6 Judicial Reaction to the Post-9/11 Legal Responses

> I know of no duty of the Court which it is more important to observe, and no powers of the Court which it is more important to enforce, than its power of keeping public bodies within their rights. The moment public bodies exceed their rights they do so to the injury and oppression of private individuals.
>
> —Nathaniel Lindley, English jurist,
> *Robert v. Gwyrfai District Council* (1899)

> A court which yields to the popular will thereby license itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will.
>
> —Justice Felix Frankfurter, U.S. Supreme Court,
> *American Federation of Labor v. American Sash and Door Co.* (1949)

In the aftermath of the September 11 terrorist attacks in the United States, federal authorities were quickly presented with the problem of how to legally handle the diverse group of individuals taken into custody—from American citizens fighting on foreign battlefields to Americans at home with allegiances to al Qaeda, from foreign nationals of Islamic faith inside the United States to foreign combatants caught during the invasion of Afghanistan. What happens to them? Are they all treated similarly? Do they all have the same basic set of legal rights? Should they be prosecuted, detained for questioning, deported, or held indefinitely during hostilities?

Initially, there was a determination that Americans captured at home or abroad on the wrong side of the government's war on terror would be tried in regular courts, as would foreign nationals captured inside the United States; however, foreign al Qaeda and Taliban members caught abroad would be detained as "unlawful combatants," and unsympathetic Islamic foreigners found in violation of INS regulations would simply be deported.

Thus, John Walker Lindh, the American Taliban, and Zacarias Moussaoui, a French national al Qaeda member caught in Minneapolis, were arraigned and charged in federal courts. However, as the cases against them began to simultaneously unfold, tapping more government resources and risking exposure of intelligence data, the administration decided to switch tracks and to begin shunting Americans into military imprisonment for indefinite detention without access to counsel instead of facing the specter of an unpredictable and time-consuming adversarial process. Consequently, Yaser Hamdi, another American Taliban, and Jose Padilla, an American al Qaeda member, subsequently found their way into naval brigs instead of courtrooms.[1]

So who's job is it to protect individual liberties from being trampled into the dust by the government in its zealous pursuit of bogeymen, be they communist sympathizers during the cold war or terrorist sympathizers during the war on terror? Since the days of John Marshall, the federal judiciary has recognized its constitutional responsibility to tell Congress and the president when they are stepping over the line delineating their respective powers and to order them to take a step back. Several initiatives have been undertaken in court both by and against the government in its war on terror. However, due to the reactive and deliberative nature of our judicial system, this branch of government necessarily responds more slowly to events than do the other two branches.

Thus, two years after the attacks, there has been no meaningful constitutional challenge to the USA Patriot Act or other legislative initiatives; the executive has not yet empanelled any military tribunals; most of the thousand INS detainees have been released or deported; the Lindh case has been settled; the Moussaoui case has been stayed; Hamdi and Padilla have been relegated to solitary confinement; and the attorney general's aggressive detention, surveillance, and deportation programs have enjoyed some judicial sup-

port and some sporadic judicial resistance—yielding decidedly mixed legal results.

Nonetheless, it remains useful to survey the current lay of the post-9/11 judicial landscape, if for no other purpose than to gauge the potential involvement of that branch and to get a sense of where litigation may ensue and what the outcome may be. An inseparable corollary to this challenge involves the timeliness of judicial reaction. Almost 140 years ago, the Supreme Court defended the continued application of constitutional protections during wartime in *Ex Parte Milligan:*

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false.[2]

That seminal case is still cited today by constitutionalists but is sought to be avoided by the current administration in its conduct domestically of the war on terror. During the Civil War, one of the many powers President Lincoln accrued to the executive as a wartime exigency was the power to order summary military detention of civilians for the duration of hostilities and even trial by military tribunal. When this power was challenged as unconstitutional absent legislative assent by Chief Justice Taney in the 1861 *Ex Parte Merryman* decision, Lincoln ignored the opinion—but released Merryman anyway and later secured Congress's retroactive permission to suspend habeas corpus protections.[3]

In 1866, a year after the war had ended and Lincoln had died, the Supreme Court returned to the issue in the *Milligan* case, cognizant of the fact that such problems could be sorted out better in the absence of hostilities or immediate threats to the nation's survival:

> The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the government and the fundamental principles of

American liberty. During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.[4]

In their decision, the Court recognized the government's need to detain people who posed an immediate threat to the country but agreed with Taney's earlier assertion in *Merryman* that a national emergency, such as recent war, could not sanction the military detention and trial of a civilian not subject to military law or the laws of war when federal civil courts were open and functioning to hear criminal accusations. Milligan was a U.S. citizen who lived in Indiana for twenty years (not a zone of hostilities during the war) when he was arrested at his home in Indianapolis by the military in 1864, held in "close confinement," charged with treason, tried by military tribunal in 1865, and sentenced to hang.

This time the executive was acting pursuant to legislative authority by way of the 1863 Habeas Corpus Act. However, the Court found the law's provisions to have been misapplied by the government. Moreover, indefinite detention was not allowed: "it was not contemplated that such person should be detained in custody beyond a certain fixed period, unless certain judicial proceedings . . . were commenced against him."[5]

Specifically, the act directed the secretaries of state and war to furnish lists of persons who they thought should be held in custody to Article III judges in those jurisdictions where the persons were held. If a grand jury convened and adjourned without indicting, then the person was to be discharged. Moreover, the executive's refusal to issue the lists could not operate to the detriment of those detained and not indicted because the unindicted individuals were equally entitled to discharge twenty days after the time of their arrest and the termination of the grand jury session.[6]

The government tried to exclude Milligan from the terms of this act by characterizing him as a prisoner of war; however, the Court was not persuaded:

> It is not easy to see how he can be treated as a prisoner of war. . . . If in Indiana, he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offense, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?[7]

However, the principle derived from *Milligan*—that Americans cannot be detained by and subjected to military jurisdiction if they are not prisoners of war when civilian courts are open to hear charges against them—has been skirted thus far by the Bush administration. That principle was not overturned when the Supreme Court heard a similar case in 1942 (*Ex Parte Quirin*), since the American Nazi in that matter was captured as a prisoner of war in uniform coming ashore to attack the United States. Perhaps prophetically, the earlier *Milligan* Court noted:

> This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation.[8]

Two years have passed since the terrible events of September 11, 2001. American federal courts must rouse themselves to the task of checking the executive's power grab ostensibly justified in terms of national security. They need not wait for the end to the war on terror, as the Supreme Court waited until after the Civil War, to return balance to the Constitution. It must be returned now.

Article III Federal Courts

Long ago, the U.S. Supreme Court declared, "ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end."[9] In practice, this premise is embodied in substantive and procedural mandates derived from our constitutional system of government and applicable to all criminal proceedings.

Article III federal courts are the bulwark of freedoms in our legal system, ensuring the basic canon of the Fourth, Fifth, and Sixth Amendments against illegal searches, seizures, and self-incrimination and guaranteeing a speedy trial, access to court, access to counsel, access to a jury, and the right to confront adverse witnesses and evidence. The panoply of protections emanating from these amendments breathes life and meaning into the fundamental notions of due process and equal justice and is applicable to all who come within the jurisdiction of American courts.

The challenge in the post-9/11 aggressive prosecutorial environment will be ensuring that two centuries of precedent interpreting constitutional protections and carving a delicate balance between truth seeking and equal justice in the criminal process are not vitiated in the name of expediency and scapegoating.

Fumbling into the Court System: The Lindh and Moussaoui Cases

The first case concerns John Walker Lindh, an American citizen and the son of a wealthy San Francisco area family.[10] He was captured in Afghanistan fighting for the Taliban. A convert to Islam after read-

ing the autobiography of Malcolm X, Lindh moved to Yemen, enrolled in a *madrasah*, and later answered the call to jihad—fighting with Islamic fundamentalist groups in Kashmir and Kunduz.[11] After his capture, Lindh was held for about a month in Camp Rhino outside Kabul and then transported back to the United States to face criminal charges for his actions on behalf of the Taliban, namely, conspiracy to kill U.S. nationals outside the United States, providing material support to a foreign terrorist organization, and engaging in prohibited transactions.[12] He was indicted in Virginia federal district court on February 5, 2002.[13]

Because Lindh was processed through the U.S. criminal justice system, he was entitled to the same constitutional protections afforded every U.S. citizen, including the right to counsel and the right to be fully advised of the charges against him.[14] Represented by competent criminal defense counsel, one of the first constitutional challenges to Lindh's detainment and prosecution alleged that the criminal charges were vague, ambiguous, and not sufficiently stated so as to provide fair notice of the charges against him. Consequently, Lindh's attorneys filed a motion for a bill of particulars requesting that the government identify the:

- nationals and military personnel he is alleged to have conspired to kill
- date, time, and place where he agreed to join the illegal conspiracy
- exact nature of the material support and resources he is alleged to have provided to the conspiratorial enterprise
- specific illegal activity he was alleged to have advanced by his support or services

Essentially, Lindh sought to compel the government to state its charges with more specificity to ensure the indictment alleged criminal conduct and was not simply a vehicle to prosecute him for mere association with an unpopular group.[15] The judge, however, rejected the defense motion.[16]

Lindh also attacked the government's use of incriminating statements allegedly made while he was a captive in Afghanistan.[17] The legal basis for these arguments was the fifty-five-day delay between Lindh's capture and his arrival in the United States, where he was

finally allowed access to legal counsel. Lindh alleged that he was subject to coercive interrogation tactics at Camp Rhino and held incommunicado for fifty-five days. Lindh further contended that, because there was no justifiable reason for the delay in presenting him for arraignment in U.S. court (even though the government had begun preparing its case against him), any statements made during that period of unlawful confinement should be inadmissible.

