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CONSTITUTIONAL LIMITS TO THE FIGHT AGAINST TERRORISM

*Leon Friedman*¹

Today when I left my house, I was listening to the radio. The U.S. Attorney General, John Ashcroft, announced that the government had arrested and indicted six people for terrorism. Included among these suspects were four Americans.² I was just about to turn off the radio when it was announced that the U.S. Attorney in Oregon was asked, "Why didn't you put them in front of a military commission?" I was in such a rush to get here that I did not get the immediate answer, but I'll give you another question.

To put this in a contemporary framework, yesterday, some terrible person outside of Maryland killed five people.³ Suppose he was an alien, not a U.S. citizen, and suppose further that he had training in Al Qaeda or something, or he was training in Afghanistan. I assume killing five people was a terrorist act.

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² Attorney General John Ashcroft, Press Conference: Portland Cell (Oct. 4, 2002). Six defendants were named by General Ashcroft and charged with engaging in a conspiracy to join Al Qaeda and Taliban forces against the United States. See *U.S. Charges Six With Conspiracy*, WASH. POST, Oct. 5, 2002, at A1.

³ Francis X. Clines, *Random Shootings Kill Five in Washington Suburbs*, N.Y. TIMES, Oct. 4, 2002, at A1. Five individuals were randomly shot in the northern suburbs of Washington D.C.. These killings have been linked to the alleged D.C. snipers, John Muhammad and Lee Malvo. For more information, see Eric Lichtblau & Jayson Blair, *Ashcroft Decides Virginia Will Try Sniper Cases First*, N.Y. TIMES, Nov. 8, 2002, at A1.

Could that type of person be tried by these famous military commissions?⁴ Possibly, if he were not a U.S. citizen. While President Bush signed a military commission order providing for military trials for non-U.S. citizens, American citizens may not be tried in such a forum.⁵ I just raise these issues to give you the kind of thinking that we all have to confront at this point.

Ten years ago, we experienced the first World Trade Center bombing.⁶ The bombers were tried for destruction of property and a series of federal offenses.⁷ They were tried and convicted for using weapons of mass destruction, a federal offense.⁸ Each participant received a life sentence.⁹ Immediately thereafter, there were conspiracies to bomb the Lincoln Tunnel.¹⁰ The would-be bombers were tried in the United States District Court for the Southern District of New York for conspiracy and received very lengthy sentences.¹¹ The people who bombed the embassies in Africa were tried in the United States for killing Americans.¹² It is an offense under American law to destroy American property or conspire to kill American officials abroad.¹³ So, up until last

⁴ A military commission is defined as "courts whose procedure and composition are modeled upon courts-martial, being the tribunals by which alleged violations of martial law are tried and determined. The membership of such commissions is commonly made up of civilians and army officers. They are probably not known outside of the United States and were first used by General Scott during the Mexican war." BLACK'S LAW DICTIONARY 992-993 (6th ed. 1990).

⁵ Military Order of November 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001). Section 2 (a) states "the term 'individual subject to this order' shall mean any individual who is not a United States citizen . . ."

⁶ The first World Trade Center bombing occurred on February 26, 1993, killing six people and injuring more than 1,000. See Martin Gottlieb, *Explosion at Twin Towers: The Response; Size of Blast 'Destroyed' Rescue Plan*, N.Y. TIMES, Feb. 27, 1993, Sec. 1, at 23.

⁷ See *United States v. Rahman*, 854 F. Supp. 254 (S.D.N.Y. 1994).

⁸ Violent Crime Control and Law Enforcement Act, 18 U.S.C. § 2332a(a).

⁹ Richard Bernstein, *Trade Center Bombers Get Prison Term for 240 Years*, N.Y. TIMES, May 25, 1994, at A1.

¹⁰ *Rahman*, 854 F. Supp. at 258.

¹¹ *Id.*

¹² *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001).

¹³ 18 U.S.C. § 1114 (2000) (protection of officers and employees of the United States); *id.* § 1117 (conspiracy to murder); *id.* § 844 (f)(1) and (f)(2) (penalties

November, we did not have any difficulty in applying our normal criminal law to even the most destructive events in the United States or abroad. The Oklahoma City bombing was a terrible event.¹⁴ What if the culprit had been a foreigner, a non-U.S. citizen? If it happened today and the culprit was not a U.S. citizen, would it be appropriate to put that suspect on trial before a military commission?

I want to provide you with a point of reference to consider these questions in light of the tragic events of September 11.¹⁵ As a result of September 11, do we now decide that the normal legal methods that we have for dealing with criminal acts or attacks on our property or individuals is insufficient? Our normal criminal procedure requires that a suspect be indicted by a grand jury of one's peers; that you have a right to counsel; that you be found guilty beyond a reasonable doubt; that you receive a jury trial. Do we now conclude that this is not good enough anymore? Do we now conclude that additional legal weapons are needed in order to deal with the problems that are coming up?

