disallow prisoner of war status to combatants serving an entity that violates this injunction.<sup>264</sup> As the

Moussaoui's case would likely result in his prosecution before a military tribunal).

<sup>261</sup> 317 U.S. 1, 39-41 (1942) (distinguishing military tribunals and Article III courts by identifying the different constitutional procedures that apply).

<sup>262</sup> *Id.* (discussing the Sixth Amendment in relation to military tribunals).

<sup>263</sup> Scholars have engaged in extensive debate on this issue. Compare Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 613-20 (2002) (arguing that military tribunals are appropriate under international law), Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249, 249-50 (2002) (arguing the validity of the Administration's Military Order establishing military tribunals), and Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 274-75 (2002) (discussing statutory authority for military tribunals), with Katyal & Tribe, *supra* note 5, at 1267-77 (arguing that express legislative authority, including declaration of war, is required), Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653, 656-57 (2002) (criticizing *Quirin*), and Turley, *supra* note 5, at 735-39 (same).

<sup>264</sup> See, e.g., *United States v. Lindh*, 212 F. Supp. 2d 541, 557 (E.D. Va. 2002). The *Lindh* court employed the Geneva Convention's four-pronged test, under which combatants, to acquire "combatant status," must:

- 1) have a fixed command structure,
- 2) wear a common uniform, emblem, or insignia,
- 3) carry arms openly, and,
- 4) comply with the law and customs of war.

Geneva Convention, *supra* note 154, art. 4(A)(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138-40. Under the Geneva Convention, combatants without uniforms may still be considered lawful if they have taken up arms "spontaneously" to resist an invading military force and respect the laws of war. *Id.* 6 U.S.T. at 3322, 75 U.N.T.S. at 138-40. A federal court has found that this provision does not confer prisoner of war status on members of the Taliban, since they violated the laws of war by targeting civilians. See *Lindh*, 212 F. Supp. 2d at 557-58.

*Quirin* Court observed, the United States' use of military tribunals to adjudicate violations of the laws of war dates from the Revolutionary War and was familiar to the framers.<sup>265</sup> Individuals such as the September 11 hijackers, who concealed their identities and intentions to facilitate the killing of innocents on behalf of a transnational network, qualify as "enemy belligerents" not materially different from the Nazi saboteurs whose trial before a military tribunal the Supreme Court authorized in *Quirin*.<sup>266</sup> Just as an institutional equity approach would find implied legislative authority in Congress's Joint Resolution after September 11 for the bounded detention of alleged enemy combatants subject to procedural safeguards, it would find authority for military tribunals similarly cabined.<sup>267</sup>

An institutional equity approach will be most helpful in determining what safeguards apply to the conduct of military tribunals. A court will consider first the likelihood of a false positive outcome. As noted above, the Court on habeas review has interpreted the jurisdiction of military tribunals narrowly to encompass cases of "enemy belligerents" who have committed violations of the law of war.<sup>268</sup> In *Quirin*, for example, the Court denied relief based on the facts conceded by all parties that petitioners entered United States territory "in time of war" on a mission designed to destroy property in the United States "used or useful in prosecuting the war."<sup>269</sup> The Court distinguished *Ex parte Milligan*,<sup>270</sup> a case heard immediately after the Civil War, which held on habeas review that a military tribunal lacked jurisdiction to try a long-time Indiana resident for sedition when civilian courts were functioning properly; the Court determined that Milligan was "not . . . a part of or associated with the armed forces of the enemy."<sup>271</sup>

Moussaoui's case is close enough to Milligan's to require a searching review on habeas of evidence supporting a military tribunal's assertion of jurisdiction. Moussaoui, in contradistinction to Milligan, is not a United States

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<sup>265</sup> See *Quirin*, 317 U.S. at 31 & n.9 (noting the case of British Army Major John Andre, who was tried and convicted before a military commission convened by George Washington in 1780 after being apprehended within United States lines in disguise and with false papers on a mission to contact the traitorous General Benedict Arnold).

<sup>266</sup> See *id.* at 15-17 (authorizing jurisdiction to the military commission based on the "law of war," which includes crimes "anywhere 'within the lines of a belligerent'").

<sup>267</sup> See 10 U.S.C. § 821 (2000) (reenacting Article 15 of the Articles of War after *Quirin*'s interpretation of Article 15 as authorizing military tribunals).