The case continued for five months with the government struggling to refine and present its case against Lindh while also maintaining the secrecy of classified information. Finally, on July 15, 2002, in a move that surprised most observers, a plea agreement between the government and Lindh was announced. Under the agreement Lindh pleaded guilty to two counts in the indictment (supplying services to the Taliban and carrying explosives in the commission of a felony) in exchange for serving two consecutive ten-year sentences and fully cooperating with the government in its investigation of al Qaeda. While prosecutors hailed the accord as eminently fair and a "victory in the war on terrorism," it did not escape notice that the government's willingness to bargain coincidentally escalated as constitutional infirmities in its case were gradually revealed.[18]

The second case concerns Zacarias Moussaoui, the suspected twentieth hijacker who failed to follow through on his part of the 9/11 terrorist attacks. Moussaoui, a thirty-five-year-old French national of Moroccan descent, was a member of al Qaeda and an alleged coconspirator of the nineteen Islamic hijackers who carried out the attacks that destroyed the WTC and damaged the Pentagon. In February 2001, Moussaoui entered the United States and enrolled in flight school in Norman, Oklahoma. However, he failed his training program and subsequently reenrolled at another flight school in Minnesota. While at the Minnesota school, Moussaoui expressed an unusual interest in learning to fly larger aircraft, constantly peppering his instructors with questions about specifications and technical operations. Eventually, Moussaoui's detailed questions relating to complex aircraft systems aroused suspicion, and those misgivings were relayed to the FBI. In August 2001, Moussaoui was arrested on visa and immigration violations.[19]

As evidence of his involvement in the 9/11 attacks mounted, Moussaoui was transferred to the federal prison in Alexandria, Vir-

ginia, where, on January 3, 2002, he was arraigned on six counts of conspiracy to commit murder and terrorism in connection with the terrorist attacks. Perhaps foreshadowing the bizarre twists and turns the case would eventually take, when apprised of the charges against him and asked how he would plead, Moussaoui refused "in the name of Allah" to enter a plea, prompting the judge to enter a not guilty plea on his behalf.[20]

In the ensuing months Moussaoui has flooded the court with handwritten motions impugning the motives and competency of his attorneys and making derogatory remarks about the trial judge in his case. Indeed, his invective against his court-appointed attorneys was so offensive that the judge eventually permitted Moussaoui to represent himself on the condition that he have an attorney act as his cocounsel.[21]

After a series of legal battles concerning whether Moussaoui's proceedings would be televised and whether he was competent to stand trial, Moussaoui shocked the court by electing to plead guilty to four of the charges against him, only to abruptly shift course when advised of the consequences of his guilty plea. Due to the wrangling over complex legal issues connected with the discovery phase of the case, Moussaoui's trial has been indefinitely delayed. However, in the ensuing months since Moussaoui's arrest and detention, the government's case against him has been plagued by a number of embarrassing missteps. For example, in an effort to comply with Moussaoui's right to receive certain information necessary to the preparation of his case, the government inadvertently left classified documents in his cell. Later, while retrieving those documents, federal marshals engaged in potentially incriminating conversations with Moussaoui without advising him of his right to remain silent.

At this writing, the parties appear to have reached a stalemate on the issue of access to material witnesses. Moussaoui is seeking to personally interview high-ranking al Qaeda member Ramzi Binalshibh, whose testimony Moussaoui claims will exonerate him of the charges against him. The government has refused such access on the grounds that national security interests might be jeopardized if the two men are permitted direct contact.[22] U.S. district judge Leonie Brinkema ruled that the testimony of the witness would be relevant and necessary to Moussaoui's defense and ordered the

government to produce him for a deposition carried out under conditions set by the *government*. Dissatisfied with this outcome, the government appealed to the Fourth Circuit Court of Appeals, which ultimately determined that it does not have jurisdiction over the case until the government first refuses to comply with Judge Brinkema's order and she imposes penalties for their noncompliance. Judge Brinkema is currently considering penalties that could range from complete dismissal of the case to informing future jurors of the government's failure to comply with the court's order.

Implicit in the government's obstinancy is the looming threat that Moussaoui's case might be removed altogether from the civilian court and transferred into a military court, where presumably the pathway to execution will be paved with fewer obstacles. The prospect of removing Moussaoui's case to the military courts to avoid compliance with a district court order raises fundamental questions concerning the American criminal justice system's ability to handle terrorism cases, particularly those in which the defense might legitimately hinge on access to sensitive national security information. Indeed, as the Fourth Circuit succinctly observed,

> This appeal is one of extraordinary importance, presenting a direct conflict between a criminal defendant's right "to have compulsory process for obtaining witnesses in his favor," U.S. Const. amend VI, and the Government's essential duty to preserve the security of this nation and its citizens.[23]

As many courts have done in the past, Judge Brinkema's order adroitly strikes a balance between the competing concerns of due process and national security, yet the government steadfastly refuses to comply.

But, perhaps more importantly, the prosecution's noncompromising approach to the Moussaoui case brings into sharp focus America's commitment to equal justice under the law within its criminal justice system. To examine this issue, consider the likelihood that Moussaoui will receive a plea deal similar to John Walker Lindh's. After all, comparing the facts of the cases, Lindh was on the battlefields of Afghanistan, bearing arms, face to face with American soldiers, prepared to fight and presumably kill on behalf of his radical beliefs. By contrast, Moussaoui was, at best, a religious

zealot whose own ineptitude exposed him as a "suspicious" individual, leading to his arrest and, thereby, rendering him useless to the 9/11 plot. Indeed, his handwritten diatribes fashioned as court pleadings and his bitter outbursts in court have led many to question his mental competency.[24] Lindh's guilty conduct was witnessed firsthand by soldiers who captured him in Afghanistan, while Moussaoui's alleged guilt is contained in reams of documents yet to be presented at trial, and the government is seeking the death penalty against him.[25]

Both men are alleged to have known about the September 11 plot. Why then does it appear that the government is taking a hardline aggressive prosecutorial stance in Moussaoui's case? Could it be that Moussaoui is not only the alleged twentieth hijacker but ultimately symbolic of all the other 9/11 hijackers as well? America needs a 9/11 defendant, a physical being in the defendant's chair representing those who callously inflicted pain and anguish on innocent victims through heinous acts of terrorism. With his foreign status, physical appearance, demeanor, and resolute adherence to radical Islamic beliefs, Moussaoui fits the bill quite nicely. He is one of them, he knew them, he conspired with them, and for that he may pay with his life—through a military justice process if not though civil justice.

Americans as "Enemy Combatants": The Hamdi and Padilla Cases

> The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: "Take heed what thou doest—for this man is a Roman."
>
> —Robert H. Jackson, U.S. Supreme Court associate justice, *Edwards v. California* (1941)

It is psychologically troubling for Americans to learn that fellow Americans wish their country ill. It is more troubling to learn that these citizens would join organizations such as the Taliban and al Qaeda to carry their ill wishes into action. However, it is shocking to learn that our federal government is stripping U.S. citizens of their supposedly guaranteed due process rights under the banner of national security. Yet that is exactly what is happening to Jose

Padilla and Yaser Hamdi—leading to what may become a split in the federal circuit courts over whether the executive branch is acting beyond its power by affixing labels to citizens that effectively suspend their constitutional rights.

Jose Padilla, a.k.a. Abdullah al-Muhajir, is of Hispanic origin. He is an American citizen, born in Brooklyn, who recently left the country and joined al Qaeda. He was apprehended in May 2002 reentering the country at Chicago with plans to allegedly detonate a "dirty" radiological bomb in furtherance of al Qaeda's unholy cause. Attorney General Ashcroft first labeled him a "material witness" as a pretext to hold him indefinitely without prosecuting; however, when a New York federal judge ruled such use of the material witness statute inappropriate, Padilla was redesignated an "enemy combatant" and turned over to the DOD. He has since been denied access to counsel and is undergoing interrogation in a South Carolina military prison.[26]

When he was taken into custody, Attorney General Ashcroft announced at a news conference in Moscow, where he was visiting, "We have captured a known terrorist . . . [and have] disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive 'dirty bomb.'"[27] However, without access to a lawyer, without access to civil courts, without access to anyone beyond his military captors, Padilla has no method of challenging the attorney general's announcement. Thus, his indefinite detention (now going on two years) may amount to summary conviction by announcement.

Yaser Esam Hamdi is of Arabic origin, born in Louisiana when his father was employed there. He is an American citizen who left the country with his Saudi family as a child. It is unclear whether he ever returned. But he eventually joined al Qaeda and sought to do harm to fellow Americans. He was captured in Afghanistan, transferred to Guantanamo Bay, Cuba, and then shuttled to a military base in Virginia upon discovery of his citizenship. He too has been labeled an "enemy combatant," and a decision by a federal judge that he is entitled to a public defender is now being challenged by the DOD on appeal.[28] Meanwhile, he continues to linger in solitary confinement in a holding facility in South Carolina after being transferred from Virginia in July 2003.

