

2004

With All Due Deference: Judicial Responsibility in a Time of Crisis

Shira A. Scheindlin

Matthew L. Schwartz

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

Recommended Citation

Scheindlin, Shira A. and Schwartz, Matthew L. (2004) "With All Due Deference: Judicial Responsibility in a Time of Crisis," *Hofstra Law Review*. Vol. 32 : Iss. 4 , Article 21.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol32/iss4/21>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawlas@hofstra.edu.

WITH ALL DUE DEFERENCE: JUDICIAL RESPONSIBILITY IN A TIME OF CRISIS

Hon. Shira A. Scheindlin & Matthew L. Schwartz***

"I . . . do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

*Oath of Office for United States Judges*¹

I.

The political branches of our government have a constitutional mandate to conduct appropriate wars² and are well-suited to do so. They are politically accountable and capable of taking quick action. In contrast, the judiciary is by nature deliberative. Most often, judges consider issues and events in hindsight and are peculiarly insulated from the vagaries of political accountability by the constitutional grant of life tenure. Does this mean, however, that courts should abdicate their

* United States District Judge for the Southern District of New York.

** Law Clerk, Hon. Shira A. Scheindlin (2002-2004); Columbia College, B.A., 2000; Columbia Law School, J.D., 2002. The authors wish to thank the participants at the Hofstra Law School conference entitled *Judging Judges Ethics*, and in particular Samuel Dash and Ronald Rotunda, for their helpful comments. This article was previously published as Hon. Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795 (2004).

1. 28 U.S.C. § 453 (2003); 5 U.S.C. § 3331 (2003).

2. See U.S. CONST. art. I, § 8, cl. 1, 12-15; art. II, § 2, cl. 1.

traditional role—or that the rule of law is suspended—when the nation is at war? The answer to this rhetorical question is plainly no. What, then, is the standard by which a judge should review executive or legislative actions taken in wartime? This is the question we address in this article.

There are several possible answers, none completely satisfactory. Courts could find that enforcing constitutional rights trumps every competing need—even that of effectively fighting a war. This approach would require courts to conduct an independent non-deferential review of executive action, regardless of whether that review decreases the nation's ability to successfully defend itself against its enemies. This approach has been flatly rejected: “[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”³ A second possible approach is to defer completely to the political branches in wartime. The problem with this approach is that decisions based on such deference create precedents that are unacceptable once the threat of war has receded. The third approach—and the one traditionally adopted by American courts—is to apply a diminished standard of review to the constitutionality of wartime policies and actions. But regardless of the approach taken, the first question in every case is whether the action taken is truly part of the war effort, or whether “war” is being invoked to insulate actions that would not otherwise survive judicial review.

Since the declaration of the “War on Terror,” there appears to be a palpable and rising distrust of the judiciary by the political branches, a distrust that may be exacerbated by a fear that the courts will not tolerate significant departures from constitutional standards even when actions that so depart are taken in the name of national defense. This distrust manifests itself through executive and legislative actions that prevent the judiciary from fulfilling its mandate to act as a check on the political branches—by excluding it entirely, drastically curtailing its authority, or by outright intimidation of judges in the hope of dissuading them from rejecting initiatives that might not withstand constitutional scrutiny.

Historically, courts have shown great deference to decisions of the political branches in times of war. But the current war is different. It is a war without borders or duration. We are not fighting a foreign country or a regular army. In that sense, the line between battlefield hostilities and domestic crime is blurred. Because of this difference, courts today have been less deferential than in the past—at least at the trial level. The record in the appellate courts has been more mixed, with some panels reverting to the high level of deference traditionally accorded to military

3. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

decisions, while others have applied near plenary review. It remains to be seen what the high court will do; in a span of eight days in April 2004, the Court heard four cases challenging government actions taken in furtherance of the War on Terror.

While the tension between guarding constitutional rights and pursuing military goals exists, we continue to believe that the judiciary must play its traditional role as the guardian of the Constitution. Neither knee-jerk rejection of, nor blind deference to, the administration's policies are acceptable. But a careful balancing of the twin goals of liberty and security, which may both be achievable, is the judiciary's role and its mandate. It may not be easy, but a judge's oath requires nothing less.