On November 13, 2001, President Bush issued a presidential order stating that military commissions may be convened in order to try non-U.S. citizens for acts of terrorism.¹⁶ There were some modifications. For instance, a conviction now requires a vote of two-thirds of the members present. A huge amount of attention has been devoted to the military commissions. Attorney General Ashcroft appeared before Congress and defended it.¹⁷ As of today, two o'clock in the afternoon of October 4th, 2001, the commissions have yet to be utilized.

for damaging or destroying property of the United States by use of explosives or fire).

¹⁴ The Oklahoma City bombing occurred at the Alfred P. Murrah Federal Building on April 19, 1995, killing 168 people and injuring hundreds. *Bombing Prosecutors to Seek Death Penalty*, N.Y. TIMES, Oct. 21, 1995, § 1, at 8.

¹⁵ From herein, September 11 will refer to the September 11, 2001 United States terrorist attacks which include the destruction of the World Trade Center, the attack of the Pentagon, and the crash of United Flight 93.

¹⁶ See Military Order of November 13, 2001, *supra* note 5.

¹⁷ See Testimony of Attorney General John Ashcroft Senate Committee on the Judiciary (Dec. 6, 2001) available at <http://www.usdoj.gov/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm> (last visited April 16, 2003).

Moussaoui, who allegedly was the twentieth hijacker on September 11, was charged with regular U.S. crimes.¹⁸ The shoe bomber,¹⁹ who pleaded guilty this morning, was charged only with regular U.S. crimes.²⁰ So the question is: if it was not appropriate to refer these cases to the military commission, under what circumstances would a referral be appropriate? I suspect that the theory was: what would we do if we actually captured Osama bin Laden or his chief lieutenants? Would we bring him back to Foley Square²¹ here in New York for a regular trial? Imagine the security problems. Imagine all his followers coming to the courtroom or demonstrating. I suspect the military commission was to be an escape hatch for people of that caliber. We would try them, but not at Foley Square. We would do what we did with General Yamashita,²² we would try them in the Philippines, or in Samoa, or in some American possession where we could control the possibility of any kind of demonstration. However, I think a lot of ink has been spilled regarding whether this would be an appropriate legal procedure.

I want to spend a little time on the constitutional issue. There are three, possibly four, Supreme Court precedents regarding the use of military commissions. There is, of course, *Ex parte Milligan*.²³ When I went to law school it was a very important

¹⁸ United States v. Moussaoui, Crim. No. 01-455-A, 2002 U.S. Dist. LEXIS 13326 (E.D. Va. July 11, 2002).

¹⁹ The shoe bomber, whose alias was Richard C. Reid, was arrested in December of 2001 after boarding a plane from Paris bound for Miami with explosives attached to his shoes. Warren Hoge, *A Nation Challenged: The Convert; Shoe-Bomb Suspect Fell in With Extremists*, N.Y. TIMES, Dec. 27, 2001, at B6.

²⁰ The federal grand jury indictment against Reid contained nine counts. They included attempted use of a weapon of mass destruction, attempted wrecking of a mass transportation vehicle, attempted destruction of an aircraft, attempted murder, placing an explosive device on an aircraft, interfering with a flight crew, and using a destructive device during a crime of violence. David Johnston, *A Nation Challenged: The Bombing Suspect; Al Qaeda Trained Bombing Suspect, Indictment Says*, N.Y. TIMES, Jan. 17, 2002, at A1.

²¹ Foley Square is the location of the Federal Courthouse for the Southern District of New York.

²² *In re Yamashita*, 327 U.S. 1 (1946). The Court held that the military commission which tried General Yamashita conformed with the Articles of War.

²³ *Ex parte Milligan*, 71 U.S. 2 (1866).

case. However, it seems to have dropped out of all the casebooks. Milligan was a copperhead²⁴ and was in Indiana where he intended to blow up a Union munitions factory.²⁵ There was a plot to disrupt the National Democratic Convention to be held in Chicago.²⁶ He was a very bad guy. These events transpired during the middle of the Civil War and it was considered a rather serious issue. He was tried before a military commission and a writ of habeas corpus was sworn out and the case then went to the Supreme Court.²⁷

There are two important issues from *Ex parte Milligan*. First, the Court stated:

The Constitution of the United States is a law for rulers and people equally in war and in peace and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.²⁸

Second, the Court held that martial law can never exist when the courts are open and in the proper and unobstructed exercise of their jurisdiction.²⁹ When Attorney General Ashcroft appeared before the Senate and was asked about *Milligan* he stated, "Well, *Milligan* is limited to its facts."³⁰ I wonder which facts he was referring to?

There is a later precedent, and the later precedent, of course, concerns the saboteurs who landed in Amagansett, Long Island.³¹ In *Ex parte Quirin*,³² there were four saboteurs on the

²⁴ A copperhead refers to an individual residing in the northern states during the Civil War who sympathized with the South. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 289 (9th ed. 1986).

²⁵ *Milligan*, 71 U.S. at 5.

²⁶ *Id.*

²⁷ *Id.* at 130.

²⁸ *Id.* at 121.

²⁹ *Id.*

³⁰ See Testimony of Attorney General John Ashcroft, *supra* note 17.

