CIVIL LIBERTIES DURING NATIONAL EMERGENCIES: THE INTERACTIONS BETWEEN THE THREE BRANCHES OF GOVERNMENT IN COPING WITH PAST AND CURRENT THREATS TO THE NATION'S SECURITY

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Echoing the obvious, the Supreme Court historically has recognized that "no governmental interest is more important than the security of the Nation."[1] In light of the events of September 11, 2001, and the President's declared "war on terrorism," our government is being challenged, as never before, to determine to what extent civil liberties should be compromised when the nation's security is at risk. As Supreme Court Justice Sandra Day O'Connor publicly remarked soon after September 11, "we're likely to experience more restrictions on personal freedom than has ever been the case in our country."[2] She posed two questions "likely to take years to resolve":

1. Can a society that prides itself on equality before the law treat terrorists differently than ordinary criminals?

2. At what point does the cost to civil liberties from legislation designed to prevent terrorism outweigh the added security that that legislation provides?[3]

In its recent June 28, 2004, decision in *Hamdi v. Rumsfeld*, the Supreme Court began to answer these questions, with Justice O'Connor herself writing the plurality decision.[4] Although eight members of the Court rejected the Fourth Circuit Court of Appeals' determination that Hamdi's detention was not justiciable, the court issued four opinions which exemplify the tensions and uncertainties surrounding the interactions between the three branches of government in grappling with issues concerning threats to the nation's security.[5]

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1. Haig v. Agee, 453 U.S. 280, 307 (1981).

2. Justice Sandra Day O'Connor, Address at the New York University School of Law Groundbreaking Ceremony (Sept. 28, 2001).

3. *Id.*

4. 124 S. Ct. 2633 (2004).

5. *Id.*

This article will explore the manifestations of these tensions and their impact on civil liberties as the Executive, Legislative, and Judicial branches have sought to define their respective roles and responsibilities in addressing past and current national security crises. Part I will examine the scope of the powers that the Constitution and Congress have conferred upon the President to act in times of national emergency. Part II will explain modern anti-terrorism legislation enacted by Congress before September 11; Part III will review the post-September 11 anti-terrorism legislation. Finally, Part IV will explore judicial decisions addressing the President's war-making powers, historic cases addressing the curtailment of civil liberties during past national emergencies, and decisions concerning the recent terrorist crisis.

I.
THE PRESIDENT'S POWERS TO ACT DURING NATIONAL EMERGENCIES

A. Constitutional Provisions

The Constitution assigns both Congress and the President responsibility for national security. The Constitution confers upon Congress the power to "provide for the common Defence and general Welfare of the United States,"[6] "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,"[7] "[t]o raise and support Armies,"[8] and "[t]o provide and maintain a Navy."[9]

The Constitution designates the President as "Commander in Chief of the Army and Navy of the United States,"[10] and obliges the President to "preserve, protect and defend the Constitution of the United States" to the best of his ability.[11] It provides, however, that only "Congress shall have Power . . . [t]o declare War."[12]

The last president to seek and obtain a declaration of war from Congress was President Franklin D. Roosevelt, who asked Congress to declare war against Japan on December 8, 1941, the day after the attack on Pearl Harbor, and against Germany and Italy three days later. More typically, presidents have avoided the need to seek congressional approval for waging war by invoking their constitutional authority as Commander in Chief and by characterizing the use of military force as something short of a declaration of war. President Truman, for example, coined the term "police action" when committing troops to fight in Korea in the early 1950s, and later presidents have similarly committed troops

6. U.S. CONST. art. I, § 8, cl. 1.
7. U.S. CONST. art. I, § 8, cl. 10.
8. U.S. CONST. art. I, § 8, cl. 12.
9. U.S. CONST. art. I, § 8, cl. 13.
10. U.S. CONST. art. II, § 2, cl. 1.
11. U.S. CONST. art. II, § 1, cl. 8.
12. U.S. CONST. art. I, § 8, cl. 11.

without congressional consent. Presidents Johnson and Nixon deployed military forces in Vietnam in the 1960s without prior congressional approval, as did the first President Bush in Iraq in 1990 and President Clinton in Eastern Europe in the late 1990s. In each case, the President invoked his role as Commander in Chief, his obligation to faithfully execute the laws of the United States, and the need for prompt and decisive action in justifying his use of force.

From time to time, Congress has clashed with a presidential deployment of military forces in the absence of congressional consent. In 1973, over President Nixon's veto, Congress refused to fund the further bombing of Cambodia, effectively ending American involvement in Indochina. Later that year, and again over President Nixon's veto, Congress enacted the War Powers Resolution,[13] which provided that

> [t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are [to be] exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[14]

Although the Resolution's constitutionality has not been directly challenged in court, no administration has acknowledged that it was legally bound to act pursuant to the provisions of the Resolution.[15] Periodically, legislation has been introduced forbidding the President from entering hostilities abroad without prior congressional approval, but such attempts have not proven successful.[16]

B. Statutes Authorizing Presidential Declarations of "National Emergencies"

The issue of what circumstances constitute "war" sufficient to trigger a constitutional declaration of war by Congress has been rendered largely academic because Congress consistently has enacted legislation empowering the executive to take sweeping actions to address the country's crises. In general, the modern statutory framework authorizing the executive to act in times of national crises can be fairly characterized as falling into three broad categories: (1) pre-September 11 statutes authorizing the President to declare and address "national emergencies," (2) pre-September 11 anti-terrorism statutes, and (3)

13. War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541–1548 (2000)).

14. 50 U.S.C. § 1541(c) (2000).

15. Jeffrey C. Dannenberg, *Reconciling the War on Terrorism with the U.S. Constitution, in* PERSPECTIVES ON 9/11 65, 75 (Yassin El-Ayouty ed., 2004).

16. *See, e.g.*, Constitutional War Powers Resolution of 2001, H.R.J. Res. 27, 107th Cong. (2001) (proposing "to fulfill the intent of the framers of the Constitution that Congress and not the President has the power to declare war").

post-September 11 anti-terrorism statutes.

The modern-era usage of "declarations of national emergency" came into play in 1917 with the passage by Congress of the Trading With the Enemy Act ("TWEA"),[17] shortly after Congress declared war against Germany. As originally enacted, TWEA permitted the President to declare a national emergency following a congressional declaration of war "if [the President] shall find it compatible with the safety of the United States."[18] A declaration of national emergency empowered the President to exercise virtually unlimited control "with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest."[19] President Wilson used TWEA as the basis for suspending the gold standard, conscripting soldiers, and taking over portions of railroad, ocean shipping, and communications industries. In 1933, at the depths of the Great Depression, Congress expanded TWEA to authorize presidential declarations of national emergencies to address any peacetime crises that in a president's judgment threatened the nation's well-being.[20] President Roosevelt utilized this extended power to support many of his New Deal programs—for example, by declaring a "Bank Holiday" national emergency in 1933, which temporarily closed "all banking institutions and all branches thereof located in the United States of America" to prevent the hoarding of gold and currency.[21] In 1950, citing the threat of "world conquest by communist imperialism," President Truman declared a national emergency and later used it as a legal basis for seizing control of many of the nation's steel mills.[22] President Nixon declared two national emergencies: In 1970, as a result of "unlawful work stoppage" by "certain employees of the Postal Service," he ordered the Secretary of Defense "to take such action as he deems necessary . . . in order that the laws of the United States pertaining to the Post Office Department" be enforced;[23] in 1971, on account of a "prolonged decline in the international monetary reserves of the United States," he ordered that certain tariffs be imposed on imported goods.[24]

Presidents were slow to declare the end of national emergencies, resulting in lingering executive branch authority. Because President Truman's 1950 declaration of a national emergency due to the threat of the spread of communist aggression was not terminated during his administration, Cold War Presidents Kennedy, Johnson, Nixon, Ford, and Carter each retained broad authority to deal

17. Trading with the Enemy Act, Pub. L. 65-91, 40 Stat. 411 (1917) (codified at 50 U.S.C. app. §§ 1–44 (2000)).

18. 50 U.S.C. app. §5(a) (2000).

19. 50 U.S.C. app. § 5(b)(1)(B) (2000).

20. *See* Act of Mar. 9, 1933, Pub. L. No. 73-1, 48 Stat. 1 (providing relief in the national emergency of banking).

21. Proclamation No. 2039, 48 Stat. 1689 (1933).

22. Proclamation No. 2914, 64 Stat. A454 (1950).

23. Proclamation No. 3972, 84 Stat. 2222 (1970).

24. Proclamation No. 4074, 85 Stat. 926 (1971).

with the threat of communism. In 1973, a Senate Special Committee on the Termination of the National Emergency, concerned about the seemingly unfettered power of a president to declare a national emergency at virtually any time and to sustain the declaration for an unlimited duration, examined the sweep of the TWEA and the balance it struck between presidential authority and constitutional restraint on that authority. The Committee found that the TWEA gave the President authority, upon declaring a national emergency, to "seize property; organize and control the means of production; seize commodities; assign military forces abroad; institute martial law; seize and control all transportation and communication; regulate the operation of private enterprise; restrict travel; and, in a plethora of particular ways, control the lives of all American citizens."[25]

At the time, no fewer than four national emergencies declared pursuant to the TWEA remained on the books, including President Roosevelt's 1933 bank holiday declaration, President Truman's 1950 communist aggression declaration, and President Nixon's 1970 and 1971 declarations concerning the post office strike and the country's decline in international monetary reserves. As a result of its review of executive authority under the TWEA, Congress passed the National Emergencies Act in 1976,[26] which provided that "[a]ll powers and authorities possessed by the President" arising from any existing declaration of national emergency were to be terminated two years after the passage of the Act, unless affirmatively renewed by the President.[27] The Act exempted a number of categories of national emergency declarations, however, to permit Congress an additional opportunity to consider the entire national emergency framework.[28] The Act therefore did little to assuage the widespread belief held by many lawmakers that presidents had misused the authority conferred upon them by the TWEA to declare national emergencies, and in 1977 a number of expert witnesses testified before a House Subcommittee that TWEA had been used inappropriately as an instrument of foreign policy in non-emergency situations.[29]

In response to these concerns, Congress enacted the International Emergency Economic Powers Act ("IEEPA") in 1977.[30] IEEPA preserved the President's power to declare national emergencies during times of declared war, but amended the TWEA by replacing the President's broad authorization to

25. S. REP. NO. 93-549, at III (1973).

26. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601, 1621, 1622, 1631, 1641, 1651 (2000)).

27. 50 U.S.C. § 1601(a) (2000).

28. 50 U.S.C. § 1651(a) (2000).

29. *See, e.g., Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 238 Before the Subcomm. on Int'l Econ. Policy and Trade of the House Comm. on Int'l Relations*, 95th Cong. 16 (1977) (statement of Professor Andreas F. Lowenfeld, New York University School of Law).

30. International Emergency Economic Powers Act, Pub. L. 95-223, 91 Stat. 1625 (1977) (codified at 50 U.S.C. §§ 1701–1706 (2000)).

declare national emergencies during peacetime with the more circumscribed peacetime authority "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[31] The President retained the broad power conferred under the TWEA, once a national emergency had been declared, to take all requisite actions "with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest."[32] Like the TWEA, the IEEPA also provided that "when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals," the President may confiscate any property of any foreign person, organization, or country, provided that the President has determined that the person, organization, or country "has planned, authorized, aided, or engaged in such hostilities or attacks against the United States."[33] To curtail the potential for abuse, IEEPA requires congressional consultation and review,[34] and further specifies that upon exercising any powers granted by IEEPA, the President must report to Congress.[35] It also contains a humanitarian aid exception, which precludes the President from prohibiting or regulating "donations . . . of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering."[36]

Since the enactment of IEEPA, all presidents have relied on authority conferred by the National Emergencies Act and IEEPA when declaring national emergencies, many of which have related to international terrorism. President Carter, for example, relied on both statutes when declaring a national emergency caused by Iranian state-sponsored terrorism,[37] as did President Reagan when he declared a national emergency with respect to the Libyan government's support for terrorist activities.[38] The first President Bush cited the statutes when declaring a national emergency stemming from the proliferation of chemical and biological weapons.[39] President Clinton declared at least three terrorism-related national emergencies: one arising from "grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process,"[40] one relating to the Sudanese government's "continued support for international terrorism,"[41] and a third, on July 4, 1999, based on a finding that "the actions and policies of the Taliban in Afghanistan, in allowing territory under its control to be used as a

31. 50 U.S.C. § 1701(a) (2000).
32. 50 U.S.C. § 1702(a)(1)(B) (2000 & Supp. I 2001).
33. 50 U.S.C. § 1702(a)(1)(C) (2000 & Supp. I 2001) .
34. 50 U.S.C. § 1703(a) (2000).
35. 50 U.S.C. § 1703(b) (2000).
36. 50 U.S.C. § 1702(b)(2) (2000).
37. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 15, 1979).
38. Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 9, 1986).
39. Exec. Order No. 12,735, 55 Fed. Reg. 48,587 (Nov. 16, 1990).
40. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).
41. Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (Nov. 5, 1997).

safe haven and base of operations for Usama bin Laden and the Al-Qaida organization . . . constitute an unusual and extraordinary threat to the national security and foreign policy of the United States."[42] Most recently, President George W. Bush, citing the National Emergencies Act, declared a national emergency on September 14, 2001, "by reason of the terrorist attacks at the World Trade Center . . . and the Pentagon, and the continuing and immediate threat of further attacks on the United States."[43] There are currently sixteen declarations of national emergency in force. Twenty others, dating back to President Wilson, have been terminated.

II.
MODERN ERA PRE-SEPTEMBER 11 ANTI-TERRORISM LEGISLATION

A. The Emergency Detention Act of 1950 and the Non-Detention Act of 1971

Enacted shortly after the invasion of South Korea, the Emergency Detention Act of 1950 authorized the President, during times of war, invasion, or "[i]nsurrection within the United States in aid of a foreign enemy," to declare an "Internal Security Emergency."[44] Following the declaration of such an emergency, the Attorney General was authorized to detain "each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage."[45] The Act further authorized the Attorney General to establish detention camps like those used to intern American citizens of Japanese ancestry during World War II.[46] The Act afforded a series of procedural safeguards to persons detained pursuant to a command of the Attorney General, including the right to appear before a hearing officer for a probable cause determination, the right to counsel, and the right to appeal.[47] The Internal Security Emergency was to continue in existence "until terminated by proclamation of the President or by concurrent resolution of the Congress."[48]

The Emergency Detention Act was repealed in 1971 by the Non-Detention Act.[49] As noted in a House Report accompanying the repeal, "[t]he concentration camp implications of the [Emergency Detention Act] render it

42. Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (July 4, 1999).

43. Proclamation No. 7463, 66 Fed. Reg 48,199 (Sept. 14, 2001).

44. Emergency Detention Act of 1950, Pub. L. No. 81-831, § 102(a), 64 Stat. 1019, 1021 (repealed 1971).

45. *Id.* § 103(a).

46. *Id.* §104(c); *see also* H.R. REP. NO. 92-116, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435 (observing that the Emergency Detention Act "authorizes the establishment of detention camps").

47. Emergency Detention Act §§ 104(d)–(f), 109–110, 111(a), 111(c)–(d).

48. *Id.* § 102(b).

49. Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347 (amending 18 U.S.C. § 4001) (codified at 18 U.S.C. § 4001 (2000)).

abhorrent" and the Act "would seem to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense, but on mere suspicion that an offense may occur in the future."[50] Amid cries that "the mere continued existence of the Emergency Detention Act has aroused much concern among American citizens, lest the Detention Act become an instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views,"[51] the House Report recommended more than mere repeal:

> [I]t is not enough merely to repeal the Detention Act. . . . Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority. . . . The Committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists.[52]

Thus, the Non-Detention Act, in addition to merely repealing the Emergency Detention Act, expressly provided that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[53] Referring to the detention of Japanese-Americans during World War II, the legislative history of the Non-Detention Act strongly suggests that Congress intended to proscribe all detentions, whether in peacetime or otherwise, unless specifically authorized by Congress.[54]

B. The Foreign Intelligence Surveillance Act of 1978

In 1978, faced with the rise of international terrorism and in recognition of the need for effective investigative and enforcement mechanisms, Congress passed the Foreign Intelligence Surveillance Act ("FISA").[55] FISA authorized the Executive Branch to use electronic surveillance if "a significant purpose of the surveillance is to obtain foreign intelligence information."[56] It was later amended to include physical searches.[57] "Foreign intelligence information" is expansively defined as information that relates to national security, foreign affairs, or the ability of the United States to protect against actual or potential attacks by a "foreign power" or "agent of a foreign power."[58] If investigators seek foreign intelligence information from a "United States person"—broadly

50. H.R. REP. No. 92-116, at 4.

51. *Id.* at 2.