Part II of this Article will briefly examine the traditional role of the judiciary in our tripartite system of government, and the responsibility of judges to uphold the rule of law as an effective check on the political branches. Part III recounts the history of the judiciary's war-time jurisprudence, with a particular emphasis on the Supreme Court's deferential treatment of the executive's exercise of discretion in military matters. Part IV surveys the post-September 11 legal landscape, noting that trial courts have been more receptive to claims that certain actions of the political branches have endangered fundamental Constitutional rights, while appellate courts have been more willing to adopt the deferential attitude displayed in earlier times by the Supreme Court. Part V will examine certain actions taken by the political branches since September 11 that reflect, in part, the attitude of those branches towards the judiciary. In conclusion, we contend that even in war, the judiciary must be allowed to function as the third, and co-equal, branch of government envisioned by our founding fathers.

II.

Apart from the Bible, we can think of no document other than the Constitution that has engendered such a disproportionate ratio of commentary to text. Nowhere is this ratio more askew than for Article III of the Constitution, pertaining to the judiciary. Article I, relating to Congress, consists of 2,386 words that set forth the composition of the Senate and the House of Representatives, their internal rules and procedures, and the limits of those bodies' law-making powers. Similarly, Article II consists of 1,050 words and sets forth the qualifications for becoming President, the workings of the Electoral College, and the powers and responsibilities of the Executive. It also

gives the President the power, after receiving the advice and consent of the Senate, to appoint federal judges.⁴

Article III, in contrast, consists of only 388 words divided among three sections. Section one creates the Supreme Court and empowers Congress to create inferior courts that it deems necessary. It also specifies that federal judges shall have life tenure. Section two outlines the jurisdiction of the Court, and section three defines the crime of treason. There is no guidance regarding who may sit as a federal judge, let alone the scope of her powers and duties.

Seizing upon the opportunity to define the limits of its own power, the Supreme Court early on held that the judiciary is a co-equal branch of government.⁵ Simply because the Constitution affords more words to explaining the legislative and executive authorities makes those branches no more important; as Montesquieu (the philosophical inspiration for the United States Constitution) explained, “[t]here would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers that, of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”⁶ Unlike the state constitutions of Virginia,⁷ Massachusetts,⁸ and New Hampshire,⁹ and despite the urging of James Madison,¹⁰ the Constitution contains no specific reference to a separation of powers, nor to the equality of the three branches of government. Nonetheless, this concept is implicit in the structure of the Constitution.¹¹

4. See U.S. CONST. art. II, § 2, cl. 2.

5. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803).

6. 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 163 (Thomas Nugent trans., J.V. Prichard ed., Fred B. Rothman & Co. 1991) (1777).

7. VA. CONST. art. I, § 5.

8. M.G.L.A. CONST. pt. 1, art. 30.

9. N.H. CONST. pt. 1, art. 37.

10. See generally William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYR. L. REV. 715, 720-23 (1984) (describing the debate among the Framers regarding separation of powers). Indeed, early drafts of the Bill of Rights contained an explicit separation of powers provision, providing that “[t]he powers delegated in this constitution are appropriated to the departments to which they are respectively distributed: so that the legislative departments shall never exercise the powers vested in the executive or judicial[,] nor the executive exercise the powers vested in the legislative or judicial, nor the judicial exercise the powers vested in the legislative or executive departments.” Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113, 130 (1971) (quoted in Banks, *supra*, at 723, n.44).

11. See, e.g., Letter from Thomas Jefferson to George Hay (May 20, 1807), in 10 THE WORKS OF THOMAS JEFFERSON 404 (Paul Leicester Ford ed., 1905) (stating “[t]he leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other”); Letter from Thomas Jefferson to James Madison, in 9 THE WRITINGS OF THOMAS JEFFERSON 368 (Andrew A. Lipscomb & Albert Ellery Bergh, eds., 1905) (“[The] principle [of the Constitution] is that of a separation of Legislative, Executive and Judiciary functions except in cases specified. If

Moreover, the judiciary stands as the final bulwark of the Constitution, ensuring that the laws enacted by the legislature and enforced by the executive are permissible exercises of Constitutional powers:

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on.¹²

It has long been accepted that federal judges, appointed for life terms, exercise this function of judicial review neutrally, owing allegiance only to the Constitution and the rule of law. The Constitution is “the supreme Law of the Land,”¹³ in times of peace *and* conflict.