³¹ Amagansett, New York is a Long Island town along the coast of the Atlantic Ocean where in June of 1942, during World War II, four Nazi saboteurs came

coast of Long Island and four saboteurs in Florida, all members of the German Army.³³ As soon as they landed, they took off their uniforms and immediately tried to get to various metropolitan centers.³⁴ Only a week after they landed, one of the saboteurs called the police, and they were very quickly rounded up.³⁵ One was a United States citizen, seven were not.³⁶ They were tried before a military commission where six of the defendants were sentenced to death.³⁷ A writ of habeas corpus was sworn out and the case went to the Supreme Court.³⁸ The Supreme Court denied the writs without decision and the six were then executed. Subsequently, the Supreme Court issued a decision explaining why they declined to issue the writs.³⁹

There were a few key elements in *Quirin* that distinguish it from the current potential cases. First, the United States was engaged in a declared war, fighting the German Army. These saboteurs were engaged in war with us and were members of the German Army.⁴⁰ The defendants never disputed that, and it was

ashore from a German submarine. Their mission was to commit sabotage in New York City and the metropolitan area. They were skilled in secret writing, chemistry, and explosives. The FBI was able to apprehend all of the suspects. See also www.fbi.gov/libref/historic/history/worldwar.htm (last visited April 16, 2003) or *Ex parte Quirin*, 317 U.S. 1 (1942).

³² *Ex parte Quirin*, 317 U.S. 1 (1942).

³³ *Id.* at 21. The court stated "after the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing." *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 20.

³⁷ *Quirin*, 317 U.S. at 31. The court stated,

The spy who secretly and without uniform passes the military 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 war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Id.

³⁸ *Id.* at 7.

³⁹ *Id.*

⁴⁰ *Id.* at 20.

never at issue. Second, the military commissions were authorized by Congress under their constitutional grant of authority to enact such tribunals.⁴¹ Further, the acts that the defendants were charged with, specifically coming to the United States and planning to blow up whatever facilities they intended to were separate from their status as “enemy combatants.”⁴²

Why is that important? Well, one of the cases that has come up is the “dirty bomber,” Mr. Padilla.⁴³ Does anyone know what has happened to Mr. Padilla? He was arrested. Although Attorney General Ashcroft was in Moscow at the time of Padilla’s arrest, he held a special news conference for the express purpose of announcing the arrest.⁴⁴ Mr. Padilla, a United States citizen was alleged to have been trained by Al Qaeda to return to the United States and build a dirty bomb. This allegation was accredited to a suspected Al Qaeda member.⁴⁵ Padilla was eventually taken to New York on a material witness warrant and held for thirty days

⁴¹ *Id.* at 27. The court stated:

By the Articles of War, 10 U.S.C. §§ 1471-1593, Congress has provided rules for the government of the Army. It has provided for the trial and punishment by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the “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 the court martial.

Id.

⁴² The Court in *Quirin* stated that unlawful combatants are subject to capture and trial by military tribunals for “acts which render their belligerency unlawful.” See *Quirin*, 317 U.S. at 27.

⁴³ See Andrea Kannapell, *Front Lines*, N.Y. TIMES, June 16, 2002, § 4, at 2. Jose Padilla was arrested for a terrorist plot to release a dirty bomb in the United States. *Id.* Dirty bombs “are made by attaching radioactive material to a conventional bomb to spread it over a wide area.” Loius Charbonneau, *IAEA Director Warns Of ‘Dirty Bomb’ Risk*, WASH. POST, March 12, 2003, at A15.

⁴⁴ *Traces of Terror: The Investigation; U.S. Says It Halted Qaeda Plot To Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1. Attorney General John Ashcroft was in Moscow at a meeting with Russian officials when he announced the arrest of Jose Padilla. *Id.*

⁴⁵ *Id.* Jose Padilla had conversed with Abu Zubaydah, a captured lieutenant of Osama bin Laden who revealed the dirty-bomb plan to United States officials. *Id.*

under this warrant.⁴⁶ The Department of Justice, to their credit, recognized that they had to take some action with regard to this “witness” they were holding. There are Supreme Court cases that provide that persons seized are entitled to be brought before a judge and within thirty days brought before a jury.⁴⁷ The Department of Justice was not certain how they were to handle Padilla, so they simply transferred him to the Department of Defense.⁴⁸

While in the “custody” of the Department of Defense, they labeled Padilla an enemy combatant and likened him to the saboteurs that landed on Long Island, allowing them to transfer him to a brig in Charleston, South Carolina.⁴⁹ Why South Carolina? I suspect because the Department of Defense likes the Fourth Circuit. The Department of Defense reasons that the Fourth Circuit will be sympathetic to its position. While various briefs have been submitted before Judge Mukasey in the Southern District stating “produce the body,”⁵⁰ no one has heard anything regarding Padilla for two or three months now. The question remains under what authority is the Department of Defense holding this “witness”?