52. *Id.* at 5.

53. 18 U.S.C. § 4001(a) (2000).

54. H.R. REP. No. 92-116, at 2, 4.

55. Foreign Intelligence Surveillance Act, Pub. L. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801–1811, 1821–1829, 1841–1846, 1861–1862 (2000)).

56. 50 U.S.C. § 1804(a)(7)(B) (2000 & Supp. I 2001).

57. *See* 50 U.S.C. § 1822 (2000).

58. *See* 50 U.S.C. § 1801(e) (2000) ("foreign intelligence information"); 50 U.S.C. § 1801(a) (2000) ("foreign power); 50 U.S.C. § 1801(b) (2000) ("agent of a foreign power").

defined as a United States citizen, a lawfully admitted alien, or a United States-based corporation or unincorporated association[59]—the information must both "relate[] to" and also be "necessary to" national security, foreign affairs, or to protect against attack.[60] FISA was foreshadowed by the Supreme Court in 1972 in *United States v. U.S. District Court* (commonly referred to as the *Keith* case), in which the Court remarked that the President's duty implies "the power to protect our Government against those who would subvert or overthrow it by unlawful means" and that "[i]n the discharge of this duty, the President . . . may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government."[61] If it wished, the Court observed, Congress could designate a special court to authorize electronic surveillance in sensitive cases;[62] Congress later did just that by establishing the Foreign Intelligence Surveillance Court.[63]

The Foreign Intelligence Surveillance Court consists of eleven judges appointed by the Chief Justice of the United States Supreme Court from among the country's federal district judges.[64] Each judge is empowered to act on behalf of the court. The court's docket "is comprised almost exclusively of applications for electronic surveillance and/or searches, the orders authorizing the surveillance and the search warrants, and returns on the warrants."[65] All of the court's docket entries are classified as secret.[66] Each application must be approved by the Attorney General or his designee and must meet a number of statutory requirements, including the reasons the Government believes the target of the proposed surveillance or search is a foreign power or agent of a foreign power and a detailed account of why the information sought qualifies as foreign intelligence information.[67] In addition, each application must set forth the proposed "minimization procedures" the Government will use[68]—that is, the procedures the Government intends to take to minimize the risk that irrelevant, private information will be collected, retained, or disseminated.[69] One such minimization procedure requires that an official not otherwise involved in the investigation review raw data and pass on only information that qualifies as foreign intelligence information.[70] The application must also contain a

59. 50 U.S.C. § 1801(i) (2000).

60. 18 U.S.C. § 1801(e)(2) (2000).

61. United States v. U. S. Dist. Court, 407 U.S. 297, 310 (1972).

62. *Id.* at 323.

63. *See* 50 U.S.C. § 1803 (2000).

64. 50 U.S.C. § 1803(a) (2000 & Supp. I 2001).

65. Letter from Colleen Kollar-Kotelly, Presiding Judge, Foreign Intelligence Surveillance Court, to Senators Patrick Leahy, Arlen Specter, and Charles Grassley, Senators, United States Senate (Aug. 20, 2002), *available at* http://www.fas.org/irp/agency/doj/fisa/fisc082002.html.

66. *Id.*

67. 50 U.S.C. §§ 1804(a)(4), 1804(a)(7)(E) (2000).

68. 50 U.S.C. § 1804(a)(5).

69. See 50 U.S.C. § 1801(h) (defining "minimization procedure").

70. *Id.*

statement that the information sought cannot reasonably be obtained by normal investigative techniques.[71] When the target of a proposed surveillance or search is a United States person, the Foreign Intelligence Surveillance Court will nevertheless find the target to be an agent of a foreign power if *any* of the following are sufficiently alleged:

> (a) the target, on behalf of a foreign power, knowingly engages in clandestine intelligence activities which may involve a criminal law violation;
>
> (b) the target, again on behalf of a foreign power or at least under the direction of an intelligence network, knowingly engages in other intelligence activities and his activities involve or are about to involve criminal violations;
>
> (c) the target knowingly engages in sabotage or international terrorism or is preparing to do so; or
>
> (d) the target knowingly aids or abets another who acts in any one of these ways.[72]

Congress also established a reviewing court, called the United States Foreign Intelligence Surveillance Court of Review, to hear appeals from the decisions of the Foreign Intelligence Surveillance Court.[73] This Court consists of three judges, drawn from the Federal Judiciary's district and circuit court judges and appointed by the Chief Justice of the United States Supreme Court.[74] If the Court of Review affirms the denial of a surveillance or search application, the Government may seek review by the Supreme Court.[75]

C. The AntiTerrorism and Effective Death Penalty Act of 1996 and Its Amendments to the Immigration and Nationality Act

In 1996, largely in response to the attack on the World Trade Center in 1993 and the 1995 bombing of a federal building in Oklahoma City, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA").[76] The Act was designed to "deter terrorism, provide justice for victims, [and] provide for an effective death penalty."[77]

Among other things, AEDPA amended the Immigration and Nationality Act[78] ("INA") to authorize the Secretary of State to identify and designate

71. 50 U.S.C. § 1804(a)(7)(C) (2000).

72. *See* 50 U.S.C. § 1801(b)(2) (2000).

73. 50 U.S.C. § 1803(b) (2000).

74. *Id.*

75. *Id.*

76. Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 42 U.S.C. (2000)).

77. *Id.* pmbl.

78. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended in

qualifying groups as "Foreign Terrorist Organizations" ("FTOs").[79] When designating a group as an FTO, the Secretary "may submit, for *ex parte* and in *camera* review, classified information used in making the designation."[80] Once the Secretary of State designates a group as an FTO and publishes notice of the designation in the Federal Register, the Secretary of the Treasury is authorized to "require United States financial institutions possessing or controlling any assets of any [designated FTO] . . . to block all financial transactions involving those assets."[81] In addition, AEDPA provides that all persons within or subject to the jurisdiction of the United States are subject to criminal liability if they "knowingly provide[] material support or resources" to an FTO.[82] It also precludes members of FTOs from entry into the United States, and facilitates the identification and removal of "alien terrorists."[83]

1. "Foreign Terrorist Organizations"

To be designated as an FTO, the group must be a "foreign organization," must "engage" in "terrorist activity," and the group's terrorism or terrorist activity must "threaten[] the security of United States nationals or the national security"—which includes national defense, foreign relations, and economic interests[84]—of the United States.[85] "Terrorism" is defined as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[86] "Terrorist activity" includes hijacking, sabotage, kidnapping, assassination, or the use of biological or chemical agents or nuclear devices with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.[87] It also includes a threat, attempt, or conspiracy to do any of these acts.[88] To "engage in terrorist activity" means to commit, prepare for, or plan a terrorist activity, and includes gathering information on potential targets, soliciting funds, or providing material support for terrorist activity.[89] Members of FTOs are inadmissible to and removable from the United States.[90]

By 1997, the State Department had designated thirty groups as FTOs. Al

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scattered sections of 8 U.S.C. (2000)).

79. *See* 8 U.S.C. § 1189(a) (2000 & Supp. II 2002).

80. 8 U.S.C. § 1189(b)(2) (2000).

81. 8 U.S.C. § 1189(a)(2)(C) (2000 & Supp. II 2002).

82. 18 U.S.C. § 2339B(a)(1) (2000 & Supp. II 2002).

83. 8 U.S.C. § 1531 (2000) (definition of "alien terrorist"); 8 U.S.C. § 1227 (2000 & Supp. II 2002) (classes of deportable aliens).

84. 8 U.S.C. § 1189(c)(2) (2000 & Supp. II 2002).

85. 8 U.S.C. § 1189(a)(1) (2000 & Supp. II 2002).

86. 22 U.S.C. § 2656f(d)(2) (2000).

87. 8 U.S.C. § 1182(a)(3)(B)(iii) (2000 & Supp. II 2002).

88. 8 U.S.C. § 1182(a)(3)(B)(iii)(VI) (2000 & Supp. II 2002).

89. 8 U.S.C. § 1182(a)(3)(B) (2000 & Supp. II 2002).

90. *See* 8 U.S.C. § 1182 (a)(3)(B)(i)(IV)-(V) (2000 & Supp. II 2002); *see also* 8 U.S.C. §1227 (a)(1)(A) (2000).

Qaeda was added in 1999. An organization designated an FTO may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit, but not later than thirty days after the designation is published in the Federal Register.[91] Designations are valid for two years, and may be renewed for additional two-year periods in the same manner as the original designation.[92] As noted, any person in the United States or subject to the jurisdiction of the United States faces criminal liability for knowingly providing "material support or resources" to a designated FTO.[93] The definition of "material support or resources" is broad: It includes "currency 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."[94] Any United States financial institution that becomes aware that it has FTO funds in its possession or control must keep the assets and report their existence to the Office of Foreign Assets Control of the United States Department of the Treasury.[95] The State Department contends that an FTO designation:

> Supports [American] efforts to curb terrorism financing and . . . encourage[s] other nations to do the same, [s]tigmatizes and isolates designated terrorist organizations internationally, [d]eters donations or contributions to and economic transactions with named organizations, [h]eightens public awareness and knowledge of terrorist organizations, [and] [s]ignals to other governments [the] concern about named organizations.[96]

2. "Alien Terrorists"

AEDPA's amendments to the INA also provide that an individual designated as an "alien terrorist"—that is, "[a]ny alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity"[97]—may be tried in a new "Removal Court."[98] The Removal Court is to be composed of five federal district court judges appointed by the Chief Justice of the Supreme Court.[99] Judges of the Removal Court are authorized to consider classified

91. 8 U.S.C. § 1189(b)(1) (2000).
92. 8 U.S.C. § 1189(a)(4)(B) (2000 & Supp. II 2002).
93. 18 U.S.C. § 2339B(a)(1) (2000 & Supp. II 2002).
94. 18 U.S.C. § 2339A(b) (2000 & Supp. II 2002).
95. 18 U.S.C. § 2339B(a)(2) (2000).
96. United States Department of State, Office of Counterterrorism, *Foreign Terrorist Organization List* (Oct. 23, 2002), *at* http://www.state.gov/s/ct/rls/fs/2004/35167.htm.
97. 8 U.S.C. § 1227(a)(4)(B) (2000 & Supp. II 2002).
98. 8 U.S.C. § 1533(a) (2000).
99. 8 U.S.C. § 1532(a) (2000).

evidence *ex parte* and *in camera*, but the removal hearing is otherwise open to the public.[100] The Removal Court has yet to convene; instead, immigration judges have adjudicated the cases of alleged alien terrorists, like those of all aliens facing deportation, at removal proceedings in immigration courts. After September 11, the Attorney General, who is charged by the INA with the administration and enforcement of all laws relating to the immigration and naturalization of aliens, designated certain removal proceedings as "special interest" cases for aliens who, in his judgment, had close associations with the September 11 hijackers, Al Qaeda, or other terrorist groups. The Chief Immigration Judge, Michael Creppy, subsequently issued a directive to all Immigration Judges governing the adjudication of these special interest cases, commonly known as the "Creppy Directive."[101] The Directive precludes immigration judges from discussing the cases with anyone outside of the Immigration Court and mandates the closure of the courtroom to all visitors, including family and the press.[102] The Directive also bars the dissemination of information either confirming or denying whether such a case was even on the docket or scheduled for a hearing.[103] In sum, unlike special interest cases that might be adjudicated in the Removal Court, the Directive contemplated a complete information blackout when these cases were tried in the Immigration Court.

III.
POST-SEPTEMBER 11 ANTI-TERRORISM LEGISLATION

In the months immediately following September 11, Congress enacted a spate of terrorism-related bills, including the Authorization for Use of Military Force,[104] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"),[105] the Homeland Security Act of 2002,[106] the Victims of Terrorism Tax Relief Act of 2001,[107] the Public Health Security and Bioterrorism Preparedness and Response Act of 2002,[108] the Enhanced Border Security and Visa Entry

100. *See* 8 U.S.C.§ 1533(c)(1) (2000) (consideration of classified information); 8 U.S.C. § 1534(a)(2) (2000) (open hearings).

101. Memorandum from Michael Creppy, to All Immigration Judges and Court Administrators (Sept. 21, 2001), *available at* http://archive.aclu.org/court/creppy_memo.pdf.

102. *Id.*

103. *Id.*

104. Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001).

105. Pub. L. No 107-56, 115 Stat. 272 (to be codified in scattered sections of 8, 15, 18, 22, 31,42, 49, 50 U.S.C).

106. Pub. L. No. 107-296, 116 Stat. 2135 (2002) (to be codified in scattered sections of 6 U.S.C.).

107. Pub. L. No. 107-134, 115 Stat. 2427.

108. Pub. L. No. 107-188, 116 Stat. 594 (to be codified in scattered sections of 2, 7, 21, 29, 42 U.S.C.).

Reform Act,[109] the Terrorist Bombings Convention Implementation Act of 2002,[110] and the Terrorism Risk Insurance Act of 2002.[111] The most far-reaching are the Authorization for Use of Military Force, the USA PATRIOT Act, and the Homeland Security Act.

A. Authorization for Use of Military Force

On September 18, 2001, the President signed Public Law 107-40, a Joint Resolution entitled "Authorization for Use of Military Force." It provides:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[112]

The Joint Resolution states that it "is intended to constitute specific statutory authorization within the meaning of . . . the War Powers Resolution."[113] When President Bush signed it, he cautioned that he was doing so in keeping with "the longstanding position of the executive branch regarding the President's constitutional authority to use force"[114] and expressed his opinion that to the extent the War Powers Resolution limits this power, it was likely unconstitutional.[115]

The President relied on both the Joint Resolution and his authority as Commander in Chief to support a declaration on November 13, 2001 that non-

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109. Pub. L. No. 107-173, 166 Stat. 543 (2002) (to be codified in scattered sections of 8 U.S.C.).

110. Pub. L. No. 107-197, 116 Stat. 721.

111. Pub. L. No. 107-197, 116 Stat. 2322. In addition, twenty-seven September 11 resolutions have been approved, ranging from encouraging every citizen to stand in solidarity and display the United States flag, to condemning post-attack bigotry against Arab-Americans, American-Muslims and South Asian Americans. No fewer than eighty-seven proposed pieces of legislation have received floor action. *See* Legislation Related to the Attack of September 11, 2001, *at* http://thomas.loc.gov/home/terrorleg.htm (last modified Oct. 30, 2002). *See also* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No 107-56, 115 Stat. 272 (2001); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

112. Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224, § 2(a) (2001).

113. *Id.* § 2(b)(1).

114. President Signs Authorization for Use of Military Force Bill, 37 WEEKLY COMP. PRES. DOC. 1333 (Sept. 18, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html.

115. *Id. See also* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., ISSUE BRIEF FOR CONG. NO. IB81050, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 5 (2003), *available at* http://fpc.state.gov/documents/organization/19134.pdf ("It is important to note that since the War Powers Resolution's enactment, over President Nixon's veto in 1973, every President has taken the position that it is an unconstitutional infringement by the Congress on the President's authority as Commander-in-Chief.").

United States citizens who have committed acts of terrorism, or who harbor terrorists, may be tried by military tribunals.[116]

B. The USA PATRIOT Act

Perhaps most comprehensive of all the post-September 11 legislative enactments is the USA PATRIOT Act,[117] which President Bush signed into law on October 26, 2001. The Act passed the House of Representatives by a vote of 356 to 66, and the Senate by a 98 to 1 margin. Although it became law just six weeks after September 11 and was not accompanied by the usual conference or committee reports, portions of it had been actively considered by both the 105th and 106th Congress.

The declared purpose of the USA PATRIOT Act is "[t]o deter and punish terrorist acts in the United States and around the world [and] to enhance law enforcement investigatory tools."[118] When signing the bill, President Bush remarked:

> We're dealing with terrorists who operate by highly sophisticated methods and technologies, some of which were not even available when our existing laws were written. The bill before me takes account of the new realities and dangers posed by modern terrorists. It will help law enforcement to identify, to dismantle, to disrupt, and to punish terrorists before they strike.[119]

The Act is complex. It adds 300 pages to the United States Code and amends fifteen statutes. Its contents can roughly be categorized as falling into five main areas: (1) provisions creating new terrorism-related crimes; (2) provisions relating to the treatment of FTOs; (3) provisions expanding the Government's authority to search for evidence of crimes; (4) provisions facilitating inter-agency sharing of information; and (5) provisions relating to funding.

1. Terrorism-Related Crimes

The Act greatly expands the federal criminal code by creating discrete terrorism crimes and by broadening the definitions of domestic and international terrorism. "Domestic terrorism" is extended to include "acts dangerous to human life that are a violation of the criminal laws," so long as they "appear to

116. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

117. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No 107-56, 115 Stat. 272 (2001) (to be codified in scattered sections of 8, 15, 18, 22, 31,42, 49, 50 U.S.C.).