<sup>268</sup> As the Court indicated in *Quirin*, habeas always lies to raise the issue of the legality of an individual's confinement within United States territory. 317 U.S. at 24. The Court will therefore hear the petition, despite the failure of the President's Military Order, like Roosevelt's Order during World War II, to expressly allow for habeas review.

<sup>269</sup> *Id.* at 36-37.

<sup>270</sup> 71 U.S. 2, 121-27 (1866) (indicating the boundaries between the need for martial law and the protections of the Constitution).

<sup>271</sup> *Quirin*, 317 U.S. at 45 (limiting *Ex parte Milligan* to the facts and circumstances of that case).

citizen and has acknowledged that he is a member of Al Qaeda.<sup>272</sup> Moussaoui claims, however, that his mission, designated by bin al-Shibh, concerned training not for the September 11 attacks but for future attacks abroad not necessarily involving United States nationals or property.<sup>273</sup> Although President Bush's Military Order asserts authority to try any member of a terrorist organization in a military tribunal, allowing mere membership to support military tribunal jurisdiction would create a far-reaching forum beyond the narrow range of actions constituting enemy belligerency under the case law.<sup>274</sup> To support jurisdiction, the government would need to make a *prima facie* showing that a defendant, like the petitioners in *Quirin*, sought clandestinely to injure persons or property within the United States on behalf of a foreign power or entity, including a terrorist organization such as Al Qaeda.<sup>275</sup> This jurisdictional threshold reinforces the centrality of the exculpatory information Moussaoui seeks from bin al-Shibh.

The adequacy of remedies element falls into place upon recognition of the importance of access to exculpatory evidence in ascertaining the jurisdiction of a military tribunal. Suppose a defendant can counter the government's effort to make a *prima facie* showing that he is an enemy belligerent. Under *Milligan*, the government has an adequate remedy: trial in civilian courts on charges of providing material support to a terrorist organization.<sup>276</sup> Admittedly, prosecution on this basis would not result in the death penalty or a life sentence.<sup>277</sup> In a constitutional democracy, however, the government should hesitate to select a forum based solely on an *a priori* view of the desirability of a particular punishment.

The balance of hardships tilts in the same direction. The government must assert that even the generic arguments about disruption of interrogation they

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<sup>272</sup> See Shenon, *supra* note 74 (reporting Moussaoui's admitted ties to Al Qaeda and loyalty to Osama bin Laden).

<sup>273</sup> *United States v. Moussaoui*, No. Cr-01-455-A, 2003 WL 21263699, at \*1 (E.D. Va. Mar. 10, 2003).

<sup>274</sup> See generally Katyal & Tribe, *supra* note 5 (highlighting the fallacies of President Bush's Military Order in light of relevant law).

<sup>275</sup> See *Quirin*, 317 U.S. at 30-31 (distinguishing between "lawful and unlawful combatants," and proclaiming jurisdiction of military tribunals over unlawful combatants).

<sup>276</sup> While some courts have found particular terms such as "personnel" in the definition of material support to be vague, see, e.g., *Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d 382, 404 (9th Cir. 2003), Moussaoui's own admission that he came to the United States with the specific intent to receive training for future violence on Al Qaeda's behalf allays the concerns about fair notice that drive vagueness doctrine. See Margulies, *Virtues and Vices*, *supra* note 10, at 205-06 ("[T]he Constitution would allow the government to apply the term 'personnel' to an individual employed by [a designated terrorist organization such as Al Qaeda] or under its control who knowingly assists the organization.").

<sup>277</sup> See 18 U.S.C. § 2339A(a) (2000) (imposing as a penalty "[a fine] under this title, imprison[ment for] not more than 15 years, or both).

have already raised in federal court are sufficient to defeat access, under the implied authority provided by the Congress's Military Force Authorization of September 2001. The petitioner, however, can counter with the mandate under the federal statutes establishing habeas corpus jurisdiction that courts "'dispose of the matter as law and justice require' . . . ."<sup>278</sup> Courts should not lightly assume that Congress would, upon the Executive's mere assertion of exigency, dispense with habeas petitioners' "opportunity to present and contest facts."<sup>279</sup> Taking the government on faith would also undermine the Court's integrity in a manner far more fundamental than the *ex parte* contacts in *Quirin* between the government and members of the Court,<sup>280</sup> which an institutional equity perspective would view as largely cured by the undisputed factual predicate that supported military jurisdiction in *Quirin*.<sup>281</sup>