What will become of the two Americans detained indefinitely, without access to counsel, incommunicado—in direct violation of

their Fifth Amendment due process rights and Sixth Amendment rights to counsel? If they are not tried in federal courts like Lindh, where can they be prosecuted? President Bush's military order establishing tribunals in the DOD currently excludes the possibility of trying American citizens[29]—a political concession designed to tamp down on public resistance to the order. In hindsight, it works to block trial of either Padilla or Hamdi by military tribunal unless the order is revised, which may be politically impossible.

Consequently, by labeling them "enemy combatants," the government must try them, if it decides to do so, before regular military courts under the UCMJ. This is provided for in the Geneva Convention.[30] But to take this route opens the door to criticism that American citizens are accorded treaty rights while non-Americans receive second-rate justice—because both Americans and non-Americans were captured as enemy combatants.[31]

Alternatively, the government can just throw away the key and let them languish indefinitely. So far, the government's justification has been an undisguised effort to extract information from them. As the DOJ argued in its case to dismiss Padilla's habeas petition, "The detention of enemy combatants is critical to preventing additional attacks on the United States, aiding the military operations, and gathering intelligence in connection with the overall war effort."[32]

In the case of enemy combatant Hamdi, whose cause has gone further in the courts than that of Padilla, Judge Robert G. Doumar of the federal district court in Norfolk, Virginia, twice ordered the government to allow Hamdi access to a lawyer. The government refused to comply and appealed the orders to the Fourth Circuit Court—which stayed the orders and returned the case to Judge Doumar, who then asked the government to show him evidence that Hamdi qualified as an enemy combatant. Frustrated that they did not receive a rubber stamp, the government refused to do this as well, claiming the need to protect classified information, and appealed that order.[33]

The Fourth Circuit Court of Appeals ruled on January 8, 2003, that because Hamdi was captured overseas fighting for the Taliban he could be held indefinitely as an enemy combatant by the military, effectively without access to an attorney, based solely on the government's assertion that he is one—and this cannot be challenged by him or anyone else acting in representative capacity.[34]

While acknowledging the continued right of judicial review even in wartime, the court essentially noted that this had little meaning given the sweeping deference due the president under the Constitution:[35]

> The constitutional allocation of war powers affords the president extraordinarily broad authority as commander in chief and compels courts to assume a deferential posture in reviewing exercises of this authority. . . . The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. In fact if deference is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain.[36]

Hamdi retains his habeas rights as an American citizen, but any inquiry into his detention must remain "extremely limited."[37] Indeed, the court denied Hamdi the right to challenge any facts presented by the government against him supporting his designation as an enemy combatant subject to indefinite detention. Moreover, the court held that Geneva Convention protections guaranteeing combatants the right to have their status reviewed by a competent tribunal were unavailable to Hamdi because those treaty provisions are not self-executing and, therefore, give no rise to individually assertable rights, only state and government rights.[38]

The Second Circuit Court of Appeals is considering similar arguments on Padilla's fate. Because he was being held in New York as a material witness before he was reclassified as an enemy combatant, that jurisdiction has remained seized of his case despite the government's attempts to transfer the case, as it has the prisoner, to South Carolina.[39] Directly contrary to the Fourth Circuit's decision in *Hamdi,* the lower court in Padilla's case found that he "has the right to present facts" refuting the government's assertions that he is an enemy combatant; thus he must have access to counsel for this purpose.[40]

However, if the Second Circuit rules similarly on appeal to the Fourth Circuit in *Hamdi,* those decisions could constitute a green light from the judicial branch for the administration to move ahead with creation of its proposed enemy combatant designation com-

mittee, first reported in 2002. For Americans suspected of false allegiance, the attorney general, secretary of defense, and CIA director will decide whether a suspect is to be relegated to indefinite detention in military custody as an enemy combatant. If the suspect is a foreigner, the national security advisor will join this new Ashcroft-Rumsfeld-Tenet triumvirate in its decision.[41]

So how does the government decide who is an enemy combatant? What are the criteria? That is for the administration to know and for Americans not to ask about. Solicitor General Ted Olsen, whose wife was killed in the 9/11 terrorist attacks, defends the decision to keep the criteria a secret: "There will be judgments and instincts and evaluations and implementations that have to be made by the executive that are probably going to be different from day to day, depending on the circumstances."[42]

Secret criteria, based on instinct, that change day to day? That sounds suspiciously like the secret and ever-changing criteria determined by congressional cabals led by Senator McCarthy a half-century ago to determine who was a communist sympathizer and then to publicly destroy them. Indeed, history should make us wary whenever a self-anointed portion of the government presumes to define "un-American" and then hold citizens accountable for activities that fall under such a designation.

Significantly, the only authority the government can show to support its retrograde detention policy is the sixty-year-old Supreme Court opinion in *Ex Parte Quirin.* There, the Court decided that Americans working in collusion with German Nazi saboteurs seeking to destroy industrial targets in the United States could be tried by military commissions instead of civilian courts.[43] Widely criticized, *Quirin* had rested on the trash heap of other infamous and unjust decisions like *Plessy v. Ferguson, (Dred) Scott v. Sanford,* and *Korematsu v. United States,* until it was resurrected by the attorney general in his desperate attempt to justify the detention policies of his department in the absence of any other authority.[44]

Politically, however, the legal position of indefinite detention is untenable in the long term. Nevertheless, it is the likely outcome for two of these U.S. citizens. The compelling question generated by this action concerns why indefinite detention of Americans by the military inside the United States is necessary. The only reason identified beyond the government's national security rationale deduced

by legal scholars is one of judicial efficiency—they simply can not or will not undertake the tremendous effort to mount full-scale prosecutions and discovery efforts in each of these cases and the many more that are likely to occur.[45] In effect, they may as well have shrugged and suggested that perhaps during "wartime" anything is possible—even in America.

It was wrong in the 1940s to inter 120,000 Japanese Americans without charges, evidence, trials, or the ability to demonstrate their allegiance to America. It was wrong in the 1950s to arrest, harass, and destroy the reputations of American "communists" without evidence of traitorous intent or false allegiance. It is wrong today to snatch Americans off the street, designate them as "enemies," and throw them into military brigs without access to counsel, courts, the evidence against them, or the opportunity to refute the designation, be they Taliban, communists, or Japanese.

But perhaps the most psychologically sinister aspect of how America is treating its own in this regard involves the debilitating degree of isolation visited upon them. Indefinite detention in military prison not only means that enemy combatants have no access to counsel—it means they have no access to the outside world whatsoever. Padilla's and Hamdi's respective families have had no contact with them since their confinement. This raises serious international human rights issues, ironically the very same issues raised by the United States on countless occasions against other countries.

So long as Padilla and Hamdi are considered viable intelligence sources and demonstrable threats to the country in its war on terror (according to the low threshold the government must meet), they amount to no more than isolated canaries in a cage with the drape pulled down. Having secured limited judicial acceptance of this practice, the Bush administration is now in the process of extending this treatment to foreign nationals within the United States.

Ali Saleh Kahlah al-Marri, a Qatari student pursuing a master's degree at Bradley University in Peoria, Illinois, was arrested by the FBI and charged in federal court with lying about his travels shortly after September 11, 2001, and with credit card fraud. But on June 23, 2003, the president issued an order declaring him an enemy combatant with alleged ties to al Qaeda and transferred him out of the civilian court system into military imprisonment on a navy brig in South Carolina.[46] Al-Marri's lawyers from his criminal case in Illi-

nois (suddenly without their client) have undertaken arguments in federal court there against the president's power to summarily pull defendants from the civilian criminal court system and transfer them to the military.

Consequently, the Seventh Circuit may emerge as a new judicial battleground in this ongoing battle the government is undertaking to secure favorable judicial opinions supporting its conduct. In an apparent decision to limit the possibility of more negative judicial reaction, however, the DOJ has requested transfer of the al-Marri case out of Illinois to the federal court in South Carolina—the current physical location of the defendant and, coincidentally, a jurisdiction that has already ruled favorably on the detention of Hamdi.[47]

Other Federal Court Rulings

Federal courts have begun ruling in cases beyond the headliners of Lindh, Moussaoui, and the enemy combatants. Several members of what the DOJ styles "al Qaeda sleeper cells" within the United States have been arrested and indicted in Oregon and New York.[48] District courts have also taken up cases involving the status of immigrants and closed deportation hearings within the INS system, as well as cases involving the ability of captured foreign detainees at Guantanamo Bay, Cuba, to petition for release.

Domestic Terrorist Cells: The Buffalo and Oregon Cases

On September 14, 2002, three days after the first anniversary of the devastating 9/11 terrorist attacks, federal law enforcement agents arrested six Arab American men in Lackawanna, New York, a Buffalo suburb. All of the suspects, who are American born and of Yemeni descent, were charged with operating a terrorist cell in western New York and knowingly and unlawfully providing material support to al Qaeda by attending a terrorist training camp in Afghanistan, where Osama bin Laden allegedly lectured the men about the alliance of the Islamic jihad and al Qaeda.[49]

Coincidentally, the Buffalo suspects are alleged to have attended the same terrorist training camp as John Walker Lindh, who, as part

of his plea arrangement with the government, agreed to cooperate fully with authorities investigating terrorism at home and abroad. It is not known what role Lindh might have played in leading the government to its investigations in Buffalo. Pleas of not guilty have been entered for all of the men, and their cases are currently pending in the federal criminal court system.[50]

A month later, four more Americans were arrested in Portland, Oregon, and indicted in federal court along with two others (one citizen extradited back to the United States from Malaysia and another noncitizen still at large) for plotting to join al Qaeda and Taliban fighters in their jihad against America.[51] The six individuals allegedly developed a plan to go to Afghanistan and take up arms against coalition forces, having trained with Chinese rifles in Oregon to prepare for the trip, but the plan never came to fruition.[52]

According to the FBI, there was no indication that the alleged members of the Portland cell sought to attack targets within the United States: "They had not gotten to a point where they were identifying targets or anything like that." The tip that led to these arrests came from a Hamas sympathizer of Palestinian origin who is serving thirty months in prison on weapons and fraud charges.[53]

Why weren't the alleged members of the Buffalo and Portland cells tagged with the label "enemy combatant" and transferred to the DOD? That is an open question. However, three possible reasons present themselves. First, there was clearly much more FBI surveillance undertaken in these cases, several months' worth actually, to build up a strong evidentiary case against them. In contrast, there was little evidence compiled against Hamdi and Padilla—certainly not enough to withstand the scrutiny of an Article III federal court.