I raise this because his status as an enemy combatant and the accusations against him are the same thing. His case is not like the German saboteurs. They were admitted enemy soldiers. Thus, their status as enemy combatants and the criminal action for which they were charged in that case, were two separate issues. In Padilla’s case the issues are neither separate nor distinct, they are the same issue. We are not certain if Padilla is an enemy combatant. Padilla arrived in Chicago in civilian clothes. Unless he buried his Al Qaeda uniform when he landed in the United

⁴⁶ Benjamin Weiser, *Traces of Terror: The Courts; U.S. Defends Decision to Move Suspect in ‘Dirty Bomb’ Case*, N.Y. TIMES, July 19, 2002, at A15.

⁴⁷ *Gerskin v. Pugh*, 420 U.S. 103 (1985) (holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to detention).

⁴⁸ See Patricia Hurtado, *Padilla’s Release Demanded*, SEATTLE TIMES, June 13, 2002, at A6.

⁴⁹ *Id.*

⁵⁰ Habeas corpus is defined as, “a writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.” BLACK’S LAW DICTIONARY 715 (7th ed. 1999).

States it is difficult to analogize the facts of *Quirin* to Padilla's case. Finally, consider that the defendants in *Quirin* were actually indicted, unlike this Padilla fellow who is sitting in some brig in South Carolina yet to be produced before a court. He is yet to have any charges presented against him, and yet to have his status actually examined by a federal court to determine whether the actions taken against him were proper or not.⁵¹ I think the Padilla case is the one that raises the most serious civil liberties issues.

There is also the case of *Hamdi v. Rumsfeld*.⁵² Hamdi was a United States citizen who was actually a member of the fighting Afghanistan, a member of the Taliban.⁵³ He was taken as a prisoner of war and he is discovered to be a United States citizen.⁵⁴ He is eventually brought to Norfolk, Virginia, again within the Fourth Circuit. While in Norfolk, somebody says "I want to be his lawyer" or someone on his behalf, some friend says "I petition to have a lawyer appointed."⁵⁵ The Fourth Circuit, of all circuits, said to the Department of Justice lawyer arguing the case, 'you can just grab someone and not have a lawyer have access to him simply on the say so of the executive?'⁵⁶ The Court found that a troubling proposition.

There are two other Supreme Court cases dealing specifically with the issue of what I call constitutional limitations on the fight against terrorism. Besides *Quirin*, which was decided during World War II, there was *Duncan v. Kahanamoku*.⁵⁷ After Pearl Harbor, the United States declared martial law in Hawaii, and for two or three years thereafter, the civilian courts did not operate.⁵⁸ If you broke into a store or robbed a bank or beat up on someone, you were not tried by a United States court, you

⁵¹ See Benjamin Weiser, *supra* note 46.

⁵² 296 F.3d 278 (4th Cir. 2002). The court reversed an order mandating access to counsel for an alleged enemy combatant.

⁵³ *Id.* at 279.

⁵⁴ *Id.* at 280.

⁵⁵ *Id.* at 283.

⁵⁶ *Id.* at 284.

⁵⁷ 327 U.S. 304 (1946).

⁵⁸ *Id.* at 307-09.

appeared before a military commission.⁵⁹ Was that permissible under the Constitution? While Duncan had been found guilty of assault in the military commission, on a writ of habeas corpus to the Supreme Court, the Court stated that it was not permissible to try the defendant in the military commission.⁶⁰ In *Duncan*, the Supreme Court stated:

Military trials of a civilian charged with a crime, especially when not made subject to judicial review, are so obviously contrary to our political traditions and our institution of jury trials in courts of law, that the tenuous circumstance offered by the Government can hardly suffice to persuade us that Congress was willing to enact a Hawaiian supreme court decision permitting such a radical departure from our steadfast beliefs.⁶¹

The tenuous circumstances were the attack on Pearl Harbor and the fact that Hawaii was a territory rather than a state. These, according to the Court, were not enough to justify removing the civilian courts and making every crime in Hawaii subject to military control.⁶²

Next, there was *In re Yamashita*.⁶³ Yamashita was the Japanese general in the Philippines who was charged with failing to control his forces and allowing them to commit various atrocities against United States soldiers as well as the civilian population.⁶⁴ A military commission tried him.⁶⁵ The Supreme Court upheld his military trial over two very strong dissents by Justices Murphy and Rutledge.⁶⁶ The Court reasoned that the

⁵⁹ While at the time, Hawaii was a territory of the United States, and not a state, the citizens enjoyed all of the benefits of the United States Constitution, including jury trials.

⁶⁰ *Duncan*, 372 U.S. at 324.

⁶¹ *Id.* at 317.

⁶² *Id.* at 324.

⁶³ 327 U.S. 1 (1946).

⁶⁴ *Id.* at 14.

⁶⁵ *Id.* at 10.