The judiciary exists alongside and equal to the political branches, but also as a check against their powers. Of course, the political branches act as a check on the judiciary as well, by appointing the members of the various courts¹⁴ and by the power of impeachment,¹⁵ by enacting legislation capable of overruling judicial decisions¹⁶ and ultimately by amending the Constitution.¹⁷ Relevant to our subject matter, the political branches are vested with the power to wage war and make the decisions necessary to conduct such wars successfully.¹⁸ The role of the political

this principle be not expressed in direct terms, it is clearly the spirit of the Constitution, and it ought to be so commented and acted on by every friend of free government.”).

12. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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

14. *See id.*

15. *See id.* art. I, § 3, cl. 6.

16. *See id.* art. I, § 8, cl. 18.

17. *See id.* art. V.

18. *See id.* art. I, § 8 cl. 8, 12-15; art. II, § 2, cl. 1.

branches is to win the war and minimize damage.¹⁹ The legislation, regulations, and executive orders they issue are the embodiment of that goal. The judiciary has no role in waging wars.²⁰ But the judiciary's role is *always* to protect the Constitution, even (and maybe especially) in troubled times.

The judiciary thus walks a tight-rope. Judges are trained in the art of balancing one set of interests against another—both of which are legitimate. For example, public safety and the rights of the accused have always been in tension. But the stakes are highest in war time. Judges, like all who reside here, support the need to safeguard freedom and defeat those enemies who would threaten it. But judges must balance these obvious goals with the equally important need to ensure that Constitutional rights are not diminished in the process. Neither blind deference nor automatic opposition to the political branches serves this end.²¹

As one Justice recently explained,

Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; judges represent the Law. Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide individual cases and controversies on individual records, neutrally applying legal principles, and, when necessary, standing up to what is generally supreme in a democracy: the popular will.

A judiciary capable of performing this function, owing fidelity to no person or party, is a longstanding Anglo-American tradition, an

19. See generally *The Brig Amy Warwick* (The Prize Cases), 67 U.S. (2 Black) 635, 668-71 (1862); see also *id.* at 668 (holding that the President has "no power to initiate or declare a war" absent Congressional authorization, but "[i]f a war be made by invasion ... the President is not only authorized but bound to resist force by force. He ... is bound to accept the challenge without waiting for any special legislative authority").

20. See generally U.S. CONST. art. III; see also *Padilla v. Rumsfeld*, 352 F.3d 695, 727-28 (2d Cir. 2003) (Wesley, J., dissenting) ("As I read *The Prize Cases*, it is clear that common sense and the Constitution allow the Commander in Chief to protect the nation when met with belligerency and to determine what degree of responsive force is necessary. ... In reaching this conclusion the Court noted the President's decision regarding the level of force necessary is a political not a judicial decision.").

21. See generally Jean Bethke Elshtain, *Intellectual Dissent and the War on Terror*, THE PUBLIC INTEREST, Spring 2003.

essential bulwark of constitutional government, a constant guardian of the rule of law. The guarantee of an independent, impartial judiciary enables society to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Without this, all the reservations of particular rights or privileges would amount to nothing.²²

In times of crisis, history has shown, “majorities and officials” alike pose a significant threat to the “rights or privileges” guaranteed by the Constitution. It is precisely in these times that the judiciary must be most vigilant, lest it permit a diminution of our treasured liberties not easily undone once the hostilities end. “Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law.”²³

III.