Deferring to the government would also yield the opportunity costs associated with lack of concern for principles of fairness built into international law.<sup>282</sup> If the United States wishes to foster and maintain the cooperation of other nations in antiterrorism efforts, it should demonstrate its commitment to consistency with international norms in the conduct of military tribunals. The chorus of criticism that greeted the Military Order establishing the tribunals<sup>283</sup> has squarely placed the burden of proof on the United States in the court of world opinion. On this view, fairness is a strategic as well as legal imperative,<sup>284</sup> undercutting the Executive's assertion of exigency as a

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<sup>278</sup> *Padilla v. Bush*, 233 F. Supp. 2d 564, 602 (S.D.N.Y. 2002) (citing *Harris v. Nelson*, 394 U.S. 286, 300 (1969) (quoting 28 U.S.C. §§ 2243, 1651(a) (2000))), *cert. granted*, 124 S. Ct. 1353 (Feb. 20, 2004).

<sup>279</sup> *See id.* at 601-02. The Due Process Clause's guarantees of fairness inform this interpretation of the habeas statute's mandate. *Id.* at 601 (stating that a procedural due process inquiry involves consideration of the private interest affected, the state's interest, and "'the risk of an erroneous deprivation . . . [coupled with] the probable value . . . of additional or substitute safeguards'" (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))).

<sup>280</sup> *See* Turley, *supra* note 5, at 734-43 (exposing the inadequacies of the *Quirin* precedent and its limits as applied to the actions of the Bush administration).

<sup>281</sup> *Cf.* Katyal & Tribe, *supra* note 5, at 1280-93 (distinguishing *Quirin* from potential disputes about President Bush's Military Order).

<sup>282</sup> *See* Protocol I: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 5, 1125 U.N.T.S. 37, 37-78 (requiring fairness in trials of unlawful combatants); Orentlicher & Goldman, *supra* note 263, at 661-62 ("President Bush's Military Order does not even purport to provide [the] safeguards [established in Protocol I].").

<sup>283</sup> *See* Goldsmith & Sunstein, *supra* note 263, at 277 (pointing to concerns of constitutionality and infringement on civil liberties provoked by the Bush Military Order).

<sup>284</sup> *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 110, 115-17 (Richard Delgado ed., 1995) (discussing the role played by concern about perceptions of American legitimacy during the Cold War in the development of civil rights law); *cf.* Margulies, *Regime Change*, *supra* note 153 (arguing for

monolithic force.

Taking the likelihood of false positives, the adequacy of remedies, and the balance of hardships, the path of institutional equity is clear. An Article III court or a military tribunal seeking to prove that it took guidance from a body of principles transcending any particular appointing authority<sup>285</sup> would order the government to provide a defendant with reasonable access to sources of exculpatory evidence. Only this result will accord proper weight to exigency, equality, and institutional integrity.

### CONCLUSION

A case like *Moussaoui* demonstrates the challenges crises yield for courts. Procedures that, even in normal times, secure only a grudging toleration from the public seem like quaint artifacts government can no longer afford. Indeed, the values of fairness and process that are the institutional stock in trade of courts appear as obstacles, particularly where, as in antiterrorism efforts, the disputes that courts are called upon to adjudicate involve the war and foreign affairs powers committed by the Constitution to the political branches. This image of judicial irrelevance has attained such currency that commentators concerned with the preservation of constitutionalism in crises look elsewhere as a matter of course.

Those asserting judicial irrelevance—including both political officials seeking to expand government power and oppositional groups hoping to take public indignation to the streets—act hastily when they write off the courts. Crises such as the September 11 attacks require a governmental response that integrates three core criteria: exigency, equality, and systemic integrity. Exigency refers to the need for flexibility in detecting and deterring future danger. Equality warns of the temptation to create false positives by singling out members of vulnerable groups. Integrity embodies the vigilance about false positives that fearful or arrogant officials can sacrifice on the altar of exigency. Integrating these criteria has historically been the obligation of the judiciary.

Courts have not performed this daunting task with uniform success. Deference to exigency has often carried the day, spawning episodes like *Korematsu* that submerge democratic values. In reaction, a few courts and commentators have permitted their distrust of deference to move too far in the direction of a doctrinaire absolutism. Ironically, the absolutists have emerged at the same unhappy juncture as champions of deference, disdaining the

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importance of multilateral transitions that reflect heightened American commitments to inclusion and accountability).