118. *Id.* pmbl.

119. Remarks on Signing the USA PATRIOT Act of 2001, 37 WEEKLY COMP. PRES. DOC. 1550 (Oct. 26, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/10/20011026-5.html.

be intended . . . to influence the policy of a government by intimidation or coercion" and "occur primarily within the territorial jurisdiction of the United States."[120] "Terrorist activity" has been expanded to include the use of "dangerous device[s]."[121] Harboring or concealing persons who commit or are about to commit terrorist acts is punishable by up to ten years imprisonment.[122] It is a crime to provide "material support or resources" to anyone engaged in terrorist activities outside, as well as inside, the United States.[123] The assets of groups engaged in planning or perpetrating domestic or international terrorism are subject to civil forfeiture.[124] Attacks against "mass transportation systems" are brought within the purview of the Act.[125] There are also particularized criminal provisions addressing bulk cash smuggling, cyberterrorism, and the possession of certain kinds of biological agents.[126]

2. Foreign Terrorist Organizations

The Act expands the definition of FTOs to include not just those designated by the Secretary of State pursuant to AEDPA, but also any group "of two or more individuals, whether organized or not," which engages in "terrorist activities," thereby enlarging the category of inadmissible and deportable aliens.[127] It also authorizes the exclusion of "representative[s] of a political, social, or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities."[128] The Act further provides that aliens who the Attorney General certifies are "engaged in any . . . activity that endangers the national security of the United States" may be detained for up to seven days without being charged.[129] Greater access to the education records of students, particularly foreign students, is authorized.[130]

3. Searches

As President Bush observed when signing the Act, the Act catches up with digital-age technology, permitting officers to obtain search warrants to seize voice and electronic mail and track internet use.[131] Warrants can now be

120. 18 U.S.C. § 2331(5) (2000 & Supp. II 2002).
121. 8 U.S.C. § 1182(a)(3)(B)(iii)(IV)(b) (2000 & Supp. II 2002).
122. 18 U.S.C. § 2339(a) (2000 & Supp. II 2002).
123. 18 U.S.C. § 2339A(a) (2000 & Supp. II 2002).
124. 18 U.S.C. § 981(a)(1) (2000 & Supp. II 2002).
125. 18 U.S.C. § 1993 (2000 & Supp II 2002).
126. *See* 31 U.S.C. § 5332 (2000 & Supp I 2001), 18 U.S.C. § 1030 (2000 & Supp II 2002), and 18 U.S.C. § 175 (2000 & Supp II 2002), respectively.
127. 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2000 & Supp. II 2002).
128. 8 U.S.C. §1182(a)(3)(B)(i)(IV)(bb) (2000 & Supp. II 2002).
129. 8 U.S.C. § 1226a (2000 & Supp. II 2002).
130. 20 U.S.C. § 1232g(j) (2000 & Supp. I 2001).
131. Remarks on Signing the USA PATRIOT Act of 2001, *supra* note 119.

executed outside the judicial district in which they are issued, making a significant difference when seconds matter or when the information sought is located in computers or internet service providers spread across the country.[132] The Act expands the use of "pen registers"—devices that capture outgoing information, such as telephone numbers—by specifying that their use is not limited to telephone lines, but can also, for example, be used to monitor e-mail.[133] The Department of Justice claims that these devices have allowed its investigators to trace communications to kidnappers, terrorist conspirators, and at least one major drug distributor; to identity thieves, a four-time murderer, and a fugitive who fled on the eve of trial using a fake passport; and to obtain valuable information concerning the kidnapping and murder of Wall Street Journal reporter Daniel Pearl.[134]

The Act requires telecommunications companies to assist investigators in their search for information and shields third parties, such as internet service providers or electronic bulletin board hosts, from civil liability for cooperating with investigatory efforts.[135] "Sneak and peek" searches—those where law enforcement officers search secretly and do not have to disclose that they have searched until after the fact—are authorized.[136] In addition, the Act amended FISA to provide that the gathering of foreign intelligence information had to be only "a significant purpose" of the Government's surveillance application;[137] prior to AEDPA, the Department of Justice and some courts had interpreted FISA as requiring that the gathering of foreign intelligence information be "a primary purpose" of the Government's application.[138]

4. Information Sharing

Prior to September 11, there were only limited mechanisms permitting investigators and law enforcement officials to share important information, particularly "foreign intelligence information." The Act facilitates cooperation and sharing among governmental agencies involved in the war against terrorism. For example, it provides for greater access to the National Crime Information Center ("NCIC"), which, according to the Department of Justice, is "the nation's

132. 18 U.S.C. § 2703(d) (2000 & Supp. II 2002); 18 U.S.C. § 3127(2) (2000 & Supp. II 2002) (defining "court of competent jurisdiction").

133. *See* 50 U.S.C. § 1842(d)(2)(A)(iii) (2000 & Supp. I 2001)

134. *Tools Against Terror: How the Administration is Implementing New Laws in the Fight to Protect Our Homeland: Hearing Before the Subcomm. on Tech., Terrorism, And Gov't Info. of the Senate Comm. on the Judiciary*, 107th Cong. 15 (2001) (oral testimony of Alice Fisher, Deputy Assistant Attorney Gen., Criminal Div., Dep't of Justice).

135. 18 U.S.C. § 2703 (2000 & Supp. II 2002).

136. 18 U.S.C. § 3103a (2000 & Supp. II 2002).

137. 50 U.S.C. § 1804(a)(7)(B) (2000 & Supp. I 2001); 50 U.S.C. § 1823(a)(7)(B) (2000 & Supp. I 2001).

138. *See* In re Sealed Case No. 02-001, 310 F.3d 717, 732–734 (Foreign Intel. Surv. Ct. Rev., 2002) (citing 50 U.S.C. § 1804(a)(7)(B) and noting the FISA court's and some senators' interpretations of "a purpose").

principal law enforcement automated information sharing tool."[139] It also allows federal investigators to consult with federal law enforcement officers to coordinate efforts to investigate or protect against attack by foreign powers or their agents.[140] Since enactment of the USA PATRIOT Act, the FBI reportedly has provided the State Department with millions of records, and has furnished the INS with information regarding military detainees in Afghanistan, Pakistan, and Guantanamo Bay.[141]

5. Funding

The USA PATRIOT Act authorizes funding for state and local initiatives to improve police and fire department responses to and prevention of terrorist acts[142] and funding for programs to train federal, state and local officials in the identification and use of foreign intelligence.[143] It also establishes anti-drug training in Asia,[144] and provides benefits for victims of terrorism and for public safety officers injured or killed in the line of duty.[145] The Act also authorized funding for rewards for information leading to the capture of terrorists although that provision has since been repealed.[146]

C. The Homeland Security Act

On November 25, 2002, President Bush signed the Homeland Security Act,[147] which created the Department of Homeland Security. Among the "primary mission[s]" of this new department are to "prevent terrorist attacks within the United States; reduce the vulnerability of the United States to terrorism; minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States;" and to act "as a focal point regarding natural and manmade crises and emergency planning."[148] To achieve those ends, the Department assumes control over a number of federal agencies and consolidates their functions into four Directorates: Science and Technology, Information Analysis and Infrastructure Protection, Border and Transportation Security, and Emergency Preparedness and Response.

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139. ALICE FISHER, DEPUTY ASSISTANT ATTORNEY GEN., PREPARED STATEMENT TO THE SUBCOMM. ON TECH., TERRORISM, AND GOV'T INFO OF THE SENATE COMM. ON THE JUDICIARY OF THE 107TH CONGRESS (2001) *available at* http://judiciary.senate.gov/testimony.cfm?id=495&wit_id=1249.

140. 50 U.S.C. § 1806(k)(1) (2000 & Supp. I 2001).

141. FISHER, *supra* note 139.

142. 18 U.S.C. § 3071 note (2000 & Supp. I 2001) (repealed 2002).

143. 28 U.S.C. § 509 note (2000 & Supp. I 2001).

144. USA PATRIOT Act, *supra* note 105 at § 1007.

145. 42 U.S.C. § 3796c-1 (2000 & Supp. I 2001).

146. 18 U.S.C. § 3071 note (2000 & Supp. I 2001) (repealed 2002).

147. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (to be codified in scattered sections of 5, 6, 18, 44, 49 U.S.C.).

148. 6 U.S.C. § 111 (2000 & Supp. II 2002).

Directorate for Science and Technology: This Directorate is responsible for identifying and developing "countermeasures to chemical, biological, radiological, nuclear, and other emerging terrorist threats. . ."[149] It is designed to embrace all of "the functions, personnel, assets, and liabilities of" a number of Department of Energy programs, including any program relating to chemical and biological national security and nuclear smuggling.[150]

Directorate for Information Analysis and Infrastructure Protection: This Directorate is charged with the responsibility of receiving and analyzing law enforcement information and intelligence "in order to identify and assess the nature and scope of terrorist threats to the homeland."[151] The Directorate is meant to act as a centralized information clearinghouse to enable law enforcement and intelligence officials to share important information quickly and efficiently. The Act requires the Federal Bureau of Investigation, Central Intelligence Agency, National Security Agency, Immigration and Naturalization Service, and Drug Enforcement Agency to provide information that the Secretary of the Homeland Security Department "considers necessary" to fulfill this responsibility.[152]

Directorate for Border and Transportation Security: This Directorate assumes authority over the Coast Guard, Customs Service, Immigration and Naturalization Service, Border Patrol, and certain functions of the Department of Agriculture and Transportation Security Administration, thereby unifying authority relating to borders, territorial waters, and transportation systems. The Act gives the Secretary of the Department of Homeland Security control over the issuance and denial of visas, but preserves the Secretary of State's traditional authority to deny visas for foreign policy reasons. The Directorate will also be responsible for the central storing and intra-governmental sharing of all information relevant to the protection of the country's borders.[153]

Directorate for Emergency Preparedness and Response: This Directorate is charged with the responsibility of "providing the Federal Government's response to terrorist attacks and major disasters," and with "building a comprehensive national incident management system . . . to respond to such attacks and disasters."[154] Agencies to be transferred to this Directorate include the Federal

149. 6 U.S.C. §182 (2000 & Supp. II 2002).

150. 6 U.S.C. § 183 (2000 & Supp. II 2002).

151. 6 U.S.C. § 121 (2000 & Supp. II 2002).

152. 6 U.S.C. § 121–122 (2000 & Supp. II 2002).

153. Homeland Security Act of 2002 §§ 401–478, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (to be codified in scattered sections of 6 U.S.C.).

154. 6 U.S.C. § 312 (2000 & Supp. II 2002).

Emergency Management Agency and several emergency preparedness and response units of the Departments of Justice and Health and Human Services. In the event of an actual or threatened terrorist attack, the Directorate may assume command of certain divisions of the Department of Energy and the Environmental Protection Agency.[155]

IV.
THE JUDICIARY'S RESPONSES

A. Judicial Decisions Addressing the President's War Making Powers

Although the Constitution bestowed upon Congress the authority to declare war, the Supreme Court long ago held, in what is commonly referred to as *The Prize Cases*, that if "a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . [and] accept the challenge without waiting for any special legislative authority."[156] In so holding, the Court reasoned that in such circumstances, the President's oath to faithfully defend the laws of the country and his constitutional status as Commander in Chief compels him to act.

The Judiciary has often been called upon to address disputes when the President commits troops to a hostile region without a congressional declaration of war. These cases are representative of the tensions and interactions of the three branches in addressing their respective roles in the war-making arena: Presidents are unwavering in their belief that as Commander in Chief they have the effective power to determine when to wage war; Congress believes its consent is a prerequisite; the Judiciary ponders whether there is a basis for judicial review.

The Judiciary has not taken a uniform approach to this issue. Some courts have simply embraced the political question doctrine without qualification. For example, in *Ange v. Bush*,[157] the District Court for the District of Columbia explicitly invoked the political question doctrine in rejecting a challenge by a serviceman to President Bush's deployment of forces to Kuwait. As it explained:

> By asking the court to determine the constitutionality of the President's actions, Ange asks the court to delve into and evaluate those areas where the court lacks the expertise, resources, and authority to explore. Ange asks the court to find that the President's deployment of U.S. forces in the Persian Gulf constitutes 'war,' 'imminent hostilities,' or even the prelude to offensive war. Time and again courts have refused to exercise jurisdiction in such cases and undertake such determination

155. 6 U.S.C. §§ 311–319 (2000 & Supp. II 2002).
156. The Brig Amy Warwick, 67 U.S. 635, 668 (1863).
157. 752 F.Supp. 509 (D.D.C. 1990).

> because courts are ill-equipped to do so. . . . The court does believe that the Constitution leaves resolution of the war powers dispute to the political branches, not the judicial branch.[158]

The court noted, however, that the President did not necessarily have free reign in the realm of war and that Congress was not "helpless without the assistance of the judicial branch," since Congress "possesses ample powers . . . to prevent Presidential overreaching," such as "declar[ing] war, exercis[ing] its appropriations power to prevent further offensive and/or defensive military action in the Persian Gulf, or even impeach[ing] the President."[159] The Second Circuit Court of Appeals has taken a more nuanced approach and has striven to carve out an area for judicial review. In *Orlando v. Laird*,[160] an action brought by a serviceman who had been called to duty in Vietnam, the court explained that in a previous case involving a soldier ordered to report for service, *Berk v. Laird*,[161] it had held that Berk's claim, "that orders to fight must be authorized by joint executive legislative action," was justiciable.[162] The court noted that it had remanded Berk's case for a hearing on his application for a permanent injunction so that he could be afforded an opportunity "'to provide a method for resolving the question of when specified joint legislative-executive action is sufficient to authorize various levels of military activity,' and thereby escape application of the political question doctrine to his claim that congressional participation has been in this instance, insufficient."[163] As the *Orlando* court explained, given the "duty of mutual participation in the prosecution of war" between the Executive and Legislative branches, "the test is whether there [was] any action by the Congress sufficient to authorize or ratify the military activity in question."[164] It concluded that there was "no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war,"[165] referencing the Tonkin Gulf Resolution, congressional appropriations for the military effort, and Congress' extension of the Selective Service Act. In dismissing Orlando's claim, it integrated and applied the political question doctrine in the following manner:

> Beyond determining that there has been *some* mutual participation between the Congress and the President, which unquestionably exists here, with action by the Congress sufficient to authorize or ratify the military activity at issue, it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the

158. *Id.* at 514.
159. *Id.*
160. 443 F.2d 1039 (2d Cir. 1971).
161. 429 F.2d 302 (2d Cir. 1970).
162. *Orlando*, 443 F.2d at 1040.
163. *Id.* (quoting *Berk*, 429 F.2d at 305).
164. *Id.* at 1042.
165. *Id.*

protracted military operations in Southeast Asia is a political question.[166]

In addition to the cases brought by servicemen, members of Congress have brought a number of challenges to the Executive Branch's war-making conduct. In *Mitchell v. Laird*,[167] the United States Court of Appeals for the District of Columbia rejected a claim by thirteen members of the United States House of Representatives against the President and the Secretaries of State, Defense, Army, Navy, and Air Force. The Representatives alleged that for at least seven years the defendants had sanctioned war in Southeast Asia without congressional authorization, thereby "'unlawfully impair[ing] and defeat[ing] plaintiffs' Constitutional right, as members of the Congress of the United States, to decide whether the United States should fight a war.'"[168] Tracking the Second Circuit's rationale in *Berk* and *Orlando*, the court ruled that the claim *could* present a justiciable question, noting that it did not see "any difficulty in a court facing up to the question as to whether because of the war's duration and magnitude the President is or was without power to continue the war without Congressional approval."[169] Nevertheless, the separate issue of the *means* by which Congress approved of war or particular choices made by President Nixon in how to bring the war to a close ultimately presented a "political question" to be resolved by the legislative and executive branches.[170] In *Dellums v. Bush*,[171] fifty-three members of Congress sought an injunction "to prevent [the President] from initiating an offensive attack against Iraq without first securing a declaration of war or other explicit congressional authorization for such action."[172]

With regard to the political question doctrine, the United States District Court for the District of Columbia, relying primarily on *Mitchell v. Laird*, held that courts "do not lack the power and the ability to make the factual and legal determination whether this nation's military actions constitute war for purposes of the constitutional War Clause."[173] The court also noted that the Judiciary routinely decides cases that "touch upon or even have a substantial impact on foreign and defense policy," and had "historically made determinations about whether this country was at war for many other purposes," such as the construction of treaties or statutes.[174] Nonetheless, it dismissed the claim on *ripeness* grounds, reasoning that since "[n]o one knows the position of the Legislative Branch on the issue of war or peace . . . [i]t would be both premature and presumptuous for the Court to render a decision on the issue of whether a

166. *Id.* at 1043.
167. 488 F.2d 611 (D.C. Cir. 1973).
168. *Id.* at 613 (quoting the complaint of the Representatives).
169. *Id.* at 614.
170. *Id.* at 616.
171. 752 F.Supp. 1141 (D.D.C. 1990).
172. *Id.* at 1143.
173. *Id.* at 1146.
174. *Id.*

declaration of war is required at this time or in the near future."[175] The court cited Justice Powell's concurrence in *Goldwater v. Carter*,[176] which argued that the courts should embrace the ripeness doctrine to defer deciding "issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse."[177]

More recently, in *Campbell v. Clinton*,[178] members of Congress challenging the constitutionality of President Clinton's 1999 bombing campaign in the former Yugoslavia encountered a different type of legal impediment to judicial review when the United States Court of Appeals for the District of Columbia held that they lacked standing to bring the lawsuit. The circuit court reasoned that "Congress has a broad range of legislative authority it can use to stop a President's war making," including control over funding and even "impeachment[,] should a President act in disregard of Congress' authority on these matters."[179] Concurring, Judge Silberman vigorously argued that the war powers claim also implicated the political question doctrine.[180] In another concurring opinion, Judge Tatel disagreed, relying primarily on cases such as *Berk*, *Orlando*, and *Mitchell* that supported the Judiciary's competence to determine whether hostilities amount to war.[181]

Although the courts have differing views regarding the justiciability of challenges to the President's war-making decisions, no such case has ever succeeded on the merits; notably, the Supreme Court has not yet ruled on the Judiciary's role in adjudicating such cases.