Second, when the alleged terrorist cells in Buffalo and Portland were broken up and their cadre arrested, the courts hearing challenges in the Hamdi and Padilla cases had not spoken on the extent of the executive's power to do what it had done with those two citizens. Consequently, the cautious approach was to proceed along the path of charging these new defendants with multiple violations of Title 18 Section 2339 prohibiting support of a terrorist organization. But if the Second Circuit follows the lead of the Fourth Circuit and extends judicial approval of the government's enemy combat-

ant designation and detention policy to citizens captured in the homeland, it would be no surprise if the attorney general directs agents to detain and then turn over future terrorist-supporting suspects to the military.

Third, the secret criteria for designating enemy combatants may require positive action in furtherance of an attack. Hamdi was captured abroad with a weapon fighting against coalition forces, Padilla was captured in Chicago seeking targets for a radiological bomb plot, and al-Marri's alleged conduct is classified.[54] Conversely, there is no indication that any of the suspects apprehended in either Buffalo or Portland were physically participating in a terrorist action against the United States. Of course, this is mere guesswork since the criteria for deciding who falls into enemy combatant status are unknown to the public and could change on a daily basis according to Solicitor General Olsen.[55]

Nonetheless, the chief law that these and future defendants not designated as enemy combatants will face as they are prosecuted by assistant U.S. attorneys is a constitutionally problematic one. The Antiterrorism and Effective Death Penalty Act of 1996 criminalized providing "material support" to any group designated by the government as a terrorist group.[56] Material support is statutorily defined as providing to the illegal organization any of the following:

> [C]urrency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.[57]

According to David Cole of the Georgetown University Law Center, this statute is unconstitutionally overbroad—effectively chilling protected activities.[58] Moreover, he argues, the lack of any intent element in the crime itself unfairly relieves the prosecution of proving in court that defendants actually meant to do the country harm through their perhaps misguided actions:

> It allows the government to obtain convictions for so-called terrorist crimes without proving any intent to engage in or

further terrorism. The government need only show that the individual provided a proscribed group with some "material support," which . . . can be mere attendance at a training camp. The law is written so broadly that it would make it a crime to write a column or to file a lawsuit on behalf of a proscribed organization, or even to send a book on Gandhi's theory of non-violence to the leader of a terrorist group in an attempt to persuade him to forego violence.[59]

At least two federal district courts in California have ruled this part of the statute unconstitutional. Prior to the war on terror, in 1998, the court for the Central District of California held that the portion of the statute's material support definition in section (b) that prohibits providing personnel and training to terrorist organizations was impermissibly vague and thus stricken from the statute.[60] In that case, several American groups were "supporting" two foreign groups listed as terrorist organizations—the Kurdistan Worker's Party (PKK), an ethnically distinct secessionist group in southeast Turkey, and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka.[61]

The court's reasoning for finding the act vague was that the statute did "not . . . appear to allow persons of ordinary intelligence to determine what type of training or provision of personnel is prohibited. Rather, [it] appears to prohibit activity protected by the First Amendment—distributing literature and information and training others to engage in advocacy."[62]

Four years later, in June 2002, the federal district court in Los Angeles dismissed the DOJ's case based on the same statute against seven individuals accused of diverting charitable donations to the People's Mujahedeen[63]—a group implicated in the takeover of the U.S. embassy in Iran in 1979 that is still listed as a terrorist organization even though it opposes the current regime in Teheran.[64] The basis for the judge's determination that the statute was unconstitutional rested on the inability of such groups designated as "terrorist" to contest that designation:

> [T]he law gives these groups "no notice and no opportunity" to context their designation as a terrorist organization, a violation of due process, Judge Takasugi ruled. "I will not abdicate my responsibilities as a district judge and turn a

> blind eye to the constitutional infirmities" of the law. . . . Because the government made its list of terrorist organizations in secret, without giving foreign groups a chance to defend themselves, the defendants "are deprived of their liberty based on an unconstitutional designation that they could never challenge," he said.[65]

It is unclear whether the government will appeal this case, but it is clear that the administration cannot continue to rely principally on a flawed statute without risking the loss of significant convictions. Consequently, it would not be surprising to find this case taken up by the Ninth Circuit Court of Appeals—the first step in making its way to the Supreme Court; nor would it be surprising to hear Attorney General Ashcroft proposing some amendments to the existing law or new antiterrorism laws altogether in the next legislative session.

Immigrant Status: The Haddad and North Jersey Media Cases

> And if a stranger sojourn with thee in your land, ye shall not do him wrong. The stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself.
>
> —Leviticus 19:33

Attorney General Ashcroft, a devoutly religious man, turned this biblical guidance on its head when he said at a November 2001 DOJ press conference that "foreign terrorists who commit war crimes against the United States, in my judgment, are not entitled to and do not deserve the protections of the American Constitution."[66] Although defending the president's decision to keep noncitizen terrorist suspects captured abroad offshore and subject to an executive-controlled judicial system, the statement is indicative of the adminstration's mind-set in this regard.

During the months immediately following 9/11, the federal government dispersed its agents throughout the country to implement the largest single dragnet in American history. It succeeded in rounding up approximately twelve hundred men of mostly Arabic

and South Asian origin, whom it then detained for questioning. Many of these individuals were arrested for technical violations of their immigration status. No names were released of those detained, and all hearings on their immigration status and requests for deportation were held in secret.[67]

By November 2001, a federal gag order had been issued prohibiting officials from discussing the detainees and even forbidding defense attorneys from taking documents out of the courtroom. Due to the secrecy of the process, no government oversight or review of the actions occurred. There was no possibility of appeal from the hearings. Immigration courts, as executive branch bodies that are part of the DOJ—not part of the Article III federal judiciary—had no choice but to comply with the department's directives.

Several court challenges were mounted against the government's detention policies—specifically attacking the decision not to release the names of individuals held, the secrecy of the immigration hearings, and the misuse of the material witness statute to hold individuals indefinitely without filing charges against them and allowing them access to counsel. The results have been decidedly mixed, as the courts continue to wrestle with the proper balance between equal justice and national security. Consequently, a split in the circuits has occurred that can only be resolved with a Supreme Court ruling.

At the end of October 2001, the ACLU filed a request for information under the Freedom of Information Act (FOIA) concerning the identity of the individuals. The executive branch remained nonresponsive. In December the group filed suit in federal district court, seeking to compel the government's compliance with FOIA. To justify its secrecy, the DOJ argued that the nature of its actions was necessary for national security reasons—that identifying the detainees would alert terrorists as to how the investigation was proceeding and could aid in future terrorist plots. The decision by Judge Gladys Kessler came down in August 2002 against the DOJ, holding that the government had to release the names of the detained individuals. However, she stayed her order pending appeal.[68]

She noted that "secret arrests are a concept odious to a democratic society."[69] Judge Kessler's rationale rested on the importance of verification that the government was operating within the

bounds of the law, and it was her sworn duty as a member of the judicial branch to make sure that the executive branch acted appropriately:

> The court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. . . . [But] the first priority of the judicial branch must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish our democracy from a dictatorship.[70]

On behalf of Ashcroft's DOJ, an assistant attorney general chastised the judge for her ruling in a remarkably strong-worded statement that not only questioned the judge's patriotism but also accused her of helping terrorists succeed in their mission:

> The Department of Justice believes today's ruling impedes one of the most important federal law enforcement investigations in history, harms our efforts to bring to justice those responsible for the heinous attacks of September 11 and increases the risk of future terrorist threats to our nation.[71]

By the time of Judge Kessler's ruling, all but 74 of the detainees had been deported or released. Most, like the 131 Pakistanis who were secretly spirited back to their homeland on a chartered Portuguese jet, left the United States quietly, without fanfare and without a public hearing of their cases.[72] Later that month, the American Bar Association voted to oppose the secret detention of foreign nationals within the United States. Unfortunately, neither of these actions came in time to help the other 1,000 nameless individuals who were held, interrogated, and disposed of by the government without judicial or public scrutiny.[73]

Five months after the ACLU action was filed, the *Detroit Free Press* together with the *Detroit News* and Congressman John Conyers from Michigan commenced an action in Detroit's federal district court to open up the secret immigration hearings against Ann Arbor resident Rabih Haddad—a native of Lebanon who had overstayed his tourist visa. In April Judge Nancy G. Edmunds ruled in

favor of the newspapers to open the hearings. In so doing, she relied on both history and practice in the absence of law to the contrary:

> The statutory and regulatory history of immigration law demonstrates a tradition of public and press accessibility to removal proceedings. From the start of the federal government's regulation of immigration in the last quarter of the nineteenth century, the governing statutes and regulations have expressly closed exclusion hearings (i.e. hearings to determine whether an alien may enter the United States), but have *never* closed deportation hearings (i.e. hearings to determine whether an alien already within the country may remain).[74]

On appeal, the Sixth Circuit agreed with Judge Edmunds. The decision, handed down at the end of August, found that the modicum of enhanced national security argued by the government as a basis to continue deportation hearings in secrecy was vastly outweighed by society's interest in public and press oversight of how the government wields its delegated power. Indeed, Judge Damon J. Keith scolded the DOJ, stating that "democracies die behind closed doors."[75] He specifically emphasized the rationale of this important concept in his opinion:

> Since the end of the 19th Century, our government has enacted immigration laws banishing, or deporting, non-citizens because of their race and their beliefs. While the Bill of Rights jealously protects citizens from such laws, it has never protected non-citizens facing deportation in the same way. In our democracy, based on checks and balances, neither the Bill of Rights nor the judiciary can second-guess government's choices. The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty.
>
> Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them "special interest" cases. The Executive Branch seeks to uproot people's lives,

outside the public eye, and behind a closed door. . . . The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings.