But if “[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed,”²⁴ then why did one former Attorney General observe that “[t]he Constitution has not greatly bothered any wartime President?”²⁵ Even a cursory review of war-time case law reveals the truth in Attorney General Biddle’s observation. It is no exaggeration to say that whenever America has gone to war (in the formal sense or otherwise), the courts have been so deferential to the political branches as to nearly abdicate their traditional role to “support

22. *Republican Party of Minn. v. White*, 536 U.S. 765, 803-04 (2002) (Ginsburg, J., dissenting) (quotation marks, internal citations, and alterations omitted).

23. ABA MODEL CODE OF JUDICIAL CONDUCT, Preamble (2000); *see also id.*, Canon I (“An independent and honorable judiciary is indispensable to justice in our society.”).

24. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).

25. FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962). Recalling the decision to impose a forced evacuation and internment of Japanese-Americans living on the American West Coast during World War II, then-Attorney General Biddle opined,

I do not think [Franklin D. Roosevelt] was much concerned with the gravity of implications of this step. He was never theoretical about things. What must be done to defend the country must be done. . . . The military might be wrong, but they were fighting the war. Public opinion was on their side, so that there was no question of any substantial opposition, which might tend toward the disunity that at all costs he must avoid. . . . Nor do I think the Constitutional difficulty plagued him. The Constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war.

Id. at 218-19.

and defend the Constitution.”²⁶ Where courts have deferred to war-time goals over constitutional guarantees, the Constitution has been the loser. The bulwark became a leaky dam.

Although a great many historical and jurisprudential trends can be gleaned from these decisions, we are neither historians nor academics. We wish only to draw attention to the attitudes that have consistently emerged when the judiciary has been required to evaluate the constitutionality of war-time measures. The cases discussed below illustrate the extraordinarily deferential attitude adopted by the courts. In some cases such deference was appropriate. In others, it was not.

Antebellum America and the Civil War

As early as 1849—twelve years before the secession of South Carolina and the subsequent civil war—the Supreme Court was called upon to decide the lawful boundaries of military power within the state of Rhode Island.²⁷ Rhode Island had become fractured over the right to vote—factions disagreed whether the franchise should be extended to all male residents, or vested only in male land-owners.²⁸ The disagreement became so severe that those in favor of extending the franchise ratified their own state constitution, elected their own governor, and took up arms against the incumbent government.²⁹ The incumbent government, in turn, recruited the state’s militia to repel the rebellion and instituted a state of martial law.³⁰

This dispute reached the Supreme Court, via the federal district court in Providence, when the home of Martin Luther was invaded and searched by militia forces, ostensibly because Luther was suspected of giving aid to the rebels.³¹ Obviously, the militia had not procured a lawful warrant, nor could they point to any exigency that justified their warrantless search under the Fourth Amendment.³² Rather, it was claimed that the break-in was justified under martial law.³³ Luther replied that Article IV of the Constitution, which “guarantee[s] to every

26. 5 U.S.C. § 3331 (2000).

27. See *Luther v. Borden*, 48 U.S. (1 How.) 1 (1849).

28. See *id.* at 35-36.

29. See *id.*

30. See *id.* at 37.

31. See *id.* at 34.

32. See *id.*

33. See *id.*

State in th[e] Union a Republican Form of Government,” implicitly forbids martial law.³⁴

Writing for a divided Court, Chief Justice Roger Taney admitted that, “[u]nquestionably a military government, established as the permanent government of the State, would not be a Republican government, and it would be the duty of Congress to overthrow it.”³⁵ But Taney went on to hold that the martial law imposed in Rhode Island was not a permanent government, but rather a temporary state of affairs while the rightful government was determined.³⁶ That being so, Taney held that the courts were ill-equipped to intervene in the political struggle, and the Court went on to suggest that the rule of law might have no place in Rhode Island until the hostilities ceased: “Could the court, while the parties were actually contending in arms for possession of the government, call witnesses before it and inquire which party represented a majority of people? . . . The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis.”³⁷ By this decision, the Court had unmistakably signaled that its role was plainly and substantially diminished in times of war.