<sup>285</sup> See Orentlicher & Goldman, *supra* note 263, at 659-60 (arguing that military tribunals are inherently unfair because “[w]hen active duty military officers assume the role of judges, they remain subordinate to their superiors”). But see *Ex parte Quirin*, 317 U.S. 1, 39-45 (1942) (finding no inherent unfairness in military tribunals, and noting their long history well known to the framers); Goldsmith & Bradley, *supra* note 263, at 249-50 (same).

onerous job of accommodating changing needs to democratic wisdom.

The conception of institutional equity advanced in this article reflects a more pragmatic tradition in American law. This tradition, embodied in seemingly disparate cases such as *Milligan*, the *Steel Seizure Case*, and *Zadvydas*, acknowledges that courts weighing the legality of emergency measures must exercise equitable discretion that integrates institutional values and prerogatives into a "workable government."<sup>286</sup> On this account, courts deciding issues such as the scope of the government's authority to detain individuals as enemy combatants must use the flexibility found in the intertwined jurisprudence of remedies and habeas corpus to reconcile exigency, equality, and integrity.

The jurisprudence of remedies and habeas offers guidance to courts practicing institutional equity. Three factors are paramount: the likelihood of false positives, the adequacy of less intrusive remedies, and the balance of hardships struck between factors such as the consequences of seeking express rather than implied legislative authority, the avoidance of constitutional questions, and consistency with international law norms. Taken together, these factors form a model of practical judgment that rejects the tempting certainties of deference or absolutism.

Assessing the likelihood of false positives is a central element in this model. As cases like *Milligan*, *Quirin*, and *Zadvydas* demonstrate, courts will find a way to review the essential fairness of individuals' adjudication and confinement, even when exigent measures, such as procedures establishing military tribunals, fail to provide for such review. The adequacy of existing remedies is also important. In cases like *Milligan* and the *Steel Seizure Case*, the Court rejected exigent measures at least in part because existing remedies, like the civilian court system in *Milligan* or a statutory cooling-off period and the ability to shut down noncompliant plants in the *Steel Seizure Case*, seemed to be sufficient to meet the need. Balance of hardships is a more nuanced calculus. Often, the Court will use limits on the duration of detention to harmonize interests. Courts should also tailor default devices such as clear statement rules to preserve the Executive's room to maneuver in matters of war or foreign policy, while imposing constraints that reduce the possibility of abuse and harmonize exigent measures with international law.

Courts can apply institutional equity to resolve some of the most challenging issues of law and terrorism. Institutional equity would require procedural safeguards such as time limits, evidentiary proceedings, and access to counsel in connection with the detention of alleged "enemy combatants" such as Jose Padilla. Institutional equity would also require that the government grant terrorism defendants such as Zacarias Moussaoui access to exculpatory evidence subject to conditions that protect the public interest and that courts dismiss all charges where the government's denial of access prejudices a

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<sup>286</sup> See *Youngstown Sheet & Tube Co. v. Sawyer* [The *Steel Seizure Case*], 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

defendant's right to a fair trial.

Finally, institutional equity would uphold a defendant's access to exculpatory evidence in proceedings before a military tribunal based on the statutory mandate of habeas courts to do what "law and justice requires."<sup>287</sup> At a minimum, courts should require that a defendant before a military tribunal have access to evidence regarding jurisdictional facts such as whether a defendant was acting as an "enemy belligerent" seeking to injure United States property or persons. The focus on jurisdictional facts would ensure that the government reserved military tribunals for violations of the laws of war as manifest as those committed by the defendants in *Quirin*. Without such a jurisdictional showing, courts balancing the hardships would relegate the government to the venerable alternative embraced in *Milligan*: trying the defendant in a civilian court.

Courts charged with reconciling exigency, equality, and integrity after September 11 do not have an easy assignment. Uncritical deference is far less taxing. In responding to deference's abdication of responsibility, institutional equity is not without its discontents. As the district court decision in *Moussaoui* demonstrates, attempts at harmonizing values can sometimes mask continuing harm to rights. All that institutional equity can offer is a framework for the vigilance required of courts, commentators, and the public. What remains is the practice necessary to both respond to crises and preserve the continuity of constitutional traditions.

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<sup>287</sup> 28 U.S.C. § 2243 (2003).