⁶⁶ *Id.* at 25 (Murphy, J., dissenting); *id.* at 41 (Rutledge, J., dissenting).

actions taken by the general constituted a violation of the law of war.⁶⁷

Certainly, atrocities against civilians, at the time and to this day, are in violation of the law of war.⁶⁸ In addition, military personnel are themselves responsible for actions they take as well as for the actions taken by personnel in their charge.⁶⁹ Thus, the Supreme Court upheld Yamashita's conviction since he was a foreigner and was certainly part of the military.⁷⁰ The *Yamashita* case certainly bears close resemblance to the Norfolk trials,⁷¹ which involves international acts, acts not committed in the United States. These are the four precedents relied on in the current situation. It is my opinion that one cannot glean much from these four cases.

There is, however, something that we can take from the *Quirin* case. It does establish the proposition that there is such a thing as an enemy combatant.⁷² If a defendant is an "enemy combatant," the rights afforded under the Constitution do not

⁶⁷ *Id.* at 15.

⁶⁸ Following the Second World War, the law of war was codified in the four Geneva Conventions. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3 (1), 6 U.S.T. 3516, states in pertinent part,

(1) Persons taking no active part in the hostilities...shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

⁶⁹ *Yamashita*, 327 U.S. at 16.

⁷⁰ *Id.* at 13.

⁷¹ See *Hamdi*, 296 F.3d 278; see also *supra* discussion accompanying notes 52-56.

⁷² *Quirin*, 317 U.S. at 1.

apply.⁷³ Thus, such a defendant cannot rely on the protection of the Constitution when such a defendant faces criminal charges.⁷⁴ Notice that both Attorney General Ashcroft, as well as Secretary of Defense Rumsfeld, attempt to invoke those magic words, “enemy combatant.”⁷⁵ Thus, the question becomes; under what circumstances can one properly label a defendant an “enemy combatant”? For once such a label is applied, then, presumably it would be appropriate to hand off the defendant to the military. Once in custody of the military, the defendant may be placed in a brig in Charleston, South Carolina, without benefit of appearing before a court of competent jurisdiction to await “trial” before a military commission.

There is of course a legitimate law of war. Moreover, there are treaties to which this country is a party, with one of the treaties being the 1949 Geneva Convention.⁷⁶ It provides that a prisoner of war is subject to the protections of the Geneva Convention if he is a lawful combatant.⁷⁷ Attorney General Ashcroft stated in his testimony before the Senate that the tragic events of September 11, and the destruction of The World Trade Center were acts of war.⁷⁸ Therefore, the Attorney General concluded the law of war is applicable.⁷⁹ The problem with the Attorney General’s conclusion is found in the Geneva Convention itself. The Geneva Convention

⁷³ *Id.* at 40.

⁷⁴ *Id.*

⁷⁵ *Id.* at 31. An enemy combatant is generally one who, without being a member of a government’s army, wages war by destruction of life or property. *Id.*

⁷⁶ The Geneva Conventions were established by sixty-three governments in 1949. The provisions provide for the protection of members of armed forces in the field and at sea, prisoners of war, and civilians in the internal territory of a hostile nation and in any occupied territory. The Geneva Conventions include: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the Geneva Convention Relative to the Treatment of Prisoners of War; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

⁷⁷ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A), 6 U.S.T. 3316 [hereinafter Geneva Convention].

⁷⁸ See Testimony of Attorney General John Ashcroft, *supra* note 17.

⁷⁹ *Id.*

only recognizes combatants provided the person is part of a regular military organization.⁸⁰ Further, the Convention considers one a lawful combatant provided the individual is under responsible military control while wearing an insignia viewable at a distance.⁸¹ This presents a difficult question regarding those members of Al Qaeda or even the Taliban.⁸² Were they lawful prisoners of war recognized as such under the Geneva Convention? Did they wear insignia viewable at a distance? Were they under responsible military control?

The Geneva Convention states that if there is any doubt as to an individual's status, as either a "lawful prisoner of war" or "unlawful prisoner of war," then such status must be determined by an independent tribunal.⁸³ Those that capture prisoners are not in a position to declare such prisoners unlawful combatants in order to avoid providing the protections afforded under the Geneva Convention. The protections afforded under the Convention include that a prisoner be properly fed, cared for and most importantly, that when hostilities are concluded he is released.⁸⁴

There is an inherent difficulty in dealing with terrorism as compared to actual war. Usually, in the case of war it is possible to determine when the war has concluded. However, in the case of terrorism, how does one know that it is over? I consider the war on terrorism as a somewhat fuzzy or quasi-war. International treaties are for the most part useless, for their applicability is to actual conflicts and not the type of war we are engaged in. Under this scenario, we continue to prosecute so-called regular criminal cases against regular criminals. For example, defendants who blow up buildings are tried via the normal criminal process. For the most part, we have done very well convicting and imprisoning such defendants. Next, we have the Geneva Convention and the law of war that we use to prosecute legal combatants and this system seems to be adequate in its operation. However, we now have created this "middle ground."

⁸⁰ Geneva Convention, art. 4 (A), 6 U.S.T. at 3316.

⁸¹ Geneva Convention, art. 4 (A)(2)(b), 6 U.S.T. at 3316.

⁸² The author notes that Al Qaeda may or may not be synonymous with the Taliban.

⁸³ Geneva Convention, art. 5, 6 U.S.T. at 3316.