B. Historic Overview of Judicial Decisions Addressing Curtailment of Civil Liberties During Past National Emergencies

Although the courts invariably have refrained from interceding to adjudicate the propriety of the President's implementation of his war powers, albeit for a variety of reasons, the Judiciary has consistently accepted cases challenging the curtailment of civil liberties in times of national crises. As the late Justice William J. Brennan explained, in articulating the need for a jurisprudence that would "help guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile," the Judiciary too

175. *Id.* at 1149.

176. Goldwater v. Carter, 444 U.S. 996 (1979).

177. *Id.* at 997 (Powell, J., concurring) *quoted in Dellums*, 752 F.Supp. at 1150. *See also* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985) (Ginsburg, J., concurring) (dismissing war powers challenge to U.S. military actions in Nicaragua on grounds of ripeness, as well as political question grounds); Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34 (2d Cir. 1985) (dismissing challenge to Executive Branch's decision to deploy cruise missiles on grounds of ripeness, as well as political question doctrine).

178. 203 F.3d 19 (D.C. Cir. 2000).

179. *Id.* at 23.

180. *See id.* at 24–28.

181. *See id.* at 37–41.

frequently has succumbed to the national hysteria surrounding the crisis when deciding these cases, instead of objectively assessing the legitimacy of the public's fears and guarding against overreactive legislation.[182] In Justice Brennan's opinion, sound jurisprudence "must be forged in times of crisis by the sort of intimate familiarity with national security threats that tests their bases in fact, explores their relation to the exercise of civil freedoms, and probes the limits of their compass."[183]

1. Pre-Twentieth Century Cases

Since the early history of the United States, the Judiciary has considered the constitutionality of legislation, enacted in the name of national security, which have had the effect of curtailing civil liberties. As Justice Brennan observed, "[t]he ink had barely dried on the First Amendment" when in 1798 Congress passed the infamous Alien and Sedition Acts.[184] The Alien Act authorized the expulsion of any alien the President deemed sufficiently threatening to national security. The Sedition Act prohibited the publication of "any false, scandalous and malicious writing" against the Government with the intent to bring it into contempt or disrepute.[185] The Alien Act was never challenged in court, but courts upheld convictions under the Sedition Act.[186] More than a century and a half later, Justice Black wrote:

> The enforcement of these statutes, particularly the Sedition Act, constitutes one of the greatest blots on our country's record of freedom. Publishers were sent to jail for writing their own views and for publishing the views of others. The slightest criticism of Government or policies of government officials was enough to cause biased federal prosecutors to put the machinery of Government to work to crush and imprison the critic. Rumors which filled the air pointed the finger of suspicion at good men and bad men alike, sometimes causing the social ostracism of people who loved their free country with a deathless devotion.[187]

During the Civil War, President Lincoln suspended the writ of habeas corpus, a means by which courts can evaluate the legitimacy of a person's incarceration, resulting in the military detention of more than 20,000 persons

182. William J. Brennan, Jr., The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises, Speech at the Law School of Hebrew University, Jerusalem, Israel (December 22, 1987) 8, *available at* www.brennancenter.org/resources/downloads/nation_security_brennan.pdf.

183. *Id.*

184. *Id.* at 2.

185. Act of July 14, 1978, Ch. 74, 1 Stat. 596 (1798).

186. Brennan, *supra* note 182, at 2.

187. Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 155 (1961) (Black, J., dissenting).

suspected of disloyalty. One of the detainees was John Merryman, who, after advocating for Maryland's secession to the Confederacy, was arrested and held by military authorities. Supreme Court Chief Justice Taney, riding on circuit, determined that Merryman's detention was unlawful, but his ruling was ignored, even after he found Merryman's jailors in contempt. Writing that he had "exercised all the power which the constitution and laws confer[red] on [him], but that power [was] resisted by a force too strong for [him] to overcome," the Chief Justice ordered that the record of the proceedings be transmitted to President Lincoln, writing that it would "remain for that high officer, in fulfillment of his constitutional obligation, . . . to determine what measures he will take to cause the civil process of the United States to be respected and enforced."[188] President Lincoln did not respond, and Merryman remained imprisoned. In *Ex parte Milligan*,[189] decided in 1866, after the writ of habeas corpus had been restored, the Supreme Court addressed the issue of whether a civilian could be tried by a military tribunal. Milligan, from Indiana, was accused of belonging to an allegedly insurgent group known as the Sons of Liberty. After a trial in a military court, he was convicted and sentenced to death by hanging, but thereafter he obtained habeas corpus judicial review of the lawfulness of his military trial. Prefacing its opinion with the poignant observation that "[d]uring 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,"[190] the Supreme Court, noting that the Constitution governs "equally in war and in peace," concluded that Milligan, who was neither a prisoner of war nor a resident of any of the states in rebellion, could not be tried by a military tribunal.[191]

2. Early Twentieth Century Cases

In 1917, Congress passed the Espionage Act,[192] which criminalized the making of false statements during times of war with the intent to undermine the success of the war effort and which, for the first time, granted federal courts the power to issue search warrants. The Act was amended a year later to outlaw the willful utterance or publication of "any disloyal, profane, scurrilous, or abusive language about" the Government.[193] In *Schenk v. United States*,[194] the Supreme Court reviewed the conviction of the general secretary of the American Socialist Party, who was charged with distributing 15,000 leaflets critical of the war and

188. Ex parte Merryman 17 F.Cas. 144, 153 (C.C. Md. 1861) (No. 9,487).

189. 71 U.S. 2 (1866).

190. *Id.* at 109.

191. *Id.* at 120.

192. Espionage Act, 65 Pub. L. 24, 40 Stat. 217 (1917) (codified at scattered sections of 22, 50 U.S.C. (2000)).

193. Act of May 16, 1918, ch. 75, 40 Stat. 553 (repealed 1921).

194. 249 U.S. 47 (1919).

draft. The leaflets urged readers: "Assert Your Rights," and "Do not submit to intimidation."[195] The Supreme Court upheld Schenk's conviction, observing that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[196] In the Court's view, Schenk's words "create[d] a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[197] The Supreme Court later applied the same "clear and present danger" test to uphold the conviction in 1918 of Eugene Debs for making a public speech that included statements such as "you need to know that you are fit for something better than slavery and cannon fodder."[198]

Justice Oliver Wendell Holmes authored both *Schenk* and *Debs*. When, in 1919, another Espionage Act leafleting conviction made its way to the Supreme Court, however, Justice Holmes dissented—not because the Court overturned the conviction, but because he had reconsidered his position regarding the boundaries of permissible anti-war speech. In that case, *Abrams v. United States*,[199] the Court upheld the defendant's conviction for the distribution of leaflets critical of United States policy at home and in Europe. In his dissenting opinion, Justice Holmes, joined by Justice Louis D. Brandeis, introduced the "marketplace of ideas" approach to the First Amendment, writing that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[200] "[W]e should be eternally vigilant," Justice Holmes wrote, "against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[201] Abrams' leaflets, he argued, did not rise to that level. Developing their marketplace of ideas approach to First Amendment free speech cases, Justices Holmes and Brandeis eloquently and forcefully dissented in two other similar cases, *Gitlow v. New York*[202] and *Whitney v. California*;[203] their trilogy of dissents receives prominent treatment in virtually every constitutional law textbook and has served as a clarion call for future courts grappling with important questions regarding the balancing of individual and societal rights.

195. *Id.* at 51.
196. *Id.* at 52.
197. *Id.*
198. Debs v. U.S., 249 U.S. 211, 214 (1919).
199. 250 U.S. 616 (1919).
200. *Id.* at 630 (Holmes, J., dissenting).
201. *Id.*
202. 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).
203. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

3. Mid-20th Century Cases

During World War II, President Roosevelt authorized the designation of large portions of California, Oregon, and Washington as "military areas" and imposed curfews upon people of Japanese ancestry who resided in those areas. Later, he authorized the indefinite relocation of more than 100,000 Japanese-Americans from the military areas to inland military camps. The curfews and camps were established in response to the perception that Americans of Japanese descent were likely to be disloyal to the United States and to jeopardize the success of the war. The Supreme Court addressed the propriety of some of these measures in *Hirabayashi v. United States,*[204] which involved a conviction for curfew violation, and *Korematsu v. United States,*[205] which involved a conviction for failure to comply with an order to evacuate a designated military area. Noting that "[t]here is support for the view that social, economic and political conditions. . . have . . . prevented [Japanese-Americans'] assimilation as an integral part of the white population," the Court found that "Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions."[206] Upholding the convictions, the Court continued:

> We cannot say that these facts and circumstances, considered in the particular war setting, could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States. . . . We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety.[207]

In 1980, a Congressional Commission concluded that the internment was a "grave injustice" prompted by "race prejudice, war hysteria and a failure of leadership."[208] During the 1940s, the Supreme Court wrestled with other challenges to the curtailment of civil liberties motivated by perceived threats to national security. In *Minersville v. Gobitis,*[209] the Court upheld the expulsion of Jehovah's Witness children from school for refusing to salute the flag during the daily recitation of the Pledge of Allegiance, reasoning that the "flag is the symbol of our national unity, transcending all internal differences, however

204. 320 U.S. 81 (1943).

205. 323 U.S. 214 (1944).

206. *Hirabayashi*, 320 U.S. at 96, 98.

207. *Id.* at 101–102.

208. REPORT OF THE COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS: PERSONAL JUSTICE DENIED 18 (1982).

209. 310 U.S. 586 (1940).

large, within the framework of the Constitution," that saluting the flag "promot[ed] . . . national cohesion," and that "[n]ational unity is the basis of national security."[210] Just three years later, however, in *West Virginia v. Barnette*,[211] the Court overturned *Gobitis*, remarking that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[212] The Court provided greater protection of civil liberties in several other cases during that decade. In *Hartzel v. United States*,[213] another Espionage Act case, the Court overturned the conviction of an anti-Semite who had sent political literature to members of the armed forces, noting that "[u]nless there is sufficient evidence from which a jury could infer beyond a reasonable doubt that he intended to bring about the specific consequences prohibited by the Act, an American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective without running afoul of the Espionage Act of 1917."[214] In *Schneiderman v. United States*,[215] it reversed the revocation of citizenship of a member of the communist party. In *Bridges v. Wixon*,[216] it halted efforts to deport a labor organizer with ties to the Communist party, observing that:

> It is clear that Congress desired to have the country rid of those aliens who embraced the political faith of force and violence. But we cannot believe that Congress intended to cast so wide a net as to reach those whose ideas and program, though coinciding with the legitimate aims of such groups, nevertheless fell far short of overthrowing the government by force and violence.[217]

In the aftermath of World War II, however, evidence of a pendulum shift was apparent. In 1940, Congress had enacted the Smith Act,[218] which provided that "[w]hoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence" may be imprisoned for up to twenty years.[219] Soon thereafter, Congress passed the Internal Security Act[220] and the

210. *Id.* at 596, 595.
211. 319 U.S. 624 (1943).
212. *Id.* at 641.
213. 322 U.S. 680 (1944).
214. *Id.* at 689.
215. 320 U.S. 118 (1943).
216. 326 U.S. 135 (1945).
217. *Id.* at 147–48.
218. Smith Act of 1940, ch. 439, 54 Stat. 670 (current version at 18 U.S.C. §§ 2385, 2387 (2000)).
219. 18 U.S.C. § 2385 (2000).
220. Internal Security Act of 1950, Pub. L. No. 88-290, 64 Stat. 987 (codified at 50 U.S.C. §§

Communist Control Act.[221] These enactments were designed to address the perceived threat of communism. In *Dennis v. United States*,[222] the Supreme Court upheld the convictions of leaders of the United States Communist Party under the Smith Act, recounting the lower court's findings that:

> [T]he leaders of the Communist Party in this country were unwilling to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared[;] . . . that the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party; that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence.[223]

In Justice Brennan's view, the Supreme Court in *Dennis* "proved unable or unwilling to assess independently the factual allegations that the Communist Party stood ready to overthrow the U.S. government."[224] He cited this case as a further example of the unwarranted sacrifice of civil liberties by the Judiciary in response to what history has shown "in one example after another" to be the "excessive . . . fears of earlier generations, who shuddered at menaces that, with the benefit of hindsight, we now know were mere shadows."[225] Just one year after *Dennis*, however, the Supreme Court sharply curtailed the Executive Branch's national emergency powers in its landmark decision in *Youngstown Sheet & Tube Co. v. Sawyer*.[226] Faced with an imminent steelworkers' strike in the midst of the Korean War, President Truman, citing his constitutional status as Commander in Chief of the Armed Forces, ordered the Secretary of Commerce to seize and operate most of the nation's steel mills. Arguing that the President lacked both congressional and constitutional authority to assume control over the factories, the mills' owners sought injunctive relief, which the district court granted and the circuit court stayed.

The Supreme Court held the seizure illegal. It initially noted that "[t]he President's power, if any, to issue the [seizure] order must stem either from an

831, 832, 834, 835 (2000)).

221. Communist Control Act of 1954, ch. 886, 68 Stat. 775 (codified at 50 U.S.C. §§ 841–844 (2000)).

222. 341 U.S. 494 (1951).

223. *Id.* at 497.

224. Brennan, *supra* note 182, at 7.

225. *Id.* at 8 (quoting WALTER GELHORN, AMERICAN RIGHTS 82–83 (1960)).

226. 343 U.S. 579 (1952).

act of Congress or from the Constitution itself."[227] Because there was no express or implied statutory authority for the President's action, and likewise no express constitutional authorization, the Court turned to whether the President's constitutional role as Commander in Chief supported the order. Characterizing the President's action as essentially lawmaking, rather than law-enforcing, the high court wrote:

> Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.[228]

In a well-known concurrence, Justice Jackson began by observing: "That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety."[229] Presidential power is at its greatest, according to Justice Jackson, "[w]hen the President acts pursuant to an express or implied authorization of Congress, . . . for it includes all that he possesses in his own right plus all that Congress can delegate."[230] In the absence of congressional authority, the President "can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[231] "In this area," he wrote, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[232] Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[233] Justice Jackson was not persuaded by the argument that by designating the President as "Commander in Chief of the Army and Navy of the United States,"[234] the Constitution impliedly conferred upon President Truman the authority to insure that the armed forces he had committed to fight in Korea were adequately supplied. "These cryptic words," he wrote, referring to the President's role as Commander in Chief, "have given rise to some of the most persistent controver-

227. *Id.* at 585.
228. *Id.* at 587.
229. *Id.* at 634 (Jackson, J., concurring).
230. *Id.* at 635.
231. *Id.* at 637.
232. *Id.*
233. *Id.*
234. U.S. CONST. art. II, § 2.

sies in our constitutional history."[235] He further noted that:

> [Although the constitutional provision] undoubtedly puts the Nation's armed forces under presidential command[,] . . . no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.[236]

In sum, the constitutional power to command the Army and Navy did not, in Justice Jackson's view, "constitute him also [as] Commander in Chief of the country, its industries and its inhabitants."[237]

The Vietnam Conflict produced its own set of issues relating to the curtailment of civil liberties. The Supreme Court upheld the conviction of an anti-war protestor who burned his draft card on the steps of a Boston courthouse, remarking that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[238] In the case of a protester who, while inside a Los Angeles courthouse, wore a jacket bearing the words "Fuck the Draft," the Court characterized the issue as:

> Whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.[239]

Commenting that "[t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours," the Court reversed the conviction.[240] And in *Smith v. Goguen*,[241] the first of many flag desecration cases to come, the Court reversed a disturbing-the-peace conviction of a protester who wore blue jeans onto which the flag had been sewn.