When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment "did not trust any government to separate the true from the false for us" [citing prior Supreme Court opinions]. They protected the people against secret government.[76]

New Jersey's federal district court judge John Bissell essentially agreed with Judge Kessler's determination to open government immigration hearings when he ruled in May 2002 that the government could only close such hearings on a case-by-case basis, not under a blanket secrecy order.[77] In the case of *North Jersey Media Group v. Ashcroft*, several media outlets and the ACLU sued to open the hearings on the basis of due process violations and the public's right to monitor the actions of government officials.[78]

The government appealed the decision to the Third Circuit Court of Appeals and sought a stay during appeal. A three-judge panel from the Third Circuit denied the government's motion,[79] but the DOJ appealed this to the Supreme Court, arguing in its brief that "This is an extraordinary case, touching on the nation's very ability to defend itself against the continuing threat of hostile attack from myriad and unknown sources"—referring to the value that releasing the names of those detained could have for terrorist cells.[80] The justices eventually granted the stay to keep the hearings secret during appeal. No opinion accompanied the Supreme Court's order.[81]

Three months later, the Third Circuit ruled in Philadelphia that the INS blanket secrecy order was appropriate,[82] given the deference due to the executive branch—reversing Judge Bissell's decision to open the hearings on a vote of two to one.[83] Chief Judge Edward Becker, writing for the court, noted:

> We are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis. On balance, however, we are unable to conclude that openness plays a positive

role in special-interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.[84]

The plaintiff's attorney criticized the court for accepting the government's "parade of horribles," and Hofstra University law professor Eric Freedman added that "Closed proceedings are always more convenient to the executive branch. . . . The real scandal here is that history, law, policy and the precedents of the Supreme Court, to say nothing of the Constitution, require the opposite result." Most of the 752 people specifically detained on immigration violations have been deported or released—only 81 remain in custody.[85]

In the spring of 2003, the DOJ's own inspector general issued a report sharply criticizing the FBI and INS for the detention of so many aliens in unnecessarily harsh conditions for unnecessarily long periods of time—blaming in particular the DOJ's blanket "hold until cleared" policy, which amounted to a guilt before innocence standard. "The clearance process took an average of 80 days, primarily because it was understaffed and not given sufficient priority by the F.B.I. . . . Even in the chaotic aftermath of the Sept. 11 attacks, we believe the F.B.I. should have taken more care to distinguish between aliens who it actually suspected of having a connection to terrorism from those aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism."[86]

Attorney General Ashcroft's response to the House Judiciary Committee on this matter was unapologetic. He specifically defended the manner in which the detentions were carried out, promised to look into allegations of abuse while refusing to appoint a special counsel, and noted his hope that things would go better next time: "[I]f we ever have to do this again, we hope that we can clear people more quickly."[87]

The Material Witness Dilemma

The government's alternate policy of indefinitely detaining people in secrecy as material witnesses when there are no immigration violations to hold them on was also questioned by a New York federal district court in May 2003. Judge Shira A. Scheindlin ruled that the

DOJ overreached its power in detaining a Jordanian man, Osama Awadallah—a student in California with a green card—as a material witness who authorities believe might have information for grand juries investigating terrorism. The judge determined that a person may only be held with probable cause under the material witness statute—which the judge ruled had not been applied correctly. Moreover, Judge Scheindlin ruled that such "witnesses" could only be detained after an indictment was returned.

The material witness statute was designed to allow for detention of an individual who had information critical to a criminal proceeding that was in progress if that individual could not be compelled to testify in any other way. The judge wrote, "Since 1789, no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation." She relied on a prior statement by Attorney General Ashcroft that he would utilize this rarely invoked law aggressively to prevent, disrupt, and delay new terrorist attacks to support her conclusion that this misuse was improper: "*Relying on the material witness statute* to detain people who are presumed innocent under our Constitution *in order to prevent potential crimes* is an illegitimate use of the statute." Ashcroft rejected the decision as an anomaly.[88]

Two months later, while the government was appealing Scheindlin's decision to the Second Circuit Court of Appeals, Judge Michael B. Mukasey, also of the New York federal district court, ruled in favor of the administration—characterizing the previous ruling by Scheindlin as an incorrect interpretation of the statute. According to Mukasey's decision, the government could proceed to use the statute to indefinitely detain individuals in secrecy in pursuit of its war on terror. With such conflicting decisions at the district level, it will be up to the Second Circuit to clarify whether the law is being manipulated or followed appropriately.[89]

Nonetheless, public opinion is steadily coalescing against Ashcroft's legal initiatives to detain noncitizens. Professor David Cole summed it up this way: "It's really unprecedented that we have locked up several hundred individuals in secret. It's as close to 'disappearing' individuals (like in South American dictatorships) as we in this country have ever come. They don't want us to know how much they're just shooting in the dark on this investigation."[90] And editorials, such as this one from the *St. Louis Post-Dispatch,*

have begun to pepper newspapers across the country since litigation against secret detentions by the government has ensued:

> In this country, we don't imprison people unless there is evidence they committed a crime. We don't hold detention hearings behind closed doors. We don't imprison people for crimes they might commit in the future. All these things are fundamental. Yet since Sept. 11, Attorney General John D. Ashcroft has used the federal material witness law in exactly those ways, locking up two dozen people. Last week, a federal judge in New York called Mr. Ashcroft's tactics "illegitimate."
>
> A material witness is not a crime suspect, but has information that is important to a prosecution. If the witness might flee, prosecutors can lock him up to get a sworn statement. But Mr. Ashcroft has used the law more broadly, imprisoning people he thinks might commit a crime. Last week's ruling freed Osama Awadallah, a Jordanian with a legal resident alien's green card who attended college in California.
>
> The FBI found his first name and old telephone number in a car used by one of the Sept. 11 hijackers. The government says he lied when asked during a polygraph exam if he had advance knowledge of the Sept. 11 attacks. A judge held him as a material witness. For 20 days, Mr. Awadallah was shuttled among four prisons, held in solitary confinement, shackled, strip-searched and held incommunicado.
>
> On Oct. 10, while handcuffed to a chair, he testified before a grand jury he had met two of the hijackers, but could remember the name of only one, Nawaf Al-Hazmi. He denied knowing another hijacker, Khalid Al-Mihdar, even after the government produced a college examination book in which Mr. Awadallah had written "Khalid." He was charged with perjury. Last week, U.S. District Judge Shira A. Scheindlin ruled the detention illegal. She said the material witness law only applied after a criminal case starts—not to the grand jury investigation before it starts. Holding an innocent person during a grand jury investigation might violate the Fourth Amendment's requirement that an arrest be based on evidence of a crime, she said.
>
> Mr. Ashcroft is appealing. He notes that many other judges have approved the use of the material witness law during grand

juries. He says that locking up material witnesses is essential to disrupting new terrorist attacks. But even if Mr. Ashcroft's use of the law was justified in the first confusing days after Sept. 11, it certainly has been abused since.

Consider the case of Abdallah Higazy, an Egyptian-born student who was arrested as a material witness on Dec. 17 when he returned to a hotel near the World Trade Center to retrieve possessions left behind on Sept. 11. The FBI confronted him with a ground-to-air radio found at the hotel. After three weeks of detention, Mr. Higazy seemed to confess and was charged with interfering with an investigation. But a few days later, another hotel guest claimed the radio. The government released Mr. Higazy in prison garb and with a $3 subway fare.