⁸⁴ Geneva Convention, art 13-16, 25-32, and 188, 6 U.S.T. at 3316.

If you are an unlawful combatant, then you do not have the protection of the Geneva Convention and additionally do not have the protection of the United States Constitution. We can stick you in a brig in Charleston as long as we want and stick you in front of a military commission if we want. I think this is sort of problematic. Who decides whether such prisoners are unlawful combatants?

In the John Walker Lindh case,⁸⁵ Lindh pleaded guilty, but his lawyer claimed Lindh was a lawful combatant.⁸⁶ It cuts two ways. If you are a lawful combatant and shoot someone, you are not guilty of murder. However, if you are an unlawful combatant and you shoot someone, then you are guilty of murder. Hence, the law of war is protective in some respects. Among other things, Lindh's lawyer argued that his client was a soldier.⁸⁷ If the court were to accept such an argument, Lindh would have the defense of lawful combatant.⁸⁸ In my opinion, such an argument would have been very weak, and his lawyers must have agreed, for Lindh pleaded guilty.⁸⁹

The District Court judge, citing a book about the Taliban,⁹⁰ held Lindh was not a lawful combatant.⁹¹ The Judge relied on the fact that Lindh was a member of the foreign fighters of the Taliban, a group that was not under responsible military control.⁹² At least in this case, there was an effort to deal with this issue. At least the district court judge considered the question as to the defendant's status.

Another major issue is the war on drugs. The effect of drug use is devastating on this nation. Many of the drugs used in this country originate in foreign countries, among them Columbia and

⁸⁵ *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

⁸⁶ *Id.* at 545.

⁸⁷ *Id.* at 552.

⁸⁸ *Id.*

⁸⁹ *United States v. Lindh*, 227 F. Supp. 2d 565, 566 (E.D. Va. 2002).

⁹⁰ KAMAL MATINUDDIN, *THE TALIBAN PHENOMENON: AFGHANISTAN 1994-97* 59 (Oxford University Press 1999).

⁹¹ *Lindh*, 212 F. Supp. 2d at 558.

⁹² *Id.*

Afghanistan.⁹³ We have declared war on drugs and we have appointed a general whose job it is to coordinate that war.⁹⁴ Are we now going to say that the drug epidemic has reached such a proportion that, from now on, any drug kingpin is considered an unlawful combatant in the war on drugs? If we can make such a declaration, can we then try such a defendant in a military commission and not in a regular court? It makes people a little nervous in using metaphors such as "we are at war."

There is no question we have foreigners trying to do damage to the United States. Is it acceptable to say "we are at war" because we face this problem? For, if that is the case, then we can term these new culprits "unlawful combatants" and we can treat them as we treated the saboteurs who landed on Long Island in the *Quirin* case. My position is, our regular criminal law has handled these defendants quite well so far. If we are worried about secret government information, we have something called the Classified Information Procedures Act.⁹⁵ The Act allows a federal court to impose various kinds of restrictions on disclosure of classified information.⁹⁶ The Classified Information Procedures Act⁹⁷ has been applied in a number of different cases. In my opinion, our normal criminal law procedures are very effective in dealing with all these terrible people who deserve the most severe punishment, but it all should be done in conformity with the Constitution.

The Supreme Court took one case which will be heard this year that has to do with aliens and immigration.⁹⁸ Under the USA Patriot Act,⁹⁹ if the Attorney General has reasonable grounds to believe that an alien is engaged in terrorist activity, the alien may

⁹³ See U.S. Department of State International Narcotics Control Strategy Report 2001, available at <http://www.state.gov/g/inl/rls/nrcrpt/2001/rpt/> (last visited April 16, 2003).

⁹⁴ John P. Walters, Director of National Drug Control Policy.

⁹⁵ 18 U.S.C. Appx. §§ 1-16 (2003).

⁹⁶ 18 U.S.C. Appx. §§ 3-4.

⁹⁷ 18 U.S.C. Appx. §§ 1-16 (2003).

⁹⁸ *Kim v. Ziglar*, 276 F.3d 523 (9th Cir.), cert. granted sub nom. *Demore v. Kim*, 122 S. Ct. 2696 (2002).

⁹⁹ Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept And Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

be taken into custody for seven days.¹⁰⁰ If you are a United States citizen and there are reasonable grounds to believe you have committed a crime, the only option the government has is to stop you for twenty minutes and pat you down for a weapon.¹⁰¹ That is the holding in *Terry v. Ohio*.¹⁰²

However, if there are reasonable grounds to believe that an alien is engaged in terrorist activity or any other activity endangering the national security, the government can hold the alien for seven days before affording the alien an opportunity to appear before a judge.¹⁰³ At that point, deportation proceedings may be started.