During the Civil War, Lincoln famously suspended the writ of habeas corpus, thereby allowing American citizens to be arrested by the military without recourse to the judiciary.³⁸ Interestingly, it was Chief Justice Taney—sitting as Circuit Justice for Maryland in *Ex parte Merryman*³⁹—who held that Lincoln was overreaching, and that it was “one of those points of constitutional law upon which there was no difference of opinion”⁴⁰ that the Constitution specifically reserves the power to suspend the writ of habeas corpus to Congress.⁴¹ The suspension of the writ without congressional authorization, Taney wrote,

34. U.S. CONST. art. IV, § 4.

35. *Luther*, 48 U.S. at 45.

36. *See id.*

37. *Id.* at 43–44. Not all members of the Court shared Chief Justice Taney’s view that the rule of law could be supplanted in times of war. Justice Levi Woodbury wrote that under martial law, “every citizen, instead of reposing under the shield of known and fixed laws as to his liberty, property, and life, exists with a rope around his neck, subject to be hung up by a military despot at the next lamp-post, under the sentence of some drum-head court-martial.” *Id.* at 62 (Woodbury, J., dissenting).

38. See Letter from Abraham Lincoln to Winfield Scott (Apr. 27, 1861), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859–1865 237 (Library of America 1989) (granting permission to suspend the writ of habeas corpus).

39. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). The *Merryman* decision was never reviewed by the Supreme Court.

40. *Id.* at 148.

41. See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

offended the Constitution and did violence to a system of checks and balances:

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one [sic], I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.⁴²

Although the court issued the writ, in a true show of presidential hubris Lincoln simply ignored the decision, keeping Merryman detained in Fort McHenry until he was subsequently indicted for conspiracy to commit treason.⁴³

In 1866—more than a year after Robert E. Lee surrendered to Ulysses Grant at the Appomattox Courthouse—the Supreme Court decided a related question: whether civilians could be tried and sentenced in military tribunals. In *Ex Parte Milligan*,⁴⁴ the Court held that they could not.

Milligan was a Southern sympathizer living in Indiana who was accused of participating in a secret organization that conspired to disrupt the Union war effort, most notably by releasing prisoners of war from an Indiana prison and by opposing the draft.⁴⁵ Although a civilian, Milligan was arrested by military officials, tried before a military tribunal, convicted, and sentenced to death.⁴⁶ His petition for a writ of habeas corpus eventually reached the Supreme Court.⁴⁷

Although the Court unanimously held that the government had no authority to try Milligan in a military tribunal—and thus that the writ should issue⁴⁸—there was stark disagreement as to the basis for this holding. Justice David Davis, writing for a five-member majority, adopted a sweeping rights-based rationale, holding that the use of

42. *Merryman*, 17 F. Cas. at 149.

43. See WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 38-39 (1998). Merryman was ultimately released on bail, and was never tried. See *id.* at 39. But, surprisingly, “there was no extended public criticism of the administration’s disregard of the decision,” even before Merryman was released. *Id.* at 45.

44. 71 U.S. (4 Wall.) 2 (1866).

45. See *id.* at 6-7.

46. See *id.*

47. See *id.* at 8.

48. See *id.* at 107.

military tribunals to try civilians during times when the civilian courts are open amounts to a violation of due process:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false⁴⁹

But the remaining four justices signed onto a concurrence, authored by Chief Justice Salmon P. Chase, a Lincoln appointee, that rejected the majority's reasoning in favor of a separation of powers approach.⁵⁰ The reason why Milligan could not be tried by military tribunal, Chase wrote, was not that the Constitution forbade it, but rather—harkening back to Chief Justice Taney's decision in *Merryman*—that Milligan could not be tried by military tribunal on the president's say-so alone.⁵¹ Rather, only Congress could authorize the use of military tribunals.⁵²

Whatever force the majority's decision in *Milligan* had was short-lived, for in 1868 the Court decided *Ex parte McCardle*,⁵³ which presented substantially the same question as *Milligan*. By this time, the war had been over for three years. Chief Justice Chase delivered a short opinion on behalf of a now-unanimous court dismissing McCardle's petition because, after *Milligan* was decided, Congress had divested the judiciary of jurisdiction over such cases.⁵⁴ Even though McCardle had made his petition under the 1867 Habeas Corpus Act,⁵⁵ Congress repealed the 1867 Act *after* the Court had heard arguments on his petition.⁵⁶ While it was obvious that Congress repealed the provision

49. *Id.* at 120-21.