C. Judicial Decisions Addressing the Recent Terrorist Crisis

To date, the Judiciary has wrestled with constitutional tensions created by the spate of legislative and executive actions in response to the current terrorist menace in basically four scenarios: (1) the gathering and use of foreign

235. *Youngstown*, 343 U.S. at 641 (Jackson, J., concurring).
236. *Id.* at 641–42.
237. *Id.* at 644–45.
238. United States v. O'Brien, 391 U.S. 367, 376 (1968).
239. Cohen v. California, 403 U.S. 15, 22–23 (1971).
240. *Id.* at 24.
241. 415 U.S. 566 (1974).

intelligence information; (2) the designation of individuals and groups as terrorists; (3) removal proceedings against suspected alien terrorists; and (4) the capture, detention, and prosecution of enemy combatants and other individuals linked to terrorism.

1. The Gathering and Use of Foreign Intelligence Information

In 1987, Ronald Pelton was convicted of a number of espionage charges arising out of his efforts to sell classified information to the Soviet Union. One of the issues raised on his appeal from his convictions was whether the trial court erred in admitting evidence obtained under FISA.[242] Pelton contended the law was unconstitutional and, in any event, that the surveillance leading to the gathering of this evidence was not conducted for "foreign intelligence purposes," as required by FISA.[243] With respect to the constitutional challenge, Pelton argued that "allowing electronic surveillance on anything less than the traditional probable cause standard for the issuance of a search warrant violate[d] the Fourth Amendment."[244] The United States Court of Appeals for the Fourth Circuit disagreed, joining "the other courts of appeal that have reviewed FISA and held the statute meets constitutional requirements."[245] In so holding, it recognized that although the Supreme Court had yet to address the issue, it had in the *Keith* case "suggested that a more flexible standard may be appropriate in the context of foreign intelligence and that the warrant requirement 'may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.'"[246] After considering "FISA's numerous safeguards [that] provide sufficient protection for the rights guaranteed by the Fourth Amendment within the context of foreign intelligence activities,"[247] the Court balanced national security interests with individuals' civil liberties, and concluded that "the provisions of FISA [were] 'reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens,' and therefore compatible with the Fourth Amendment."[248] As further support, the Court referenced circuit court decisions prior to the enactment of FISA "holding that the President has the inherent power to conduct warrantless electronic surveillance for foreign intelligence purposes."[249] As for Pelton's alternative challenge, the circuit court noted that the FISA Court's approval of the surveillance application carried "a strong presumption of veracity

242. United States v. Pelton, 835 F.2d 1067, 1071 (4th Cir. 1987).
243. *Id.* at 1075.
244. *Id.*
245. *Id.*
246. *Id.* (citing United States v. United States Dist. Court, 407 U.S. 297 (1972)).
247. *Id.*
248. *Id.* (quoting *United States Dist. Court*, 407 U.S. at 323).
249. *Id.* (quoting United States v. Truong, 629 F.2d 908, 912–14 (4th Cir. 1980)).

and regularity," and agreed with the trial court that the "primary purpose of the surveillance, both initially and throughout, was to gather foreign intelligence information."[250] The court added that a valid FISA surveillance "is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used, as allowed by [FISA], as evidence in a criminal trial."[251]

Although at the time of the *Pelton* case FISA was understood to require that the gathering of foreign intelligence information had to be "the primary purpose" of a surveillance application, the USA PATRIOT Act amendment to FISA had specified that it need be only a "significant purpose." Reasoning that this amendment eviscerated the traditional concern about prosecutorial overreaching, and stressing the need for coordinating the investigation and prosecution of terrorists, the Justice Department issued new procedures designed to permit the complete exchange of information and advice between intelligence and law enforcement officials.

In the spring of 2002, Attorney General Ashcroft presented the new procedures to the Foreign Intelligence Surveillance Court for approval. The FISA Court did not read the effect of the amendment the same way, however. It concluded that because the USA PATRIOT Act did not amend the required minimization procedures—procedures designed to prevent the acquisition, retention, and dissemination of material gathered in an electronic surveillance that is unnecessary to the Government's need for foreign intelligence information—Congress must have intended that the "wall" between investigators and prosecutors be maintained.[252] Accordingly, the FISA Court limited the future application of the Attorney General's procedures in a number of ways. Principally, the court prohibited law enforcement officials from making "recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances,"[253] and ruled that "the FBI and the Criminal Division [of the Department of Justice] shall ensure that law enforcement officials do not direct or control the use of FISA procedures to enhance criminal prosecution."[254] In this latter regard, the FISA Court ordered that a unit of the Justice Department, the Office of Intelligence Policy and Review, act as a "chaperone," and "be invited" to any meeting between the F.B.I. and the Criminal Division concerning terrorist activities.[255]

The Justice Department railed against these restrictions, appealing to the

250. *Id.* at 1076 (citing United States v. Duggan 743 F.2d 59, 77 (2d Cir. 1984)).

251. *Id.* (citing *Duggan*, 743 F.2d at 78).

252. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (Foreign Intel. Surv. Ct. 2002), *abrogated by* In re Sealed Case No. 02-001, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002).

253. In re Sealed Case No. 02-001, 310 F.3d 717, 720 (Foreign Intel. Surv. Ct. Rev. 2002) (discussing the holding of the lower FISA court).

254. In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 211 F. Supp. 2d at 625.

255. *Id.*

United States Foreign Intelligence Surveillance Court of Review, which convened for the first time. The Court of Review examined the underlying purposes of FISA's minimization requirements and concluded, contrary to the FISA Court, that they did not limit the ability of criminal prosecutors "to advise FBI intelligence officials on the initiation, operation, continuation, or expansion of FISA surveillances to obtain foreign intelligence information, even if such information includes evidence of a foreign intelligence crime."[256] It also concluded that the USA PATRIOT Act amendment to FISA prohibited the gathering of foreign intelligence information only when the Government's purpose was solely to further a criminal prosecution; "[s]o long as the government entertains a realistic option of dealing with the [foreign] agent other than through criminal prosecution, it satisfies the [new] significant purpose test."[257] Thus, the Court of Review instructed: "If the certification of the [surveillance] application's purpose articulates a broader objective than criminal prosecution—such as stopping an ongoing conspiracy—and includes other potential non-prosecutorial responses, the government meets the statutory test."[258] Because the Government was not obligated to demonstrate to the FISA Court that its primary purpose in conducting electronic surveillance was not criminal prosecution, the Court of Review considered, as had the *Pelton* court under the prior "primary purpose" standard, whether Fourth Amendment rights were implicated. Although cautioning against jettisoning Fourth Amendment requirements in the interest of national security, the Court of Review nonetheless concluded, as had the *Pelton* court, that even "assuming *arguendo* that FISA orders are not Fourth Amendment warrants,"[259] they are constitutional. In the Court of Review's opinion, if the procedures and Government showings required under FISA do not meet minimum Fourth Amendment warrant standards, they "certainly come close."[260] Consequently, they pass the overarching constitutional balancing test suggested by the Supreme Court in the *Keith* case, and applied in *Pelton,* of reasonableness "in relation to the legitimate need of the government for intelligence information and the protected rights of our citizens."[261] Attorney General Ashcroft commented that the Court of Review's decision "revolutionizes our ability to investigate terrorists and prosecute terrorist acts."[262]

256. In re Sealed Case No. 02-001, 310 F.3d at 731.

257. *Id.* at 735.

258. *Id.*

259. *Id.* at 744.

260. *Id.* at 746.

261. *Id.* at 742 (quoting United States v. United States Dist. Court, 407 U.S. 297, 322–23 (1972)).

262. Attorney General John Ashcroft, News Conference Regarding Decision of Foreign Intelligence Surveillance Court of Review (Nov. 18, 2002), *at* http://www.usdoj.gov/ag/speeches/2002/111802fisanewsconference.htm.

2. The Designation of Individuals and Groups as Terrorists

In *Paradissiotis v. Rubin,*[263] a citizen of Cyprus challenged the freezing of his United States assets under IEEPA[264] as a consequence of President Reagan's national emergency declaration regarding Libyan terrorism. In regulations written by the Secretary of Treasury pursuant to the declaration of national emergency, the "Government of Libya" was defined expansively to include "any person . . . [who] is, or has been . . . acting or purporting to act directly or indirectly on behalf" of the Government of Libya.[265] Paradissiotis had served as president and board member of two corporations which were subsidiaries of a Dutch corporation, which itself was wholly owned by a Libyan state-controlled holding company. In the opinion of the Treasury Department's Office of Foreign Assets Control ("OFAC"), which was charged with the responsibility of freezing the property interests of the Libyan Government and its agents within the United States, this was a sufficiently close nexus to warrant characterizing Paradissiotis as a "Specially Designated National of the Government of Libya."[266] Paradissiotis challenged the legality of the Secretary of Treasury's regulatory definition of the "Government of Libya" as being beyond the scope of the powers conferred on the Executive Branch under IEEPA. He also challenged OFAC's determination that he satisfied that definition. With respect to the first challenge, the United States Court of Appeals for the Fifth Circuit reasoned that "[i]n matters like this, which involve foreign policy and national security, we are particularly obliged to defer to the discretion of executive agencies interpreting their governing law and regulations."[267] Regarding the second challenge, the court factually determined that Paradissiotis actively "pursued Libya's efforts to expand its presence in European markets," [268] which justified OFAC's conclusion that he fell within the definition of the "Government of Libya." In so holding, the court concluded that OFAC's interpretation and application of the regulatory definition was neither "plainly inconsistent with the regulatory language, nor . . . unreasonable"[269] since the purpose of the definition was "to cast the widest possible net over individuals who are or have been or are suspected of being actors directly or indirectly on behalf of the government of Libya."[270]

Holy Land Foundation for Relief and Development v. Ashcroft[271] is a more

263. 171 F.3d 983 (5th Cir. 1999).

264. *See* International Emergency Economic Powers Act *supra*, note 30.

265. 31 C.F.R. § 550.304(c) (2003).

266. *Paradissiotis*, 171 F.3d at 986.

267. *Id.* at 988.

268. *Id.*

269. *Id.*

270. *Id.* at 987.

271. 219 F. Supp. 2d 57 (D.D.C. 2002), *aff'd,* 333 F.3d 156 (D.C. Cir. 2003), *cert. denied,* 124 S. Ct. 1506 (2004).

recent case challenging the broad reach of the Executive Branch's powers as a consequence of a Presidential declaration of a national emergency under IEEPA. In *Holy Land Foundation*, the Secretary of Treasury had determined that the Holy Land Foundation for Relief and Development ("Holy Land"), at the time the largest Muslim charitable foundation in the United States, qualified as a designated terrorist organization because it acted on behalf of the Palestinian organization, Hamas. Both President Clinton and the current President Bush had previously designated Hamas as a terrorist organization under the IEEPA. As a consequence, OFAC issued a "Blocking Notice" freezing all of the Holy Land's funds, accounts, and real property, and confiscated Holy Land's documents, computers, and furniture.[272]

Holy Land challenged its terrorist designation and OFAC's actions in the United States District Court for the District of Columbia, the court specified under AEDPA to review FTO designations. It argued, among other things, that many of its activities fell within IEEPA's humanitarian aid exception.[273] In opposition, the Government submitted evidence establishing that Holy Land had financial connections to Hamas: its leaders had been actively involved in various meetings with Hamas leaders; Holy Land funded Hamas-controlled charitable organizations and provided financial support to the orphans and families of Hamas martyrs and prisoners; and Holy Land's Jerusalem office acted on behalf of Hamas.[274] Applying the rule that courts afford considerable deference to the decisions of administrative agencies,[275] the court examined the administrative record compiled by OFAC—seven volumes and 3130 pages—and determined that it provided substantial support for the designation of Holy Land as a terrorist organization and the freezing of its assets.[276] However, it agreed with Holy Land in two respects: (1) that under IEEPA's humanitarian aid exception, the Government could not interfere with Holy Land's donations to Hamas of food, clothing, and medicine;[277] and (2) that under the Fourth Amendment, it was improper for the Government to have entered into Holy Land's offices,[278] searched its property, and seized its documents and office equipment without a search warrant. In placing this constitutional constraint on the Government, the court rejected the Government's contentions that because "IEEPA expressly allows the freezing of assets, a warrant requirement does not comport with the statutory framework," and that, regardless, the nature of its interest when acting under IEEPA was sufficient justification to obviate the need for a warrant.[279]

272. *Id.* at 64.
273. *Id.* at 66.
274. *Id.* at 74.
275. *Id.* at 66–67.
276. *Id.* at 69.
277. *Id.*
278. *Id.* at 79–80.
279. *Id.* at 79.

In *National Council of Resistance of Iran v. Department of State*,[280] the National Council of Resistance of Iran and the People's Mojahedin of Iran challenged their designations by the Secretary of State under AEDPA as FTOs. These designations permitted the Secretary of State to exercise essentially the same economic constraints afforded to Presidents when national emergencies are declared under IEEPA. The organizations claimed that

> by designating them without notice or hearing as a foreign terrorist organization, with the resultant interference with their rights to obtain and possess property, and the rights of their members to enter the United States, the Secretary deprived them of "liberty, or property, without due process of law," in violation of the Fifth Amendment of the United States Constitution.[281]

The Government contended that the plaintiffs had no standing to raise this constitutional due process issue because they had insufficient ties to the United States, and that, in any event, no rights were violated.[282]

The District of Columbia Circuit Court of Appeals disagreed with both of the Government's contentions.[283] With respect to the standing issue, it determined from a review of the administrative record compiled by the Secretary of State that each organization had sufficient connections with the United States to entitle it to constitutional protections.[284] As for the due process issue, the court determined that the Secretary of State acted in accordance with AEDPA's statutory requirements for the designations, but held that the fundamental due process principles of the right to notice and a hearing could not be abrogated.[285] In deference to the settled law that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,"[286] the court shaped the contours of the process due to the plaintiffs after considering three factors historically identified by the Supreme Court: (1) the nature of the affected private interests; (2) the risk of an erroneous deprivation of such interests by reason of the process; and (3) the Government's interest.[287] Weighing these factors, the court held that the Government's interest in national security warranted a tentative designation by the Secretary of State, regardless of due process concerns, so that prophylactic action could be taken.[288] Immediately afterwards, however, "the Secretary must provide notice [to the entity] of those unclassified items upon which he proposes to rely" and "afford

280. 251 F.3d 192 (D.C. Cir. 2001).
281. *Id.* at 200.
282. *Id.* at 200–01.
283. *Id.* at 200.
284. *Id.* at 202.
285. *Id.* at 196.
286. *Id.* at 205.
287. *Id.* at 206 (citing Matthews v. Eldridge, 424 U.S. 319, 335 (1976)).
288. *Id.* at 208.

to entities considered for imminent designation the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations."[289] Finally, in *Global Relief Foundation v. O'Neill*,[290] the Treasury of Secretary designated the plaintiff, an Illinois charitable foundation with worldwide operations, as an FTO, and blocked its assets pursuant to the provision of IEEPA authorizing the freezing of "property in which any foreign country or a national thereof has any interest."[291] The foundation argued that no foreign entity had an interest in its property because it was a United States corporation (and therefore considered a United States citizen) which owned all of its property. The United States Court of Appeals for the Seventh Circuit rejected the argument, reasoning that because the purpose of the statute was "designed to give the President means to control assets that could be used by enemy aliens," the term "interest" was not limited to mere legal ownership interest, but extended to the control and use of the assets.[292] Were it otherwise, the court noted, the President would be powerless under IEEPA to prevent Osama Bin Laden from establishing a trust under Illinois law, having it administered by a national bank, and directing that the trustee make trust funds available for purchases of weapons to be used by al Qaeda operatives.[293]

3. Removal Proceedings Against Suspected Alien Terrorists

Just a few months before September 11, the Supreme Court, in *Zadvydas v. Davis*,[294] signaled the possibility that suspected alien terrorists might not enjoy the same rights during removal proceedings as other aliens. While ruling that an alien could not be detained indefinitely pending deportation and that a reasonable detention time period was needed to avoid serious constitutional issues, the Court noted that the particular detention provision it was reviewing "d[id] not apply narrowly to 'a small segment of particularly dangerous individuals,' say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations."[295] It cautioned, therefore, that it was not considering "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[296] Thus, the Court left open the question whether, when dealing with suspected alien terrorists in removal proceedings,

289. *Id.* at 209.
290. 315 F.3d 748 (7th Cir. 2002), *cert. denied*, 124 S. Ct. 531 (2003).
291. *Id.* at 750 (citing 50 U.S.C. § 1702(a)(1)(B) (2000)).
292. *Id.* at 753.
293. *Id.*
294. 533 U.S. 678 (2001).
295. *Id.* at 691 (quoting Kansas v. Hendricks, 521 U.S. 346, 368 (1997)).
296. *Id.* at 696.

the needs of national security would override normal constitutional protections.