Compounding these abuses is the secrecy that has shrouded the use of the law. The Justice Department won't say how many people have been held as material witnesses. Nor are the court proceedings involving material witnesses open to the public. We all want to be safe, but in this country, we hold certain values fundamental. The Justice Department's tactics are fundamentally wrong.[91]

As of November 2002, the government had jailed forty-four people as material witnesses—holding them indefinitely without access to counsel or under indictment by a grand jury. Nine of these are still known to be in custody, twenty-nine have since been released, and it is unclear what happened to the other six. The DOJ has no comment on the matter.[92]

Battlefield Detainees: The Guantanamo Bay Cases

Camp Delta, a prison camp at the U.S. Naval Base in Guantanamo Bay, Cuba, is home to 620 detainees captured largely during the American-led invasion of Afghanistan in 2001. The newly constructed Camp Delta is a more permanent facility than Camp X-Ray, the makeshift maze of cages that served as the original detention center. The detainees are either members of al Qaeda or Taliban fighters—most are Saudi Arabian, but there are at least forty-three nationalities represented. None has appeared before any sort of tri-

bunal to have his status determined as combatant, none has access to counsel or home government, and none has been accorded legal rights guaranteed under international law—although all have been treated humanely and are kept in good physical condition.[93]

The basic rule is that both citizens and noncitizens who are arrested as suspects in criminal activity in the United States are arraigned and processed through Article III civilian courts. Both are usually accorded habeas corpus relief. Outside the United States, the rules change. In wartime, noncitizen prisoners of the enemy's forces who are captured in battle and detained abroad are processed for any criminal activity according to the terms of the UCMJ—which is brought into application through the terms of the Third Geneva Convention on Treatment of Prisoners of War.[94]

Because the Bush administration did not want its detainees accorded POW status, even though they were captured as byproducts of America's war on terrorism, the invasion of a foreign country, and the occupation of that country,[95] the DOD labeled them "unlawful combatants" and argued that the treaty protections do not apply[96] so therefore the UCMJ process does not apply. Consequently, the administration believes it can run them through military commissions to be established under the president's November 13 military order,[97] where they will enjoy fewer rights as defendants than in front of a regular court martial or Article III federal court.

The administration's definition and use of the legal status "unlawful combatant" are broad. Apparently, Taliban detainees (whom the government now recognizes as covered by the Geneva Convention as the de facto army of Afghanistan but not as POWs) and al Qaeda detainees (who the government says are not covered by the treaty) are both unlawful combatants because they failed to follow the rules of warfare, such as wearing identifiable insignia, uniforms, and so forth.[98] If they are not POWs, then by implication they are not recognized as members of the armed forces—which would make them civilians.

As civilians, their status would be covered by the Fourth Geneva Convention protecting civilians during armed conflict.[99] These treaty terms would accord them rights to be tried, if they are to be tried, by regularly constituted civilian courts (Article III federal courts). The administration has not specifically addressed this argument but is likely to broaden its definition of "unlawful combatant"

even further—analogizing the detainees to spies and mercenaries who could traditionally be summarily executed under historical practice in warfare. What does this process do to American justice? What does it do to how America is perceived by other people around the world?

Many countries, including America's allies, have criticized the administration's mass detention policies for captives of the Afghan campaign and the intentional blurring of their legal status as prisoners at Camp Delta. Such unnecessary discord and antagonism undermine the support willingly pledged by foreign governments to the United States in its war on terror after September 11, 2001.

Summary

While these examples present a mere sampling of the post-9/11 cases winding their way through the U.S. court system, definite patterns are emerging. The overwhelming majority of cases involve challenges to the detainment of men of Middle Eastern descent, whether on American or foreign soil and regardless of citizenship. These cases tell a tale of a justice system, although grounded in principles of equal justice, nevertheless being skewed to meet the demands of vengeance. In the process, our constitutional system is also distorted, shifting the judicial focus away from protecting the individual to blindly implementing executive mandates. The courts must not capitulate, as they are the last bastion of equal justice at a time when constitutional ideals are being shunted aside in the name of national security. In a different era, speaking on the role of courts in our constitutional system, Justice Hugo Black wrote:

> Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice . . . shall send any

TABLE 4. Legal Bases of Post-9/11 INS Detention, with Detainees by Nationality

Section 237 (8 USC 1227)
General Classes of Deportable Aliens

65 Pakistan
59 Egypt
31 Yemen
23 Turkey
21 Israel
20 Jordan
19 Saudi Arabia
15 Morocco
13 India
11 Tunisia
6 Syria
5 Sri Lanka
5 Lebanon
4 Palestine
4 Albania
3 Iran
3 France
2 Spain
2 South Africa
2 Senegal
2 Russia
2 Nepal
2 Mauritania
2 Kuwait
2 Austria
2 Arab Emirates
1 Zaire
1 Trinidad
1 Tanzania
1 Czech Republic
1 Afghanistan

Section 241 (8 USC 1231)
Detention and Removal of Aliens Ordered Removed

2 Lebanon
2 Yemen
2 Syria
1 Bangladesh
1 Trinidad
1 Kenya
1 India

18 USC 1001
Fraud and False Statements
1 Yemen

Section 217 (8 USC 1187)
Visa Waiver Program for Certain Visitors
3 Germany
2 France
2 Spain

Section 252 (8 USC 1282)
Conditional Permits to Land Temporarily
3 Pakistan
2 Saudi Arabia

Section 212 (8 USC 1182)
General Classes of Aliens Ineligible to Receive Visas and Ineligible for Admission

71 Pakistan
10 Egypt
9 Yemen
9 Jordan
9 India
5 Turkey
4 Syria
4 Morocco
3 Guyana
2 Tunisia
2 Senegal
2 Mexico
2 Israel
2 Iran
2 Brazil
2 Afghanistan
1 Russia
1 Libya
1 Cyprus
1 Bangladesh

Section 235 (8 USC 1225)
Inspection by Immigration Officers; Expedited Removal
1 Jordan

Note: Several detainees were held on multiple bases.

> accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.[100]

The rights against executive abuse, lodged in our Constitution from the beginning and given life by succeeding generations of jurists, must be guarded jealously. Otherwise, the balance of power among the branches may shift—potentially harming the individual in his or her exercise of civil liberty. Constitutional protections are there for a reason. For example, the Fourth Amendment defines areas of privacy immune from governmental search or seizure in the absence of minimum levels of suspicion. The remedy for government misconduct is exclusion of the unlawfully obtained evidence from the criminal trial, which, in some instances, may be case dispositive. According to the U.S. Supreme Court in the seminal case establishing the applicability of the exclusionary rule to the states,

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[101]

The Court concluded that an exclusionary rule prohibiting the introduction of illegally obtained evidence was "logically and constitutionally necessary" and, therefore, must be insisted upon as an essential ingredient to the right to be free from unreasonable searches and seizures.

In a similar vein of protecting individuals suspected of criminal

conduct, the Fifth Amendment insulates the accused from compelled self-incrimination in an interrogation setting. In the oft-cited U.S. Supreme Court opinion in *Miranda v. Arizona,* the Court described the inherent compulsion of the interrogation room:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.[102]

The prohibition against obtaining a confession of guilt through compulsory questioning reaffirms that, in the American criminal justice system, the government shoulders the burden of proving its case beyond a reasonable doubt. In fact, recognizing and acceding to a suspect's wish to remain silent are so vital to the American system of justice that law enforcement agents must affirmatively describe the applicable Fifth Amendments safeguards *and* confirm the suspect's understanding of the ramifications of waiving these protections *before* an interrogation proceeds. Hence, the evolution of *Miranda* warnings, which are so familiar to Americans that many can recite them from memory.[103]

Once a suspect has been arrested, the Sixth Amendment affords substantive and procedural protections designed to ensure that the accused is advised of the charges against him and that any subsequent trial proceedings are speedy, public, and impartial. Over the years, the U.S. Supreme Court has interpreted and expanded upon these constitutional safeguards. For example, explaining a criminal defendant's right to be apprised of the government's charges, the Court observed:

> The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the

nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defence and protect himself after judgment against another prosecution for the same offence.[104]

Moreover, to ensure that lack of resources is not outcome determinative for the indigent, the Court has construed the Sixth Amendment as mandating a right to counsel for destitute defendants in criminal cases. As part of its reasoning the Court noted that state and federal governments routinely expend vast resources trying defendants accused of crimes and that lawyers for the government are considered instrumental to the process of protecting the public order; therefore,

> [t]he [defendant's] right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[105]

Non-Article III Courts

Beyond the normal courts established by Congress under Article III of the Constitution, other judicial bodies either have already impacted the government's war on terror or may do so in the near future.

In May 2002, the Foreign Intelligence Surveillance Court, a statutorily created body pursuant to the FISA, handed down a shocking decision. Although the government was granted the eavesdropping authority it requested (no such requests have been turned down in the court's twenty-two-year history, including the 932 requests made last year),[106] the decision was surprising because it castigated the DOJ for breaching the wall separating intelligence gathered for criminal prosecution and that gathered for actual foreign intelligence purposes. It also chastised the FBI and DOJ for providing the court with false or erroneous information on which to base search warrants and wiretap authorizations on at least seventy-five occasions. The court rejected the attorney general's assertion that the new USA Patriot Act allowed the FBI much more leeway in its domestic surveillance capability.[107]

An appeal by the DOJ ensued. On November 18, 2002, the Foreign Intelligence Surveillance Court of Review emerged from nearly a quarter-century of silence. Perhaps itself impressed with the momentousness of that occasion, the court delivered a convoluted fifty-six-page opinion in which it

- chided the lower FISA court for adhering to minimization procedures governing the sharing of information developed by the DOJ and followed by the FBI and the DOJ in all physical searches of U.S. persons since their promulgation in 1995. ("The FISA court asserted authority to govern the internal organization and investigative procedures of the Department of Justice which are the province of the Executive Branch (Article II) and Congress (Article I).")[108]
- gratuitously insulted the amici curiae participants, whose contributions lent the process a scintilla of adversariness. ("The ACLU relies on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2522, to interpret FISA, passed 10 years later. That technique, to put it gently, is hardly an orthodox method of statutory interpretation.")[109]
- raised the question of whether FISA, as amended by the USA Patriot Act, is constitutional, concluding that the ques-

tion has no "definitive jurisprudential answer," further concluding that even if the standards do not comport with the Fourth Amendment, they "certainly come close," and finally concluding that "FISA as amended is constitutional because the surveillances it authorizes are reasonable."[110]