The 1996 amendments to the Immigration and Nationality Act, Illegal Immigration Reform and Immigrant Responsibility Act, IIRIRA,¹⁰⁴ provides that once an alien is taken in for a deportable offense, there is no bail.¹⁰⁵ The Ninth Circuit in *Kim v. Ziglar*¹⁰⁶ stated that you cannot apply this standard to a permanent resident alien unless there is some very special reason to believe he will flee or cause injury to the community.¹⁰⁷ Therefore, with regard to this very broad restriction on aliens, there are two laws. There is the IIRIRA, which provides for no bail, and there is the Patriot Act,¹⁰⁸ which provides for seven days detention based on reasonable grounds. The Patriot Act¹⁰⁹ is yet to be tested in the courts. The Supreme Court, the very last day of the term, granted certiorari in the case of *Demore v. Kim*,¹¹⁰ and that is the one national security case they have taken so far.

Another immigration issue is the question of whether secret proceedings can be held. There have been approximately four or

¹⁰⁰ *Id.* § 412.

¹⁰¹ *Terry v. Ohio*, 392 U.S. 1, 37 (1968).

¹⁰² *Id.*

¹⁰³ USA Patriot Act § 412.

¹⁰⁴ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified at 8 U.S.C. §1101 *et seq.* (2000))

¹⁰⁵ 8 U.S.C. § 1226(c).

¹⁰⁶ 276 F.3d 523.

¹⁰⁷ *Id.*

¹⁰⁸ Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept And Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁰⁹ *Id.*

¹¹⁰ 122 S. Ct. 2696 (2002) (granting of certiorari).

five court decisions on the issue.¹¹¹ There was a decision in the District of Columbia by federal Judge Gladys Kessler, in *Center for National Security Studies v. United States Department of Justice*.¹¹² In this case, various news organizations and the American Civil Liberties Union asked for information regarding detained aliens.¹¹³ Immediately after September 11, there were approximately 1,182 aliens picked up.¹¹⁴ The question that looms is, what is the status of these aliens? More importantly, what is the basis for their arrest?

In August 2002, Judge Kessler ordered the government to disclose information relating to the detainees and their status.¹¹⁵ None of the detainees were held on terrorist charges: some were held on deportable offenses,¹¹⁶ others were held on other criminal charges,¹¹⁷ and some were held on material witness warrants.¹¹⁸

Some of the people picked up were ordered deported.¹¹⁹ Here the questions we ask are, are these deportation proceedings open or closed? Can the press or the public have access to those deportation proceedings? Both the Third Circuit and the Sixth Circuit have held that they are open proceedings.¹²⁰ The Third Circuit ordered that all immigration proceedings must be open.¹²¹ The very last day of the term of the Supreme Court, a stay was requested and granted on that order.¹²²

¹¹¹ *Ctr. for Nat'l. Sec. Studies v. U.S. Dep't. of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (6th Cir. 2002); *N. Jersey Med. Group, Inc. v. Ashcroft*, 308 F.3d 198 (3rd Cir. 2002); *Haddad v. Ashcroft*, 221 F. Supp. 2d 799 (E.D. Mich. 2002); *Welsh v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002).

¹¹² 215 F. Supp. 2d at 94.

¹¹³ *Id.* at 97.

¹¹⁴ *Ctr. For Nat'l. Sec. Studies*, 215 F. Supp. 2d at 99 n.7.

¹¹⁵ *Id.* at 100.

¹¹⁶ *Id.* at 98.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Ctr. For Nat'l. Sec. Studies*, F. Supp. 2d at 98 n.4.

¹²⁰ *Detroit Free Press*, 195 F. Supp. 2d 937; *N. Jersey Med. Group*, 308 F.3d 198.

¹²¹ *N. Jersey Med. Group*, 308 F.3d 198.

¹²² *Id.*

The Sixth Circuit applied only a single case, the *Hamdi* case,¹²³ and did not generally open up all immigration cases. In *Detroit Free Press v. Ashcroft*, the Sixth Circuit affirmed that these cases must be open to keep 'said democracy.'¹²⁴ The Court said that a true democracy is one that operates on faith – faith that government officials are forthcoming and honest, and faith that informed citizens will arrive at logical conclusions.¹²⁵

In the immigration field, we have several important issues. We have the 'no bail provision,'¹²⁶ and the open immigration proceedings.¹²⁷ Whether or not immigration proceedings should be open will be decided in the future by the Supreme Court.

The last issue that I will discuss is the conflict surrounding material witness warrants. I mentioned that several of the people picked up after September 11, particularly immigrants, are being held on material witness warrants.¹²⁸ There has been a major clash in the Southern District of New York about whether the material witness detention provision applies to a grand jury proceeding.¹²⁹

Oftentimes an immigrant is necessary for trial. Afraid that the immigrants will run away, the government issues a warrant for their arrest. This warrant is not issued because the immigrant committed any crime. It is to make sure that he is available at the trial, and when the trial is over the immigrant is free to go. The question that remains is, can you apply the material witness provision to a grand jury witness? The answer to this question is complicated. If you look at section 3144,¹³⁰ it appears from an affidavit filed by a party that the testimony of a person is material

¹²³ *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).

¹²⁴ *Detroit Free Press*, 195 F. Supp. 2d 937.

¹²⁵ *Id.* at 944.

¹²⁶ See 8 U.S.C. § 1226 (c).