50. *See id.* 132-42.

51. *See id.* at 132-34.

52. *See id.* at 137, 140.

53. 74 U.S. (7 Wall.) 506 (1868).

54. *See id.* at 514-15.

55. 14 Stat. 385 (1867).

56. 15 Stat. 44 (1868). Congress passed the Repeal Act over President Johnson's veto. Explaining his veto, Johnson said,

I cannot give my assent to a measure which proposes to deprive any person "restrained of his or her liberty in violation of the Constitution . . .," the right of appeal to the highest judicial authority known to our Government. . . .

. . . [The Supreme Court] combines judicial wisdom and impartiality in a greater degree than any authority known to the Constitution; and any act which may be

specifically to deprive McCardle of the opportunity to gain release from military custody, the Court upheld the Repeal Act and found it lacked jurisdiction to hear McCardle's appeal.⁵⁷

There is no question that the separation of powers approach urged by the concurrence in *Milligan* had by then prevailed over the majority's rights-based view, for if trial of civilians in military tribunals truly ran afoul of due process, nothing Congress did could remedy that fact.

Although some commentators have claimed that the core holding of *Milligan*—that it is unconstitutional, regardless of congressional authorization, to try civilians in military tribunals when the civilian courts are open—remains undisturbed,⁵⁸ most scholars now recognize that “the real legacy of *Ex parte Milligan* is confined between the covers of constitutional history books. The decision itself has had little effect on history.”⁵⁹ Moreover, *McCardle* exemplified a strange view of separation of powers—the judiciary's role was essentially eliminated.⁶⁰

The Great War

When America entered World War I, the authority of the political branches to abandon constitutional protections was barely challenged. “World War I . . . created some of the most egregious violations of civil

construed into or mistaken for an attempt to prevent or evade its decision on a question which affects the liberty of the citizens and agitates the country cannot fail to be attended with unpropitious consequences.

CONG. GLOBE, 40th Cong., 2d Sess. 2094 (1868).

57. See *McCardle*, 74 U.S. at 514.

58. See, e.g., Arthur N. Eisenberg, *Wilson's Wisdom*, in *IT'S A FREE COUNTRY: PERSONAL FREEDOM IN AMERICA AFTER SEPTEMBER 11* 255-64 (Danny Goldberg et al. eds., 2002).

59. MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 184 (1991).

60. During the war, the Court had determined that it had no authority to review the determinations of military tribunals by way of appeal. See *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 253 (1864). Between *Vallandigham* and *McCardle*, a prisoner could neither appeal the decision of a military tribunal, nor could he question the validity of his trial. However, the Court in *McCardle* did suggest that there might be another, unspecified, way for a prisoner to seek redress. See *McCardle*, 74 U.S. (7 Wall.) at 515 (“Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases by appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.”).

Two years prior to *McCardle*, the Court similarly declined to evaluate the constitutionality of certain provisions of the Reconstruction Acts, Act of Mar. 2, 1867, ch. 152, 14 Stat. 428; Act of Mar. 23, 1867, ch. 6, 15 Stat. 2. In *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), Chief Justice Chase, writing for a unanimous Court, held that there can be no “judicial interference with the exercise of Executive discretion” when the executive acts pursuant to congressional mandate. *Id.* at 499.

liberties in our history.”⁶¹ It was also during World War I that the government sought, in a widespread and systematic way, to imprison those Americans that opposed the war effort in word, rather than in deed.

The Sedition Act of 1918 made it a criminal offense to use “any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the flag of the United States, or the uniform of the Army or Navy,” or any language that might bring those institutions “into contempt, scorn, . . . or disrepute.”⁶² A frequent target of prosecutors under the Sedition Act was the Socialist party and its members.