This issue came to the forefront after the Creppy Directive closed the courtroom for immigration removal proceedings against those individuals whom the Attorney General had determined were "special cases." The Courts of Appeals for the Third and Sixth Circuits have each considered the constitutionality of the Creppy Directive, reaching opposite results.

The Sixth Circuit in *Detroit Free Press v. Ashcroft*[297] recognized that while the political branches have "broad powers" to "expel and exclude aliens,"[298] that power is limited by constitutional concerns, including the public's and press's First Amendment rights. The court applied the so-called "experience and logic test" to determine whether the First Amendment compelled open removal proceedings, concluding that "experience" is manifested in a 100-year history of public accessibility to deportation hearings, and "logic" reflects a policy in favor of allowing the quasi-judicial proceeding to be open to the public to "enhance[] the quality of deportation proceedings,"[299] to "act[] as a check on the actions of the Executive,"[300] and to "ensure[] that government does its job properly."[301] Given these benchmarks, the court struck down the Creppy Directive as unconstitutional because it was both "under-inclusive by permitting the disclosure of sensitive information while at the same time drastically restricting First Amendment rights,"[302] and "over-inclusive by categorically and completely closing all special interest cases without demonstrating, beyond speculation, that such a closure is absolutely necessary."[303] While the court "sympathize[d] and share[d] the Government's fear that dangerous information might be disclosed in some of these cases,"[304] it believed that "the ordinary process of determining whether closure is warranted on a case-by-case basis sufficiently addresses [the Government's] concerns."[305] As it explained:

> Using this stricter standard does not mean that information helpful to terrorists will be disclosed, only that the Government must be more targeted and precise in its approach. Given the importance of the constitutional rights involved, such safeguards must be vigorously guarded, lest the First Amendment turn into another balancing test.[306]

In *North Jersey Media Group v. Ashcroft*,[307] a majority panel of the United States Court of Appeals for the Third Circuit ruled that the Creppy Directive was

297. 303 F.3d 681 (6th Cir. 2002).
298. *Id.* at 690.
299. *Id.* at 703.
300. *Id.*
301. *Id.* at 704.
302. *Id.* at 710.
303. *Id.*
304. *Id.* at 692.
305. *Id.* at 692–693.
306. *Id.* at 693.
307. 308 F.3d 198 (3rd Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

constitutional. Like the Sixth Circuit in *Detroit Free Press*, the Third Circuit evaluated the Government's interest in light of the "experience and logic"[308] test to decide if the public and press had a "First Amendment right to attend deportation proceedings."[309] However, the Third Circuit disagreed with the Sixth Circuit on both prongs. As for the experience prong, it found that "deportation hearings have frequently been closed to the general public," and that history and experience militated against a tradition of openness.[310] Under the logic prong, it determined that public access would not play a significant positive role in the removal process, particularly in light of the Government's interest "to avoid disclosing potentially sensitive information to those who may pose an ongoing security threat to the United States and its interests."[311] The dissenting opinion essentially agreed with the Sixth Circuit, believing that national security interests can be fully accommodated by Immigration Judges on a case-by-case basis, which was "a reasonable alternative [to] the Creppy Directive's blanket closure rule."[312]

4. The Capture, Detention, and Prosecution of Enemy Combatants and Other Individuals Linked to Terrorism

a. Historical Overview

Contemporary cases addressing the rights of combatants captured during armed hostilities are based largely upon two seminal World War II-era Supreme Court cases, *Ex parte Quirin*[313] and *Johnson v. Eisentrager*.[314]

In *Ex Parte Quirin*, eight German soldiers, dressed in German uniforms and carrying explosives, disembarked from submarines off the coasts of New York and Florida.[315] Immediately upon reaching land, they removed their uniforms and disguised themselves as American civilians, but were soon discovered and arrested.[316] After their arrests, President Roosevelt, as Commander in Chief, appointed a Military Commission by Proclamation and directed it to try the eight men "for offenses against the law of war and the Articles of War."[317] All of the

308. *Id.* at 204.
309. *Id.* at 205.
310. *Id.* at 212.
311. *Id.* at 203.
312. *Id.* at 228 (Scirica, J., dissenting).
313. 317 U.S. 1 (1942).
314. 339 U.S. 763 (1950).
315. *See Quirin*, 317 U.S. at 7.
316. *See id.*
317. 7 Fed. Reg. 5103 (July 7, 1942). Originally enacted in 1789 and amended many times since, the Articles of War was a congressional act, *see* 10 U.S.C. §§ 1471–1593 (2000), which, among other things, recognized a "military commission" appointed by military command "as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial." *Quirin*, 317 U.S. at 27. Portions of the Articles of War eventually became

men had lived in the United States at some point, and at least one of them claimed United States citizenship.[318] Each sought judicial review by *habeas corpus*.[319] At issue before the Supreme Court was whether the President acted within his authority in ordering the men tried by a military tribunal instead of by a jury in a criminal court. Notably, the Court held that it had jurisdiction to decide the issue since "neither the Proclamation nor the fact that [petitioners] are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."[320]

After reviewing the constitutional roles of Congress and the President as they relate to prosecuting a war, the Court held that the President did indeed have the authority to provide that the petitioners be tried by a military tribunal because by surreptitiously entering the country to commit hostile acts, they became "unlawful combatants punishable as such by military commission," rather than simply prisoners of war.[321] As the Court explained:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[322]

Significantly, the Court noted that it was irrelevant that the petitioners had either been in the United States at some prior time or even may have been United States citizens, because even "[United States] [c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents."[323] It distinguished the Court's civil war decision in *Milligan,* because the Court there concluded "that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war."[324] Lastly, the Court ruled that the constitutional right to a jury trial only applies to conventional criminal proceedings, and "it has never been suggested in the very extensive literature on the subject that an alien spy, in

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part of the Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2000).

318. *See Quirin*, 317 U.S. at 20.

319. *See id.* at 18.

320. *Id.* at 25.

321. *Id.* at 35.

322. *Id.* at 30–31.

323. *Id.* at 37–38.

324. *Id.* at 45.

time of war, could not be tried by military tribunal without a jury."[325]

In *Eisentrager,* twenty-one German soldiers were captured by the United States in China after Germany surrendered.[326] The soldiers were convicted of continuing to engage in military activity after the surrender and were later incarcerated at an American base in Germany.[327] Unlike the defendants in *Quirin*, none of them had any ties to the United States. Each filed a petition for a writ of *habeas corpus* claiming that his trial and detention violated United States laws.[328] The majority of the Court concluded that it had no jurisdiction to consider their *habeas* petitions because they were non-resident enemy aliens, with no claim to American citizenship, and were being held outside of the territorial jurisdiction of the United States.[329] In so holding, the Court distinguished its acceptance of jurisdiction in *Quirin* and a comparable case, *In re Yamashita,*[330] because they both involved prosecutions in the United States for offenses allegedly committed on American soil.[331] Writing for the dissent, Justice Black, in arguing for judicial review, reasoned that the Court was "fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations."[332]

b. Extraterritorial Detentions and the Guantanamo Bay Detainees

In the consolidated cases of *Rasul v. Bush* and *Al Odah v. United States,*[333] twelve Kuwaiti nationals (in the *Al Odah* case) and two United Kingdom citizens and an Australian citizen (in the *Rasul* case), all of whom are or were being held by the United States military at the Guantanamo Bay base after their capture in Afghanistan and Pakistan, brought *habeas* petitions alleging that they were not involved with the Taliban and had been captured and detained by mistake. The Kuwaitis, for example, claimed that Afghani villagers had turned them in to collect bounties or other promised financial rewards.[334] Applying *Eisentrager*, the District Court for the District of Columbia held that because the plaintiff detainees were all non-resident aliens and that the military base at Guantanamo Bay was outside of the territorial jurisdiction of the United States, the Court had

325. *Id.* at 42.

326. Johnson v. Eisentrager, 339 U.S. 763, 766 (1950).

327. *See id.*

328. *Id.* at 765.

329. *Id.* at 766.

330. 327 U.S. 1 (1946).

331. *Eisentrager,* 339 U.S. at 779–81.

332. *Id.* at 795 (Black, J., dissenting).

333. The district court dismissed the *Al Odah* and *Rasul* actions in one decision. *See* Rasul v. Bush, 215 F.Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2002), *rev'd and remanded sub nom* Rasul v. Bush, 124 S. Ct. 2686 (2004).

334. *See id.* at 61.

no power to entertain their petitions.[335] In so holding, it explained its view of the contours of *Eisentrager* as follows:

> In sum, the *Eisentrager* decision establishes a two-dimensional paradigm for determining the rights of an individual under the habeas laws. If an individual is a citizen or falls within a narrow class of individuals who are akin to citizens, i.e. those persons seeking to prove their citizenship and those aliens detained at the nation's port, courts have focused on status and have not been as concerned with the situs of the individual. However, if the individual is an alien without any connection to the United States, courts have generally focused on the location of the alien seeking to invoke the jurisdiction of the courts of the United States. If an alien is outside the country's sovereign territory, then courts have generally concluded that the alien is not permitted access to the courts of the United States to enforce the Constitution.[336]

The United States Court of Appeals for the District of Columbia affirmed.[337] Rejecting the notion that each detainee was an "enemy alien"—none were citizens of a nation with whom the United States was at war—the circuit court found that:

> Nonetheless the Guantanamo detainees have much in common with the German prisoners in Eisentrager. They too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States.[338]

Noting that "[t]he law of the circuit now is that a 'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise,'" the court concluded that "[t]he consequence is that no court in this country has jurisdiction to grant *habeas* relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States."[339]

The Supreme Court consolidated *Al Odah* and *Rasul* and granted *certiorari* on the issue of "[w]hether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base,

335. *See id.* at 72–73.

336. *Id.* at 68.

337. *See* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd and remanded sub nom* Rasul v. Bush, 124 S. Ct. 2686 (2004).

338. *Id.* at 1140.

339. *Id.* at 1141 (quoting People's Mojahedin Org. v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999)).

Cuba."[340] Noting that the President had placed them "in a legal 'black hole' for more than *two years*, during which none has been charged with any offense, permitted to meet with members of his family or counsel, or been allowed access to any impartial tribunal," the detainees contended that for all practical purposes, Guantanamo is American territory over which the district courts have *habeas* jurisdiction, there is a "strong presumption that executive action is subject to judicial review," and that "denying judicial review is contrary to the law of civilized nations."[341] In opposition, the Government argued that "the Guantanamo detainees, like the detainees in *Eisentrager*, are being held by the U.S. military outside the sovereign territory of the United States," and that "[t]here is no statutory, precedential, or historical basis for [the Supreme Court] to tie the availability of federal jurisdiction to the merits of a detainee's international law claims."[342] Further, the respondents argue that "[e]xercising jurisdiction over claims filed on behalf of aliens held at Guantanamo would place the federal courts in the unprecedented position of micro-managing the Executive's handling of captured enemy combatants from a distant combat zone where American troops are still fighting."[343]

On June 28, 2004, the Supreme Court sided with the detainees, ruling that the federal *habeas* statute conferred jurisdiction on the district courts to entertain the detainees' petitions.[344] As an initial matter, Justice Stevens, writing for a six-to-three majority, rejected the Government's view that *Eisentrager* was factually analogous:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[345]

Eisentrager was also distinguishable, the Court noted, because it addressed the German detainees' constitutional entitlement to *habeas* review.[346] The Guantanamo detainees, in contrast, had not pursued a constitutional argument, claiming instead that the district courts were statutorily vested with *habeas*

340. Rasul v. Bush, 124 S. Ct. 534, 534 (2003).

341. Brief for Petitioners at 3, 18, 38, Al Odah v. United States, 124 S. Ct. 534 (2004) (No. 03-334, 03-343).

342. Brief for the Respondents at 12, Al Odah v. United States, 124 S. Ct. 534 (2004) (No. 03-334 and 03-343).

343. *Id.* at 11–12.

344. Rasul v. Bush, 124 S. Ct. 2686 (2004).

345. *Id.* at 2693.

346. *Id.*

jurisdiction.[347]

Turning to the text of the *habeas* statute, the Court observed that pursuant to 28 U.S.C. § 2241, "Congress has granted federal district courts, 'within their respective jurisdictions,' the authority to hear applications for *habeas corpus* by any person who claims to be held 'in custody in violation of the Constitution or laws or treaties of the United States.'"[348] In answer to the Government's invocation "of the 'longstanding principle of American law' that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested,"[349] Justice Stevens wrote:

> Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the *habeas* statute with respect to persons detained within "the territorial jurisdiction" of the United States. By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. Respondents themselves concede that the *habeas* statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship.[350]

Concluding that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241,"[351] the Court reversed and remanded to the district court "to consider in the first instance the merits of petitioners' claims."[352] In so doing, the Court specifically declined to address "[w]hether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims."[353]

Characterizing the majority's holding as extending the *habeas* statute "to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts," Justice Scalia, writing for the dissenters, asserted that the majority's holding "contradicts [*Eisentrager*] a half-century-old precedent on which the military undoubtedly relied," and represented "an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the

347. *Id.* at 2694.
348. *Id.* at 2692 (citing 28 U.S.C. § 2241 (2000)).
349. *Id.* at 2696 (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).
350. *Id.*
351. *Id.* at 2689.
352. *Id.* at 2698.
353. *Id.*

field."[354] Considering that the text of § 2241 stated that "[w]rits of *habeas corpus* may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*," (Justice Scalia's emphasis), the dissent argued that "[n]o matter to whom the writ is directed, custodian or detainee, the statute could not be clearer that a necessary requirement for issuing the writ is that *some* federal district court have territorial jurisdiction over the detainee."[355] Because it was undisputed that "the Guantanamo Bay detainees are not located within the territorial jurisdiction of any federal district court," Justice Scalia concluded that that should have been "the end of this case" and that he "would leave it to Congress to change § 2241."[356]

c. Territorial Detentions and Enemy Combatants

As of this writing, four individuals alleged to have terrorist ties are being detained in the United States by Executive Branch officials: John Walker Lindh ("Lindh"), Zacarias Moussaoui ("Moussaoui"), Joseph Padilla ("Padilla"), and Yaser Esam Hamdi ("Hamdi"). Three are Americans (Lindh, Padilla, Hamdi); three were designated by President Bush as enemy combatants (Lindh, Padilla, Hamdi); two were captured abroad (Lindh, Hamdi); two were captured in the United States (Padilla, Moussaoui); two are being or have been prosecuted in American courts (Lindh, Moussaoui); and two are being detained indefinitely in the United States without charges (Padilla, Hamdi). Comparison of their respective circumstances provides insight into the tensions and interactions between the three branches of Government in addressing the terrorist threat to our nation's security.

The Enemy Combatant: Just what is an "enemy combatant"? Lindh, Padilla, and Hamdi apparently were the first such persons ever to be designated as such by the Government. The Government did so without explaining the criteria it used and the nature of the rights, if any, it would afford individuals so designated.

The term "enemy combatant" first appeared in United States jurisprudence in *Ex Parte Quirin*:

> The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an *enemy combatant* who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of

354. *Id.* at 2701 (Scalia, J., dissenting).
355. *Id.* (citation omitted).
356. *Id.*

> war, but to be offenders against the law of war subject to trial and punishment by military tribunals.[357]

The rights of "prisoners of war" of which then-Chief Justice Stone spoke—as opposed to those of enemy combatants—were later codified in the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), a 1949 treaty to which the United States has subscribed.[358] To qualify for prisoner of war status under the GPW, individuals who have been captured by opposing military forces must satisfy four criteria regarding their military organization:

> 1. The captured individual's organization must be commanded by a person responsible for his subordinates;
>
> 2. The organization's members must have a fixed distinctive emblem or uniform recognizable at a distance;
>
> 3. The organization's members must carry arms openly; and
>
> 4. The organization's members must conduct their operations in accordance with the laws and customs of war.[359]

Prisoners of war are entitled to "lawful combatant immunity," which tracks the doctrine articulated in *Quirin* prohibiting the prosecution of soldiers for lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.[360] They are also entitled to receive maintenance and medical attention,[361] and are permitted to communicate with their families.[362] Upon the "cessation of hostilities," prisoners of war are to be "released and repatriated without delay."[363]

The GPW does not use the term "enemy combatant" and is silent as to the rights, if any, of individuals who do not qualify for prisoner of war status. It specifies that if there is "any doubt" whether captives are prisoners of war, "such persons shall enjoy the protection of the present Convention until such time as

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357. Ex Parte Quirin, 317 U.S. 1, 31 (1942) (emphasis added).

358. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention III]. Geneva Convention III is but one of the four Geneva Conventions established on that date. The other three are the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

359. *Id.*, art. 4, 6 at U.S.T. 3320, 3322.

360. Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, CASE W. RES. J. INT'L L. 205, 212 (1977). Prisoner of war status does not, however, protect individuals from being charged with war crimes, crimes against humanity, or violations of United States criminal law. *See also* Geneva Convention III, *supra* note 358, art. 82, at 6 U.S.T. 3382.

361. Geneva Convention III, *supra* note 358, arts. 15, 30, at 6 U.S.T. 3330, 3342.

362. *Id.*, art. 71, at 6 U.S.T. 3370, 3372.

363. *Id.*, art. 118, at 6 U.S.T. 3406.

their status has been determined by a competent tribunal."[364] In 1997, in seeking to implement this provision of the GPW, the United States military promulgated a regulation, entitled "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,"[365] which set out a "detailed procedure for a military tribunal to determine an individual's status."[366] The regulation also provides that "[p]ersons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed."[367]

i. Lindh

President Bush designated Lindh, the infamous "American Taliban," as the first enemy combatant. Unlike later designees, however, the Government elected to prosecute him in federal court. Lindh claimed he was a lawful combatant, and therefore entitled to lawful combatant immunity under the GPW.[368] In opposing this defense, the Government argued that Lindh's status raised a non-justiciable political issue.[369] Rejecting this contention, the United States District Court for the Eastern District of Virginia reasoned that "[b]ecause the consequence of accepting a political question argument is so significant—judicial review is completely foreclosed—courts must subject such arguments to searching scrutiny, for it is central to the rule of law in our constitutional system that federal courts must, in appropriate circumstances, review or second guess, and indeed sometimes even trump, the actions of the other governmental branches."[370] It noted, in that respect, "that treaty interpretation does not implicate the political question doctrine and is not a subject beyond judicial review."[371]

The court explained that because Lindh was being prosecuted in an American court, the GPW lawful combatant immunity defense was cognizable under the Supremacy Clause of the Constitution,[372] which provides that "all the laws of the United States" and "all treaties made . . . under the authority of the United States, shall be the supreme law of the land."[373] The court ruled, however, that the President's interpretation and application of the GPW,

364. *Id.*, art. 5, at 6 U.S.T. 3322, 3324.

365. Army Reg. 190-8 (1997).

366. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2658 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in judgment).

367. Army Reg. 190-8, § 1-6g (1997).

368. United States v. Lindh, 212 F. Supp. 2d 541, 545 (E.D. Va. 2002).

369. *Id.* at 555.

370. *Id.*

371. *Id.* at 556.

372. *See id.* at 553–54.

373. U.S. CONST. art. VI, cl. 2.

although subject to judicial review, was entitled to "great weight," and the burden was on Lindh to establish that the President's determination was unreasonable.[374] Applying the GPW four-part test as to whether, under the GPW, Lindh was a lawful combatant, and hence a prisoner of war (i.e., whether the individual's organization was commanded by a person responsible for subordinates, had distinctive emblems, openly carried arms, and conducted operations in accordance with the laws and customs of war), the court determined that Lindh did not meet this burden. Accordingly, the court reasoned, the President's determination that Lindh was an enemy combatant, and therefore ineligible for immunity, was controlling.[375] On October 4, 2002, pursuant to a plea agreement, Lindh was sentenced to twenty years imprisonment.

ii. Moussaoui

Zacarias Moussaoui, an avowed member of al Qaeda, was caught on American soil and was charged in the Eastern District of Virginia with six counts of conspiracy related to the events of September 11. He is the only individual connected with September 11 to have been criminally charged; some of the charges carry the death penalty. Unlike Lindh, he has not been designated as an enemy combatant. In *United States v. Moussaoui*,[376] the defendant sought to depose witnesses held by the Government (and apparently named as enemy combatants) whom Moussaoui claimed could either establish his innocence or preclude a death penalty.[377] Citing national security concerns, the Government refused to produce the witnesses, choosing instead to provide Moussaoui with heavily redacted summaries of the statements the witnesses had given during interrogation. Concluding that at least some of the statements, if believed, would tend to exonerate Moussaoui and/or support an argument that he should not receive the death penalty, and determining that Moussaoui's interest in a fair trial trumped the Government's national security concerns, the district court ordered that Moussaoui be provided access to the witnesses by remote video for the taking of depositions. When the Government informed the court that it would not abide by its order, the court, as a sanction, dismissed the death notice, forbade the Government "from making any argument, or offering any evidence, suggesting that the defendant had any involvement in, or knowledge of, the September 11 attacks," and precluded the prosecution from admitting certain evidence, including cockpit voice recordings, video footage of the collapse of the World Trade Center towers, and photographs of the attacks' victims.[378]

Acknowledging that it was "presented with questions of grave

374. *Lindh*, 212 F. Supp. 2d at 557.
375. *Id.* at 558.
376. 365 F.3d 292, 295–96 (4th Cir. 2004).
377. *See id.* at 296.
378. *Id.* at 298.

significance—questions that test the commitment of this nation to an independent Judiciary, to the constitutional guarantee of a fair trial even to one accused of the most heinous of crimes, and to the protection of our citizens against additional terrorist attacks," and conceding that "[t]hese questions do not admit of easy answers," the United States Court of Appeals for the Fourth Circuit agreed that Moussaoui's right to a fair trial outweighed the Government's national security concerns.[379] It disagreed, however, that the imposition of sanctions was warranted. Instead, the court remanded with instructions to the district court to fashion written statements from the witnesses' summaries that could be presented to the jury; according to the circuit court, this approach balanced Moussaoui's Sixth Amendment right to compulsory process of the witnesses while recognizing the Government's valid national security concerns.[380]

iii. Padilla

In *Padilla v. Bush*,[381] the United States District Court for the Southern District of New York was called upon to determine whether it had jurisdiction to entertain a *habeas* petition on behalf of Padilla, an American citizen captured on American soil. Arrested in Chicago, Padilla was brought to New York on a material witness warrant to compel his attendance before a grand jury investigating the September 11 attacks. After court-appointed counsel moved to vacate the warrant, the Government withdrew it, notified the court that President Bush had designated Padilla as an enemy combatant and al Qaeda operative, and transferred Padilla to a military brig in South Carolina under the custody of the Department of Defense, where he was held without charges and access to counsel.[382] Learning of these events, counsel presented a petition for *habeas corpus* on Padilla's behalf in the Southern District of New York.[383] Ruling that it had jurisdiction to entertain the petition, the district court held (1) that the President had the authority to designate as an enemy combatant an American citizen captured on American soil and to detain him for the duration of armed conflict with al Qaeda; (2) that Padilla could consult with counsel under conditions that will minimize the likelihood that he could use his lawyers as unwitting intermediaries for the transmission of illicit information; and (3) to resolve the issue of whether Padilla was lawfully detained, the court would permit him to present "any facts he may wish to present to the court," but would only examine whether the President had "some evidence" to support his finding

379. *Id.* at 295, 312.

380. *Id.* at 315.

381. 233 F. Supp. 2d 564, *remanded sub nom* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd and remanded*, 124 S. Ct. 2711 (2004).

382. *See id.* at 571.

383. *See id.*

that Padilla was an enemy combatant.[384]

Regarding its first holding, the court rejected Padilla's argument that the Non-Detention Act—forbidding the detention of citizens except pursuant to an Act of Congress—barred the President's actions. The court held that the Joint Resolution authorizing the use of military force, in permitting the President to "use all necessary and appropriate force" against those responsible for the September 11 terrorist attacks, constituted the requisite congressional authority under the Non-Detention Act to designate and hold enemy combatants.[385] In addition, the court relied on the President's role as Commander in Chief to vouchsafe the nation's security. The court addressed Padilla's concern that he could be detained indefinitely by observing that "[a]t some point in the future, when operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed, there may be occasion to debate the legality of continuing to hold prisoners based on their connection to al Qaeda," but that "[s]o long as American troops remain on the ground in Afghanistan and Pakistan in combat with and pursuit of al Qaeda fighters, there is no basis for contradicting the President's repeated assertions that the conflict has not ended."[386]

With respect to the right of counsel, and the constraints placed upon counsel to protect against the unwitting dissemination of illicit information, the court relied on its authority under the *habeas corpus* statute to appoint an attorney "in the interests of justice."[387] It also relied on the jurisdiction conferred upon courts by Congress pursuant to the All Writs Act, which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."[388]

Finally, in requiring only "some evidence" for review of the President's enemy combatant designation, the court noted that there was no particular judicial guidance "regarding the standard to be applied in making the threshold determination that a *habeas corpus* petitioner is an unlawful combatant."[389] Nonetheless, the court rejected the notion that Padilla would be entitled to either a searching judicial inquiry or a *de novo* review. In the court's view, *habeas* review would be confined to the "some evidence" standard applicable to the review of administrative determinations—meaning simply whether there was any evidence in the record that could support the determination—out of judicial deference to the judgments of the political branches in addressing terrorist

384. *Id.* at 610, 608.
385. *Id.* at 570.
386. *Id.* at 590.
387. *Id.* at 600 (quoting 18 U.S.C. § 3006A(2)(B) (2000)).
388. *Id.* at 602 (quoting 28 U.S.C. § 1651(a) (2000)).
389. *Id.* at 607.

concerns.[390]

On appeal, a divided panel of the United States Court of Appeals for the Second Circuit remanded to the district court with instructions that the district court issue the *habeas* writ and command that the military release Padilla within thirty days.[391] As a preliminary matter, the entire panel agreed that the Southern District had jurisdiction over the matter, despite Padilla's transfer to South Carolina, because the district court had personal jurisdiction over Defense Secretary Donald Rumsfeld, whose agents had removed Padilla from his place of detention in New York City, detained him, and transferred him to South Carolina.[392] "[T]hese purposeful contacts of Secretary Rumsfeld with the Southern District of New York," wrote the court, "whether personal or through agents, were substantially related to the claims asserted by Padilla and are therefore sufficient to confer personal jurisdiction over the Secretary by the District Court."[393] The majority disagreed, however, with the district court's conclusion that President Bush possessed the authority to designate Padilla as an enemy combatant and indefinitely detain him without charges. Applying the three-category Presidential power analysis set forth in Justice Jackson's *Youngstown* concurrence, the court ruled that the President lacks constitutional authority as Commander in Chief to detain American citizens on American soil outside a zone of combat, that the Non-Detention Act explicitly denied the President the right to detain citizens without congressional approval, and that the 2001 Authorization for Use of Military Force (the "Joint Resolution") did not authorize the detention of American citizens on American soil.[394]

Following the Supreme Court's lead in *Youngstown*, the majority characterized the President's enemy combatant designation and consequent detention as akin to lawmaking, which the Constitution allocated to Congress, not to the Executive Branch.[395] Acknowledging that it had "no authority" to review whether "a state of armed conflict exists against an enemy [al Qaeda] to which the laws of war apply," the majority noted, however, that "it is a different proposition entirely to argue that the President even in times of grave national security threats or war, whether declared or undeclared, can lay claim to any of the powers, express or implied, allocated to Congress."[396] The majority rejected the Government's position that *Quirin* recognized an inherent constitutional authority to detain American citizens captured on the American homeland, noting that "the *Quirin* Court's decision to uphold military jurisdiction rested on express congressional authorization of the use of military tribunals to try

390. *Id.* at 608.
391. Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003).
392. *Id.* at 710.
393. *Id.*
394. *Id.* at 711–12.
395. *Id.* at 714.
396. *Id.* at 712–13.

combatants who violated the laws of war," and that the Non-Detention Act had not been enacted when *Quirin* was decided.[397]

The majority further explained that the Non-Detention Act was "replete with references to the detentions of American citizens of Japanese descent during World War II, detentions that were authorized both by congressional acts and by orders issued pursuant to the President's war power. This context convinces us that military detentions were intended to be covered."[398] In the face of the legislative history and the unambiguous text of the Act, the majority concluded, "precise and specific language authorizing the detention of American citizens is required to override its prohibition."[399]

Turning to the issue of whether the Joint Resolution constituted the requisite approval, the majority found that it did not:

> While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not arrayed "against our troops" in the field of battle.[400]

The court buttressed its reasoning by observing that because the Joint Resolution "expressly provides that it is 'intended to constitute specific statutory authorization within the meaning of . . . the War Powers Resolution,'" it was "unlikely—indeed, inconceivable—that Congress would expressly provide in the Joint Resolution an authorization required by the War Powers Resolution but, at the same time, leave unstated and to inference something so significant and unprecedented as authorization to detain American citizens under the Non-Detention Act."[401] In the absence of congressional authorization, the majority deemed the President's actions unlawful and ordered Padilla released, with the *proviso* that the Government could, if it wished, "transfer Padilla to appropriate civilian authorities who can bring criminal charges against him. Also, if appropriate, Padilla can be held as a material witness in connection with grand jury proceedings. In any case, Padilla will be entitled to the constitutional protections extended to other citizens."[402]

In the view of the dissenting judge, not only did "the President as Commander in Chief ha[ve] the inherent authority to thwart acts of belligerency at home or abroad that would do harm to United States citizens,"[403] but, with its Joint Resolution, Congress authorized the President to detain Padilla:

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397. *Id.* at 715–16.
398. *Id.* at 719.
399. *Id.* at 720.
400. *Id.* at 723 (citing Hamdi v. Rumsfeld, 316 F.3d 450, 467 (4th Cir. 2003)).
401. *Id.*
402. *Id.* at 724.
403. *Id.* at 726 (Wesley, J., concurring in part, dissenting in part).

> [T]he Joint Resolution is a specific and direct mandate from Congress to stop al Qaeda from killing or harming Americans here or abroad. The Joint Resolution is quite clear in its mandate. Congress noted that the 9-11 attacks made it 'both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad.' It seems clear to me that Congress understood that in light of the 9-11 attacks the United States had become a zone of combat.[404]

According to the dissent, any other interpretation:

> requires a strained reading of the plain language of the resolution and cabins the theater of the President's powers as Commander in Chief to foreign soil. . . . And if, as the majority asserts, [the Non-Detention Act] is an impenetrable barrier to the President detaining a U.S. citizen who is alleged to have ties to the belligerent and who is part of a plan for belligerency on U.S. soil, then [the Non-Detention Act], in my view, is unconstitutional.[405]

The Supreme Court accepted certiorari, certifying the following questions:

> 1. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether [the Non-Detention Act] precludes that exercise of Presidential authority.
>
> 2. Whether the district court has jurisdiction over the proper respondent to the amended habeas petition.[406]

On June 28th, a five-justice majority of the Supreme Court answered the jurisdictional question in the negative; consequently, it did not reach the substantive question. Writing on behalf of Justices O'Connor, Scalia, Kennedy, and Thomas, Chief Justice Rehnquist concluded that the proper respondent was the commander of the South Carolina military brig to which Padilla had been transferred, not Secretary Rumsfeld, because the commander had immediate control over Padilla.[407] And because the United States District Court for the Southern District of New York, where Padilla's petition was pending, did not have jurisdiction over the South Carolina brig commander, the Southern District lacked jurisdiction to entertain Padilla's habeas petition.[408]

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404. *Id.* at 730 (quoting S.J. Res. 23, 107th Cong. (2001) (enacted)).
405. *Id.* at 732.
406. *See* http://www.supremecourtus.gov/qp/03-01027qp.pdf.
407. Rumsfeld v. Padilla, 124 S. Ct. 2711, 2721-722 (2004).
408. *Id.* at 2729.