- repeatedly asserted that the lower FISA court's opinion "does not clearly set forth a basis for its decision," apparently ignoring the lower FISA court's statement that its analysis and findings are "based upon traditional statutory construction . . . [involving] straightforward application of the FISA as it pertains to minimization procedures, and . . . [raising] no constitutional questions that need to be decided."[111]
- rigidly relied upon legislative statements made during the hasty passage of the Patriot Act as conclusive proof of congressional intent, while blithely dismissing more recent statements concerning congressional intent, categorizing them as "legislative future" not entitled to authoritative weight.[112]
- described the government's efforts to challenge the long-standing dichotomy between foreign intelligence and law enforcement purposes as "heroic" even though the history of FISA, senatorial statements, a letter from the DOJ, and the Patriot Act clearly accept and legitimize such a dichotomy.[113]
- apparently accepted at face value the government's uncontested assertion that false, misleading, or inaccurate FBI affidavits in numerous FISA applications may have been a result of "confusion within the Department of Justice over implementation" of the wall procedures that the DOJ itself drafted and implemented.[114]

In addition, the court did not consider one crucial question, which, if carefully and objectively analyzed, would easily have laid bare the executive branch's thinly veiled quest for unconstrained authority to invade the privacy of U.S. citizens with minimal oversight. That is, why would the government need to alter procedures for obtaining FISA warrants when the lower FISA court had never rejected an application? Indeed, according to the lower FISA court

opinion the court had "reviewed and approved several thousand FISA applications, including many hundreds of surveillances and searches of U.S. persons . . . [and had] long accepted and approved minimization procedures authorizing in-depth information sharing and coordination with criminal prosecutors." In fact, the language of the lower FISA court's opinion expressly provided that

> The FBI, the Criminal Division, and OIPR may consult with each other to coordinate their efforts to investigate or protect against foreign attack or other grave hostile acts, sabotage, international terrorism, or clandestine intelligence activities by foreign powers or their agents. Such consultations and coordination may address, among other things, *exchanging* information already acquired, identifying categories of information needed and being sought, preventing either investigation or interest from obstructing or hindering the other, compromise of either investigation, and long term objectives and overall strategy of both investigations in order to insure that the overlapping intelligence and criminal interests of the United States are both achieved. [emphasis added][115]

In light of the lower FISA court's holding regarding the exchange of information, can the government seriously contend that the minimization procedures that it drafted in 1995, which the lower FISA court dutifully adopted, were too restrictive, warranting a still more lenient approach?

Moreover, as recently revealed, even with the DOJ minimization procedures in place, the government on numerous occasions failed to strictly adhere to them as evidenced by the disturbing number of inaccurate FBI affidavits accompanying FISA applications in which the government's "misstatements and omissions involved information sharing and unauthorized disseminations to criminal investigators and prosecutors."[116]

The ruling is legally unsound. At various points throughout the opinion, the FISA review court conflates the ultimate use of criminal information gleaned from a legitimate FISA investigation with the methods used to obtain such information. The court relies upon several opinions in which the courts recognized that criminal investigation, arrest, and prosecution may be a part of FISA surveillance

as long as foreign intelligence gathering remains the primary purpose. The FISA review court criticizes these opinions, however, for not linking the primary purpose test to actual statutory language and for interpreting foreign intelligence information to "exclude evidence of crimes."

Moreover, the FISA review court inexplicably treats these cases as if they somehow impeded full implementation of FISA surveillance, when, in fact, the opinions upheld the FISA warrants at issue, concluding that the primary purpose of each investigation was foreign intelligence gathering. Indeed, there is no evidence that those courts were interpreting "foreign intelligence information" to exclude evidence of crimes, and, in fact, they expressly acknowledged that criminal prosecutions may ensue in the wake of FISA investigations.

Curiously, the FISA review court also expends a great deal of energy demonstrating that the traditional dichotomy between foreign intelligence gathering and criminal investigations was "false," only to conclude that the Patriot Act now requires such a dichotomy. The court apparently assumes that, despite the Patriot Act's swift enactment and sparse legislative history, Congress actually took the time to construct this dichotomy out of whole cloth, rather than accepting the more logical conclusion that Congress simply modified the long-standing dichotomy that existed. Indeed, Senator Leahy noted at the time of the Patriot Act passage that "no matter what statutory change is made . . . the court may impose a constitutional requirement of 'primary purpose' based on the appellate court decisions upholding FISA against constitutional challenges over the past 20 years."[117]

As evidence of the need for expanded information exchange, the FISA review court points to recent testimony before the Joint Intelligence Committee that suggests "that the FISA court requirements . . . may well have contributed, whether correctly understood or not, to the FBI missing opportunities to anticipate the September 11th attacks."[118] What the court fails to point out, however, is that the Joint Committee also determined that, prior to September 11, "the intelligence community possessed no intelligence or law-enforcement information that would have linked 16 of the 19 hijackers to terrorism or terrorist groups."[119]

In addition, the Joint Committee concluded that, with respect to

the three remaining hijackers, regardless of any information exchange hurdles, the "CIA should have acted to add these individuals to the State Department's watch list in March 2000 . . . [but failed to do so because] CIA personnel received no formal training on watch-listing . . . [and] learned about the watch-listing process through on-the-job training."[120]

By utilizing the failure to discover and prevent the September 11 hijackings as a basis for now permitting the unfettered exchange of information, the FISA review court minimized the ineptitude that apparently prevailed throughout various law enforcement agencies prior to September 11 and ignored the potential for self-serving after-the-fact rationalizations by the government designed to mask such incompetence and to shift responsibility for institutional mismanagement and chaos.

Ironically, the minimization procedures that the government now challenges as unduly burdensome would certainly not hinder its ability to investigate non-U.S. citizens entering the United States on multiple entry visas (as the hijackers did) because the lower FISA court makes clear that its "findings regarding minimization apply only to communications of or concerning U.S. persons . . . [meaning] U.S. citizens and permanent resident aliens . . . and does not apply to communications of foreign powers . . . [or] to non-U.S. persons."[121]

Essentially, the FISA review court's opinion would have the American public believe that the government has been obstructed at every twist and turn in its pursuit, investigation, and prosecution of terrorist activity, when, in fact, history reveals that just the opposite is true. The courts have been extraordinarily solicitous of the government's efforts, providing them with broad latitude to pursue counterterrorism objectives. It bears repeating that the lower FISA court has never denied a request for a FISA warrant. (The lower FISA court did not technically deny the request in the case at bar and instead issued the order with certain modifications.)

What the lower FISA court recognized and, indeed, what all Americans should legitimately fear is that the executive branch is disingenuously using its September 11 failures in conjunction with the hastily drafted and poorly crafted Patriot Act to "give the government a powerful engine for the collection of foreign intelligence information targeting U.S. persons."[122]

By adhering to the minimization procedures, the lower FISA court merely sought to assure that the balance between legitimate national security concerns and individual privacy was not disturbed by seemingly unconstrained executive power. Thus, rather than overstepping the bounds of an Article III court, the lower FISA court was, in fact, acting as Article III courts have throughout history, filling in the gaps when statutes, through their silence or ambiguity, threaten fundamental rights that inhere in a democratic society. One need only consider the U.S. Supreme Court's Fourth and Fifth Amendments jurisprudence to understand that Article III courts are not strangers to crafting and imposing standards necessary to animate the fundamental principles of a "constitutional democracy under the law."

There is no question that Congress bungled its legislative responsibility by hurriedly enacting a far-reaching statute without debate or analysis. There is also no question that the executive branch, which goaded Congress into its haste, now seeks to use this legislative failure as a means to specifically target U.S. citizens.

But perhaps most importantly, there is also no question that a secret FISA appellate court structure, with judges hand-selected by the chief justice of the U.S. Supreme Court, that hears only the government's evidence and grants only the government a right to appeal is a singularly inappropriate forum to resolve issues that threaten the fundamental rights and values of all U.S. citizens.

The only question that remains is how much further our justice system will be derailed in pursuit of the war on terrorism.

Executive Military Tribunals

As of 2003, the Bush administration has not impanelled any of the military commissions for which it has laid the legal groundwork by promulgating its military order[123] and the supporting DOD regulations.[124] Thus, it remains unclear how these courts will function in reality beyond the rules that establish them. However, it is becoming clear that Article III federal courts are reluctant to interfere in their jurisdiction or operation so long as the defendants remain outside the sovereignty of the United States.