When the Supreme Court reviewed the constitutionality of the Sedition Act—only three months before the Germans surrendered at Versailles—the justices unanimously upheld it. In the Court’s first significant foray into First Amendment law, *Schenck v. United States*,⁶³ Justice Oliver Wendell Holmes memorably wrote,

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. *When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.*⁶⁴

Using this rationale, the Court affirmed the convictions of a Socialist party official who distributed flyers opposing the draft (admittedly by “peaceful measures such as petition for repeal of the

61. Alan Brinkley, *A Familiar Story: Lessons from Past Assaults on Freedoms*, in *THE WAR ON OUR FREEDOMS* 26 (Richard C. Leone & Greg Anrig, Jr. eds., 2003). Much of the background concerning World War I was drawn from Professor Brinkley’s essay.

62. Act of May 16, 1918, ch. 75, 40 Stat. 553 (1918). A precursor to this Act was the Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798), which had made it a crime to “write, print, utter or publish . . . any false, scandalous, and malicious” statements against the government. The 1798 Act was designed to stifle criticism of the fledgling country’s increasing movement toward a war with France. The Federalists in Congress created the law, which expired under its own terms in 1801, as “a temporary defense measure necessary for protecting the nation from disloyal citizens who would aid and abet the enemy through writing and speaking.” JEFFERY A. SMITH, *WAR AND PRESS FREEDOM* 37 (1999). Thus, the courts never had the opportunity to pass on this first effort to criminalize criticism of the government.

63. 249 U.S. 47 (1919).

64. *Id.* at 52 (emphasis added).

[draft] act”),⁶⁵ and of Socialist party leader Eugene V. Debs for giving a speech opposing the draft and questioning America’s involvement in the war.⁶⁶

Subsequently, Justice Holmes changed course and became a strong voice for First Amendment freedoms. In *Abrams v. United States*,⁶⁷ decided shortly after the end of World War I, Holmes—without conceding that his prior opinions were wrongly decided—wrote that:

Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.⁶⁸

The only discernable difference between *Abrams* and *Schenck* was the prominence of the leaflet’s author and the number of copies in circulation, yet Holmes reached opposite conclusions. Little explanation was given for this change of heart, although it may simply reflect the natural evolution of Holmes’s views towards rights not previously examined; prior to this line of cases, the Court had not emphasized the protections of the Bill of Rights qua individual rights.⁶⁹

Nonetheless, Holmes remained in the minority (often with Justice Louis Brandeis) in a number of World War I-era free speech cases, as the majority continued to evaluate laws curtailing civil liberties by a different standard during times of war.⁷⁰ Moreover, the administration was not content with merely imprisoning those alleged subversives whose speech constituted a “clear and present danger” to the war effort.

65. *Id.* at 51.

66. *See generally* Debs v. United States, 249 U.S. 211 (1919) (Holmes, J.).

67. 250 U.S. 616 (1919).

68. *Id.* at 628 (Holmes, J., dissenting).

69. *See* Brinkley, *supra* note 61, at 35-37.

70. *See, e.g.,* Pierce v. United States, 252 U.S. 239, 254 (1920) (Brandeis, J., dissenting); Gilbert v. Minnesota, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). In these opinions and others, Justices Holmes and Brandeis repeatedly set out the argument for a liberal reading of the First Amendment and a robust freedom of speech:

The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely, because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language.

Pierce, 252 U.S. at 273.

Under the Espionage Act,⁷¹ among other things, mailing privileges were withheld from publications that contained “seditious” material; “seditious” material, in turn, arguably included any writing that tended to question the war effort or America’s involvement in the war.⁷² The task of determining whether a publication contained “seditious” material ultimately fell to Postmaster General Albert Sidney Burleson,

a task that Burleson approached with great relish, announcing that “seditious” materials included anything that might “impugn the motives of the government and thus encourage insubordination”; anything that suggested “that the government is controlled by Wall Street or munitions manufacturers, or any other special interests”; anything, in other words, that Burleson considered somehow radical. All publications of the Socialist party were banned by definition.⁷³

Still, when these provisions of the Espionage Act came under judicial scrutiny, they were summarily affirmed on the rationale of *Schenck*.⁷⁴ Any suggestion that the government was acting at the behest of special interests was viewed as an unacceptable “hindrance” to the war effort.