¹²⁷ See *Detroit Free Press*, 195 F. Supp. 2d at 943.

¹²⁸ Material witness warrant ensures the attendance at trial of a government witness.

¹²⁹ See *United States v. Awaddalan*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (holding that Section 3144 does not apply to a material witness before a grand jury). But see *In re Application of the U.S. for a Material Witness Warrant*, 2002 WL 1592739 (S.D.N.Y. 2002) (holding that Section 3144 does apply to a material witness before a grand jury).

¹³⁰ 18 U.S.C. § 3144 (2000) (regarding release or detention of a material witness).

in a criminal proceeding then that person may be held as a witness for the later proceeding.¹³¹

At the grand jury stage, you do not have parties. Instead, you have the United States subpoenaing someone. Judge Scheindlin, in *United States v. Awaddalah*,¹³² held that section 3144 does not apply to material witnesses before a grand jury because the wording of the statute seems to encompass an already filed indictment.¹³³ Judge Scheindlin was also concerned as to what is material to a grand jury.¹³⁴ Because you do not have an indictment, you do not have the frame work within which to decide whether something is material or not.¹³⁵

Judge Scheindlin held the material witness provision does not apply to witnesses before the grand jury.¹³⁶ Judge Mukasey, also from the Southern District, is the federal judge who has the habeas corpus federal extradition for Jose Padilla.¹³⁷ Mukasey held that the material witness provision does apply.¹³⁸ It will be interesting to see how the Supreme Court decides on this matter.

Thank you for your time.

QUESTIONS

AUDIENCE MEMBER: What is going to happen with Jose Padilla?

PROFESSOR FRIEDMAN: I think that the government is going to have to produce him. They do have evidence for him, but for one reason or another, they do not want to use that evidence in a regular criminal proceeding. They would never have picked him up without some evidence. I think, eventually, they are going to have to bring him before a federal court and present the charges. I do not know how you can keep him there indefinitely with no charges being brought.

¹³¹ *Id.*

¹³² 202 F. Supp. 2d 55.

¹³³ *Id.* at 62.

¹³⁴ *Id.* at 62-63.

¹³⁵ *Id.* at 63.

¹³⁶ *Id.* at 64.

¹³⁷ Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

¹³⁸ *Id.* at 569-70.

AUDIENCE MEMBER: Was the military commission order really more of an intelligence gathering effort rather than [a forum] to actually try people for crimes?

PROFESSOR FRIEDMAN: I just do not see why you need the military commission questioning these people for a very long time. Presumably, we got some very useful information. Why do we need the threat of a military commission in order to get that information? We have in our possession whatever information we are trying to get out of them. I am sure that may be part of it, but I do not see why the actual military commission is a necessary part of the intelligence gathering effort.

AUDIENCE MEMBER: Do you see the Lynne Stewart case as fitting into part of the picture you describe here or do you see it being something completely different or an aberration?

PROFESSOR FRIEDMAN: Lynne Stewart was a local New York lawyer.¹³⁹ I think the Lynne Stewart case was an effort to bolster the theory that lawyers can transmit security information. We want to be sure they do not. Stewart was talking to Sheik Rahman.¹⁴⁰ There was some information that he wanted made public and she made it public. The Clinton Justice Department informed her and told her she should not do this any longer.¹⁴¹ When the new administration came in she did transmit some

¹³⁹ Ms. Stewart, an attorney with offices in Manhattan, was indicted on charges of terrorism along with three other co-defendants. She was indicted for conspiring to provide material support or resources to designated foreign terrorist organizations, providing such support and resources, conspiring to defraud the United States, and making false statements to federal officers. *See United States v. Sattar*, 2002 U.S. Dist. LEXIS 14798 (S.D.N.Y. Aug. 6, 2002).

¹⁴⁰ Ms. Stewart was an attorney working for Sheik Omar Ahmad Ali Abdel Rahman, who was convicted along with other defendants of various offenses in connection with an urban terrorist plot to bomb the World Trade Center, bridges and tunnels in New York City, and plotting to murder various public figures. *See United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999). Ms. Stewart is accused of visiting Rahman in prison to further some of the criminal activity alleged in her indictment. *See Sattar*, 2002 U.S. Dist. LEXIS 14798 at *4.

¹⁴¹ *See* Susie Day, *Inside the Mind of a (Confused) Terrorist Lawyer*, FRONTPAGE MAGAZINE.COM, Nov. 25, 2002, at <http://www.frontpage.com/Articles/ReadArticle.asp?ID=4764> (last visited April 16, 2003).

information that Rahman wanted. The government said this could be dangerous and therefore, she should not do that. She was indicted for violating Justice Department regulations.¹⁴²

¹⁴² See Prepared Remarks of Attorney General John Ashcroft: Islamic Group Indictment / SAMs (Apr. 9, 2002), *available at* <http://www.usdoj.gov/ag/speeches/2002/040902agpreparedremarksislamicgroupindictments.htm> (last visited April 16, 2003); *see also Sattar*, 2002 U.S. Dist. LEXIS 14798.

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