At least two federal district court judges have determined that

they have no jurisdiction to issue writs of habeas corpus in response to requests on behalf of detainees in Guantanamo Bay. A. Howard Metz of the federal bench for California's Central District Court ruled in February 2002 that neither he nor any other federal court judge could exercise his or her jurisdiction outside the sovereignty of the United States—which is where the naval base at Guantanamo Bay legally sits. He relied on prior decisions in the 1990s by the Eleventh Circuit Court of Appeals and the federal district court for Connecticut to determine that Guantanamo Bay, while under U.S. jurisdiction and control, remained under the sovereignty of Cuba according to the terms of the lease agreement between those two countries.[125]

Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia agreed in July 2002, ruling that the Kuwaitis, Australians, and Britons seeking habeas relief for their relatives being detained in Cuba could not seek it in the federal courts for the same reasons articulated by Judge Metz. In dismissing their case, she suggested that international law might provide them some relief but that it would have to be worked out at the government-to-government level through their home countries.[126]

Given this ruling, it is apparent that the administration will not seek to impanel a military tribunal and begin a trial inside the United States or its territories, even though the president's military order allows it to do so. They simply would not want to risk interference from a federal court. Thus, when such tribunals appear, they will likely be "off-site" in Afghanistan, in another country, or in Camp Delta on Guantanamo Bay itself. An aircraft carrier or other warship would not likely suffice as a viable venue immune from the reach of federal district courts, as warships are commonly considered part of the territory of the sovereign to whom they belong.[127]

In the summer of 2003, the White House designated six Guantanamo Bay detainees as "eligible" for trial by military commission, comporting with a process laid out in DOD rules drafted to implement the president's military order providing for the establishment of the tribunals. Two of the six, Feroz Abbasi and Moazzam Begg, are British nationals. In response to domestic political pressure, Prime Minister Blair and Attorney General Goldsmith of Britain negotiated modifications to the treatment of these two from the

process likely to be encountered by other detainees—exempting them from the death penalty, opening their trials to reporters, allowing for private consultations with defense counsel, and reserving the possibility of serving sentences at home in Britain if convicted.[128] Thus, staunch political allies in America's war on terror (and invasion of Iraq) may yet be able to secure tangible benefits from their continued support.

A National Security Court?

Harvey Rishikof, a law professor at Roger Williams University and former FBI counsel, has proposed the creation of a new national security court dedicated to handling the difficult issues that have confronted federal courts and embroiled the government in a nest of legal challenges over its actions since the September 11 attacks. The basis for his proposal is twofold: (1) the continuing war on terrorism is taking its toll on the federal court system, which is not designed to hold secret trials based on classified national security–related evidence; and (2) the alternative of trying terrorists in non-UCMJ tribunals only alienates our allies, who are vehemently against it, and creates a double-standard for non-Americans.[129]

While he concedes that federal courts functioned well in the Oklahoma City bombing case and in the first WTC attack, Rishikof argues that the system itself is unable to adapt in the long term to such a continuing terrorist conflict as we now find ourselves in: "The people we are fighting do not fit into our traditional legal classifications. We can continue to improvise our way through, compromising our federal criminal procedures and alienating our allies, or we can demonstrate our commitment to the rule of law by creating an institution that can handle new challenges without damaging our constitutional principles."[130]

As to structure, Rishikof suggests expanding the jurisdiction of the current Foreign Intelligence Surveillance Court, which is staffed by eleven federal judges on a rotation basis and approves secret search and seizure warrants based on classified intelligence, and providing for a route of appeal up to the Supreme Court. Moreover, a pool of specialized defense attorneys with prior clearances to participate could be drawn from to provide counsel. The advantages he cites that would stem from such a court include designation and

fortification of an existing courthouse to hold terrorism trials—thus, streamlining physical security concerns—and the possibility of taking the court on the road to conduct hearings in remote locations, such as Camp Delta.[131]

While Professor Rishikof must be commended for the creativity of his suggestion, it must be noted that such a proposal runs directly counter to our American culture of open judicial proceedings, the fairness and legality of which are guaranteed by public scrutiny. This proposal, though well intended, likely raises more thorny constitutional and judicial process questions than it ultimately answers. Would there be a specialized pool of prescreened jurors who have special clearance? What would that do to the voir dire selection process?

Rishikof correctly points out that there are other specialized courts in the federal system for bankruptcy, tax, patents, international trade, and copyrights. However, these examples fail to support the creation of a secret tribunal because they do not operate outside public scrutiny. Allowing secret hearings for issuance of search and seizure warrants, as now happens with the FISA court, sets the outside limits of what our legal and political values permit. Allowing secret trials based on secret evidence with secret outcomes and no public scrutiny to ensure fairness breaches those limits.

A federal courthouse, designated and fortified, as Rishikof suggests, holding unidentified prisoners in cells belowground, sitting as a massive windowless concrete bunker to which access is restricted—be it in downtown Boston or rural Virginia—belongs more to the landscape of Soviet Russia or Communist China than to America. The Bush administration has, in its responses to 9/11, provided enough legal symbols of what the American legal system is *not* fundamentally about (the USA Patriot Act, the military tribunals, and the withdrawn TIPS program to enlist neighborhood informants). America does not need a lasting physical symbol such as this national security court to give it permanent form.

The U.S. Supreme Court: An Ultimate Destination

While cases challenging the government's authority to indefinitely detain individuals, to secretly surveil them, to hold them as material witnesses, or to summarily deport them are percolating in the

lower federal courts, no case derived from America's post-9/11 war on terror has yet made its way to the Supreme Court. However, given the gravity of civil liberty abuse at stake, it is extremely likely that several soon will. Consequently, it is important to gauge the tenor of the current bench on such subjects. Since Chief Justice Rehnquist has given these issues considerable thought, albeit in historical context, his are the most significant writings to consider here.

In 1998, Rehnquist published a book entitled *All the Laws but One,* which discusses the place of civil liberties in wartime. He could not have known three years later how relevant that legal analysis would be. This book discusses civil liberties in wartime within the United States. Most of it covers the Civil War, with the remainder discussing World Wars I and II. Rehnquist's proposition is that one of war's necessities for a successful conclusion may be the temporary curtailment of civil liberties.[132]

This amounts to a sophisticated chicken and egg argument—if our country is not secure, then freedom does not matter because there is no country. In fact, the title of the book refers to a speech by Lincoln in which he asked the following rhetorical question when he was justifying the suspension of habeas corpus: "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?" Rehnquist allows for this silence of the laws in a time of war because it has always been balanced with responses by both the public and the legal community.

His whole argument, then, essentially rests on faith that this will always continue to be the case, handily disregarding Justice Brandeis's admonition, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."[133] Shortly after his book's publication, Rehnquist noted in an address to the students at Drake University Law School:

> The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war is over. Again, we see the truth in the maxim Inter Arma Silent Leges—in time of war the laws are silent. To lawyers and judges, this may seem a thoroughly undesirable state of affairs, but in the great scheme of things it may be best for all concerned.
>
> The fact that judges are loath to strike down wartime mea-

sures while the war is going on is demonstrated both by our experience in the Civil War and in World War II. This fact represents something more than some sort of patriotic hysteria that holds the judiciary in its grip; it has been felt and even embraced by members of the Supreme Court who have championed civil liberty in peacetime. Witness Justice Hugo Black: he wrote the opinion for the Court upholding the forced relocation of Japanese Americans in 1944, but he also wrote the Court's opinion striking down martial law in Hawaii two years later.

While we would not want to subscribe to the full sweep of the Latin maxim—Inter Arma Silent Leges . . . perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.[134]

In a review of the book four years after its publication, *New York Times* reporter Adam Cohen noted, "[I]f Mr. Rehnquist the jurist sees the world as Mr. Rehnquist the historian does, there's cause for concern. . . . [The book's] central message is that in wartime, the balance between order and freedom tips toward order. In recounting the history, Justice Rehnquist gives all the arguments for order, and far too few for freedom. The people whose liberties are taken away are virtually invisible."[135]

As the U.S. Supreme Court begins to consider questions of equal justice and civil liberty as they are balanced against the executive's wartime administrative prerogatives, prior articulated opinions on the matter become increasingly important as a barometer of where the justices stand. Consequently, the chief justice's book, together with his public statements like those delivered at Drake and his court opinions on citizenship and its content like that given in the *Verdugo-Urquidez* case, corroborate one another as reflective of his mind regarding this critical balance.

In the 1990 case of *United States v. Verdugo-Urquidez,* the Supreme Court held that the Fourth Amendment did not apply to search and seizure by federal agents of property owned by a nonresident alien that was located in Mexico. Writing for the majority, Rehnquist concluded that the term "people" in the Fourth Amendment referred only to U.S. citizens—who were, therefore, the only individuals in whom Fourth Amendment rights could possibly be vested. Conversely, Fifth Amendment rights that vested in "persons" and Sixth

Amendment rights that vested in "the accused" could be relied on by citizens and noncitizens alike. This dichotomy together with the territorial limitation of constitutional rights mitigated against Verdugo-Urquidez being protected.[136]

This holding is consonant with his book's determination disapproving the Supreme Court's *Korematsu* line of cases in 1942–43 authorizing a curfew and detention of Japanese on the West Coast only because those cases lumped together Issei (Japanese immigrants) with Nisei (Japanese Americans). In his view, the government had much more leeway to deal with the prior class of individuals rather than the latter class based simply on their status.[137]

While the chief justice has not spoken on such issues definitively since 9/11, it may be assumed that he holds to the reasoning presented in his 1998 book and in his 1990 opinion in the *Verdugo-Urquidez* case. Although he is just one of nine justices who may decide how civil liberties are balanced against national security, or how equal justice is balanced against maintaining order, his persuasive effect on the conservative wing of the Supreme Court cannot be underestimated. Thus, it appears that defenders of the USA Patriot Act, and administration officials issuing orders and rules under it, will at least find a sympathetic ally in the chief justice should they find themselves in the Supreme Court while the war on terrorism is in progress.