Writing for the dissent, Justice Stevens initially noted that Padilla's petition "raises questions of profound importance to the Nation" and that the majority's arguments "do not justify avoidance of our duty to answer those questions."[409] Secretary Rumsfeld was a proper respondent because he had directed Padilla's removal from the Southern District to South Carolina; because "the President entrusted the Secretary of Defense with control over [Padilla]," Justice Stevens reasoned, "surely we should acknowledge that the writ reaches the Secretary as the relevant custodian in this case."[410] Venue in the Southern District was proper because the Government initially chose that forum, the district judge and the attorneys in the Southern District were familiar with the factual and legal issues, and the forum was convenient for the attorneys.[411]

Justice Stevens continued:

> Whether respondent is entitled to immediate release is a question that reasonable jurists may answer in different ways. There is, however, only one possible answer to the question whether he is entitled to a hearing on the justification for his detention.
>
> At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.
>
> Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.[412]

iv. Hamdi

Yaser Esam Hamdi was captured during the fighting in Afghanistan and

409. *Id.* at 2729 (Stevens, J., dissenting).
410. *Id.* at 2733.
411. *Id.* at 2734.
412. *Id.* at 2735 (footnote omitted).

transferred to the Guantanamo Naval Base in Cuba. When military authorities realized that he was an American citizen, they transferred him to the Norfolk Naval Base, where he was held without charge or access to counsel, and the President designated him an enemy combatant. In rejecting Hamdi's *habeas corpus* petition challenging this designation and his detention, the United States Court of Appeals for the Fourth Circuit ruled that despite his citizen status, Hamdi could not challenge the factual assertions contained in a Declaration by a Special Advisor to the Under Secretary of Defense that formed the basis of the Government's contention that Hamdi was an enemy combatant and warranted his detention.[413] The Declaration, consisting of two pages and nine paragraphs, recited that Hamdi entered Afghanistan in July or August of 2001, was affiliated with a Taliban military unit, received weapons training, surrendered to the Northern Alliance along with other Taliban militia, and at the time of his capture possessed an AK-47 rifle. Applying the principles enunciated in *Quirin*, the court reasoned:

> One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such. The privilege of citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there.[414]

In reaching this conclusion, the circuit court first recognized that "[t]he detention of United States citizens must be subject to judicial review,"[415] and that "[i]n war as in peace, habeas corpus provides one of the firmest bulwarks against unconstitutional detentions."[416] Next, it cautioned against "any broad or categorical holdings on enemy combatant designations,"[417] and confined its decision to "the specific context . . . of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces."[418] The court

413. *See* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003). There were two prior *Hamdi* decisions by the circuit court. In *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002) ("*Hamdi I*"), the court held that Hamdi's father could file a petition for a writ of *habeas corpus* on Hamdi's behalf. In *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) ("*Hamdi II*"), the court reversed the district court's order allowing Hamdi immediate and unmonitored access to counsel, and remanded with instructions to the district court to address the issue of the propriety of Hamdi's status as an enemy combatant.

414. *Id.* at 475.

415. *Id.* at 464.

416. *Id.*

417. *Id.* at 465.

418. *Id.*

emphasized that it was not addressing "the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding."[419] As to the reach of Hamdi's habeas petition, the court held that the Government need only "provide the legal authority upon which it relies for [the] detention and the basic facts relied upon to support a legitimate exercise of that authority."[420] Citing the President's war powers under the Constitution and judicial precedents such as *Quirin*, the court had little difficulty deciding that there was ample legal authority to detain enemy combatants.[421] The court then concluded that the facts set forth in the Declaration describing Hamdi's involvement with the Taliban supported Hamdi's designation as an enemy combatant.[422]

Accepting the Government's factual allegations at face value, the court rejected the notion that Hamdi should be afforded an opportunity to present facts contesting his designation as an enemy combatant.[423] It reasoned: "No evidentiary hearing or factual inquiry on our part is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch."[424] The court emphasized that "[t]he 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."[425] Noting that "the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally,"[426] it further explained its rationale for its restrictive judicial review:

> Indeed, Article III courts are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not. Any evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant, for example, would require courts to consider, first, what activities the detainee was engaged in during the period leading up to his seizure and, second, whether those activities rendered him a combatant or not. The first question is factual, and were we called upon to delve into it, would likely entail substantial efforts to acquire evidence from distant battle zones. The second question may require fine judgments about whether a particular activity is linked to the war

419. *Id.*
420. *Id.* at 472.
421. *See id.* at 463.
422. *Id.* at 473.
423. *See id.* at 473.
424. *Id.*
425. *Id.* at 474.
426. *Id.*

> efforts of a hostile power—judgments the executive branch is most competent to make.[427]

This view of the role of the Judiciary in times of national crises sharply contrasted with the court's understanding of the role of the Executive Branch:

> Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them . . . For the judicial branch to trespass upon the exercise of the warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical.[428]

Thus, the court concluded that "[a]ny effort to ascertain the facts concerning the petitioner's conduct while amongst the nation's enemies would entail an unacceptable risk of obstructing war efforts authorized by Congress and undertaken by the executive branch."[429] Finally, in response to the argument that Hamdi's detention was no longer warranted because the relevant hostilities had reached an end, the court held that "we need not reach this issue here" because "American troops are still on the ground in Afghanistan, dismantling the terrorist infrastructure."[430] It noted, nonetheless, that the Executive Branch is in "the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them."[431]

The Supreme Court, in accepting certiorari, certified the following questions:

> 1. Does the Constitution permit Executive officials to detain an American citizen indefinitely in military custody in the United States, hold him essentially incommunicado and deny him access to counsel, with no opportunity to question the factual basis for his detention before any impartial tribunal, on the sole ground that he was seized abroad in a theater of the War on Terrorism and declared by the Executive to be an 'enemy combatant'?
>
> 2. Is the indefinite detention of an American citizen seized abroad but held in the United States solely on the assertion of Executive officials

427. *Id.* (citations omitted).
428. *Id.* at 463–464.
429. *Id.* at 474–475.
430. *Id.* at 476.
431. *Id.*

that he is an 'enemy combatant' permissible under applicable congressional statutes and treaty provisions?

3. In a habeas corpus proceeding challenging the indefinite detention of an American citizen seized abroad, detained in the United States, and declared by Executive officials to be an 'enemy combatant,' does the separation of powers doctrine preclude a federal court from following ordinary statutory procedures and conducting an inquiry into the factual basis for the Executive branch's asserted justification of the detention?[432]

Six Justices voted to enter a judgment vacating the circuit court's dismissal of Hamdi's habeas petition and remanding for further proceedings, but there was no majority opinion. The plurality opinion, authored by Justice O'Connor, and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, held that the Joint Resolution for the Authorization of the Use of Military Force provided the authorization for Hamdi's detention, if the facts supporting the Government's characterization of Hamdi as an enemy combatant were correct, but that he was entitled to a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.[433] Justice Souter, in an opinion joined by Justice Ginsburg which concurred in part, dissented in part, and concurred in the judgment, disagreed that the Government's factual basis for detaining Hamdi as an enemy combatant, even if true, was sufficient to warrant application of the Joint Resolution. Justice Souter's opinion argued that in the absence of any other facts, the Non-Detention Act required Hamdi's release;[434] however, Justices Souter and Ginsburg joined the plurality's judgment of vacatur and remand so that Hamdi would at least be afforded the opportunity to secure his release under the strictures of the plurality opinion.[435]

In dissent, Justices Scalia and Stevens, in an opinion by Justice Scalia, opted for an outright reversal, rather than vacatur and remand. In their view, the Constitution did not give the Executive Branch "authority to use military force rather than the force of law against citizens on American soil;"[436] hence, Hamdi was entitled to his habeas writ, requiring his release—unless criminal proceedings were promptly brought—since Congress had not suspended the writ.

The Plurality Opinion: The plurality viewed the "threshold question" as "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'"[437] Recognizing that "[t]here is some debate as to the

432. *See* http://www.supremecourtus.gov/qp/03-06696qp.pdf.
433. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635 (2004).
434. *Id.* at 2653.
435. *Id.* at 2660.
436. *Id.* at 2669 (Scalia, J., dissenting).
437. *Id.* at 2639 (O'Connor, J., plurality opinion).

proper scope of this term," and that "the Government has never provided any court with the full criteria that it uses in classifying individuals as such," the plurality accepted for the purposes of the case that an "enemy combatant" was an individual who "was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there."[438] It noted, however, that "[t]he legal category of enemy combatant has not been elaborated upon in great detail" and that "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."[439]Assuming, without deciding, that the Non-Detention Act required congressional authorization for the detention of individuals so defined, the plurality determined that the Joint Resolution, with its authorization for the use of "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11 attacks, constituted "explicit congressional authorization" for such detention.[440] Citing *Quirin*, the plurality noted that Hamdi's citizenship was irrelevant because "[a] citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States'; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict."[441] Furthermore, "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war," Hamdi's detention was "necessary and appropriate" within the intent of the Joint Resolution.[442]

The plurality recognized that the traditional laws of war prohibiting detention after the cessation of hostilities, as reflected in the Geneva Convention, might unravel "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war."[443] The plurality decided that it need not reach that issue since "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan," sufficing to presently justify Hamdi's detention as part of the exercise of "necessary and appropriate force" under the Joint Resolution.[444]

Even though there was a legal predicate for Hamdi's detention, the plurality ruled that the Due Process Clause entitled him to a meaningful opportunity to challenge the factual findings justifying the detention, either before a criminal court or a military tribunal. Initially, the plurality "easily rejected" the Government's argument that no process was due because the facts relating to Hamdi's battlefield capture were "undisputed," since "the circumstances

438. *Id.* (citing Brief for Respondent at 3, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696)).

439. *Id.* at 2642 n.1.

440. *Id.* at 2639.

441. *Id.* at 2640–2641 (citation omitted).

442. *Id.* at 2640 (quoting Brief for Respondent at 3).

443. *Id.* at 2641.

444. *Id.* at 2642.

surrounding Hamdi's seizure cannot in any way be characterized as 'undisputed,' as 'those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances.'"[445] The Government's additional argument—that "further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake"—raised "legitimate concerns," as did Hamdi's response that the Supreme Court had consistently "recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law."[446] The plurality applied the test set forth in *Mathews v. Eldridge*:[447] "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process."[448] Hamdi's interest in freedom from physical detention by his own government, the plurality said, was "the most elemental of liberty interests."[449] That interest must be measured against the "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."[450] In the plurality's view, the proper balance recognized that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[451] However, in recognition of the unique challenges facing the Executive Branch in the war against terrorism, the plurality carved out an exception to the rules of evidence:

> At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government

445. *Id.* at 2644–45 (citing Hamdi v. Rumsfeld, 337 F.3d 335, 357 (4th Cir. 2003) (Luttig, J., dissenting from denial of rehearing en banc)).

446. *Id.* at 2645–2646.

447. 424 U.S. 319 (1976).

448. *Hamdi*, 124 S. Ct. at 2646 (citing *Mathews*, 424 U.S. at 335).

449. *Id.*

450. *Id.* at 2647.

451. *Id.* at 2648.

> puts forth credible evidence that the *habeas* petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the 'risk of erroneous deprivation' of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.[452]

Concluding, the plurality took aim at the system that put Hamdi in a naval brig without charges or access to counsel:

> In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[453]

The Opinion Concurring, Dissenting and Concurring in the Judgment: In his opinion, Justice Souter deduced that the circumstances surrounding the enactment of the Non-Detention Act suggested that the Act be read "robustly to require a clear statement of authorization to detain," and that the Joint Resolution did not constitute the requisite authority.[454] A clear statement was necessary, he believed, because the Executive Branch was not well-suited to safeguard both the nation's security and individual civil liberties:

> The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally

452. *Id.* at 2649 (citation omitted).

453. *Id.* at 2650 (citation omitted).

454. *Id.* at 2655 (Souter, J., concurring in part, dissenting in part, and concurring in judgment).

> on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that 'the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.' Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.[455]

In Justices Souter and Ginsburg's view, Hamdi "would seem to qualify for treatment as a prisoner of war under the Third Geneva Convention,"[456] since the Government acknowledged that "'the Geneva Convention applies to the Taliban detainees,'" and Hamdi was "taken bearing arms on the Taliban side of a field of battle in Afghanistan."[457] Justice Souter's opinion noted that even if his status were in doubt, the Geneva Convention requires that "captives are entitled to be treated as prisoners of war 'until such time as their status has been determined by a competent tribunal.'"[458] In addition, Justices Souter and Ginsburg expressly disclaimed any implication that they agreed with the plurality "that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas."[459] Nevertheless, they concurred in the plurality's judgment because, as Justice Souter wrote: "Although I think litigation of Hamdi's status as an enemy combatant is unnecessary, the terms of the plurality's remand will allow Hamdi to offer evidence that he is not an enemy combatant, and he should at least have the benefit of that opportunity."[460]

The Reversal Opinion: According to Justices Scalia and Stevens, Hamdi's status as a United States citizen detained within the territorial limits of the United States was dispositive. As Justice Scalia wrote:

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455. *Id.* (citing THE FEDERALIST NO. 51, at 349 (James Madison) (J. Cooke ed., 1961)).
456. *Id.* at 2658.
457. *Id.*
458. *Id.* (citing Geneva Convention III, *supra* note 358, art. 5, 6 U.S.T. at 3324).
459. *Id.* at 2660.
460. *Id.*

> Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2 [authorizing suspension of the writ of habeas corpus under narrow circumstances], allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge.[461]

In the view of Justices Scalia and Stevens, the Joint Resolution did not constitute a congressional invocation of the Suspension Clause; therefore, "[a]bsent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release."[462]

The Affirmance Opinion: Justice Thomas was the lone member of the Court who believed that Hamdi's detention was lawful. In his view, "[t]his detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioner's habeas challenge should fail, and there is no reason to remand the case."[463] The plurality, Justice Thomas thought, "utterly fail[ed] to account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly."[464]

CONCLUSION

On the legal level, *Hamdi* will be the subject of intensive analysis by judicial commentators, and for good reason. One of the many legal issues that will likely fuel discourse will be which rights should be accorded to citizens detained as enemy combatants but who were not alleged to have "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001" or "harbored" any organization or person who did so, as stated in the Joint Resolution.

More generally, *Hamdi* represents a sweeping example of the interplay between the three branches of government in dealing with the unparalleled and uncharted war against terrorism in the aftermath of September 11, and its impact upon time-honored concepts of civil liberties. The Legislature has decided, by enacting the Joint Resolution, to give the President the authority "to use all necessary and appropriate force" against those nations, organizations or persons whom he determines were involved in the September 11 attacks "in order to prevent any future acts of international terrorism against the United States by

461. *Id.* (Scalia, J., dissenting).
462. *Id.* at 2670.
463. *Id.* at 2674 (Thomas, J., dissenting).
464. *Id.* at 2674–75.

such nations, organizations, or persons;" the President has railed against the need for such authorization, believing that his constitutional powers suffice, and under either view, has taken whatever actions he has deemed appropriate; and the Judiciary has interceded to assert the sanctity of judicial review to vouchsafe the basic due process rights of each citizen detained by the Government to receive notice of the charges against him and to have a meaningful opportunity to be heard before an impartial decisionmaker.

In this latter respect, the plurality opinion of the Supreme Court in *Hamdi*, recognizing the special challenges the Government faces in dealing with the unique and open-ended nature of post-September 11 terrorism, struck its due process balance under *Mathews v. Eldridge* decidedly in the Government's favor, by shifting the burden of proof to the detainee and modifying the traditional rules of evidence. While preserving the basic concept of judicial review—which also was manifested by the majority's decision in the Guantanamo Bay cases—the plurality accorded far-reaching deference, with Justice Thomas according virtually unfettered deference, to the Executive Branch. For example, the Executive Branch was given total discretion to try an enemy combatant covered by the Joint Resolution in either a civil or military tribunal, and, of course, it has the power to determine in the first instance who should be classified as an enemy combatant under the Joint Resolution. Left to be resolved is whether the President has the power under Article II of the Constitution to designate and detain a person as an enemy combatant in the absence of the applicability of the Joint Resolution, and the nature of due process rights that would attach in those circumstances.

The sweep of the exercise of the Executive Branch's discretion allows for some curious forms of disparate treatment for those arguably similarly situated. For example, one might ask why Padilla and Hamdi were not accorded the same access to the judicial system as the white, wealthy Lindh; after all, they were all Americans designated as enemy combatants, and Padilla, unlike the others, was even captured on American soil. It is equally difficult to comprehend why the only non-American, Moussaoui, was the only one not classified as an enemy combatant, and was consequently prosecuted as an ordinary criminal. It is doubtful that the Judiciary has the power or inclination to provide for uniformity in executive decisionmaking, except the uniform rudimentary requirements of due process, and thus the Legislature must determine whether to constrain the Executive Branch's conduct, as it did when it enacted the War Powers Resolution, the Non-Detention Act, the National Emergencies Act, and IEEPA.

Although *Hamdi* represents the most recent example of the tensions inherent in the interactions between the three branches of our government in addressing threats to the nation's security, this article has highlighted many others throughout the course of the country's history, such as the tensions between the three branches in dealing with the waging of war and the power to declare national emergencies, and, of course, those poignant chapters in the lifetime of our nation when each branch had to wrestle with the issue of whether civil

liberties had to be compromised for the safety of the country.

Given this history, it seems entirely appropriate to conclude with the admonition rendered shortly after September 11, by none other than the general in charge of the Pentagon's newly-created Northern Command to oversee domestic security, cautioning against the precipitous abridgment of civil liberties: "We just have to be very, very careful that we don't misread some things we see, that we don't jump to conclusions, that we don't do things [in contravention of] . . . our Constitution and all the amendments."[465]

465. Gen. Ralph E. Eberhart, Interview, *Threats and Responses: Excerpt from Comments on Terrorists*, N.Y. TIMES, Dec. 13, 2002, at A26.