World War II

The Second World War also left a legacy of discarded rights. Early in the war, the Court underscored the fact that *Milligan* was a dead letter. In *Ex parte Quirin*,⁷⁵ the Court considered whether eight German saboteurs could lawfully be tried in closed military tribunals, notwithstanding the fact that the civilian courts were open, and that at least one of the saboteurs asserted that he was an American citizen.⁷⁶ President Roosevelt had determined that the saboteurs were “unlawful combatants,” who should be tried in military tribunals.⁷⁷ The Court affirmed the President’s determination (although it declined to adopt the

71. Ch. 30, 40 Stat. 217 (1917).

72. See *id.* tit. XII, §§ 1, 2; Act of May 16, 1918, ch. 75, 40 Stat. 553 (1918) (adding to the list of the Espionage Act’s already proscribed conduct the “print[ing], writ[ing], or publi[cation of] any disloyal, profane, scurrilous or abusive language about the form of government of the United States, or the Constitution of the United States, . . . or any language intended to bring the form of government of the United States or the Constitution . . . into contempt, scorn, contumely, or disrepute”).

73. See Brinkley, *supra* note 61, at 26-27.

74. See *United States ex rel. Milwaukee Social Democratic Publ’g Co. v. Burleson*, 255 U.S. 407, 409-10, 414-15 (1921).

75. 317 U.S. 1 (1942).

76. See *id.* at 20, 23-24.

77. See *id.* at 22-23.

government's argument that the courts were without power to review it), and also approved of many essential features of military tribunals, including eliminating the safeguards of the Fifth and Sixth Amendments—even where American citizens are concerned.⁷⁸ Although the *Quirin* Court did not overrule *Milligan*, it created a broad exception to *Milligan*'s prohibition on military tribunals. By distinguishing *Milligan* on the narrow basis that *Milligan* was a non-combatant, the Court held that unlawful belligerents could be tried in military tribunals.⁷⁹ It was no longer the case that “[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace.”⁸⁰

That principle was reinforced one year later, when the Court considered the constitutionality of a military regulation that imposed an 8:00 p.m. curfew on all Americans of Japanese ancestry.⁸¹ Chief Justice Harlan Fiske Stone, writing for the majority in *Hirabayashi v. United States*, held that “[t]he war power of the national government is the power to wage war successfully.”⁸² In effect, *Hirabayashi* held that when a decision of the political branches involves military imperatives, a court may not review it—even when the decision openly and obviously eliminates a right guaranteed to the people by the Constitution.

Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.⁸³

Nor was the Court concerned about the claim that such a measure discriminated on the basis of national origin. Although the Court acknowledged that such classifications “are by their very nature odious to a free people,”⁸⁴ it stressed that the curfew in question was not based

78. See *id.* at 39-40.

79. See *id.* at 45.

80. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866).

81. See *Hirabayashi v. United States*, 320 U.S. 81, 83 (1943).

82. *Id.* at 93 (internal quotation marks and citations omitted).

83. *Id.* (citations omitted).

84. *Id.* at 100.

solely on national origin: "The fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan."⁸⁵ That fact that there was no evidence that Hirabayashi himself was disloyal to the United States or posed any threat was not even considered.

The following year, in *Korematsu v. United States*,⁸⁶ the Court affirmed the conviction of a Japanese-American citizen who had remained at his home in San Leandro, California, after the military had ordered that all persons of Japanese ancestry should be evacuated from the West Coast and sent to internment camps.⁸⁷ Once again, the Court overlooked questions of race discrimination and racial profiling and the absence of any particularized suspicion that Korematsu was disloyal. Justice Hugo Black wrote:

We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.⁸⁸

Justice Robert Jackson, dissenting, went one step further:

In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. . . . Hence courts can never have any real alternative to accepting the mere declaration of the authorities that issued the order that it was reasonably necessary from a military viewpoint.⁸⁹

85. *Id.* at 101.

86. 323 U.S. 214 (1944).

87. *See id.* at 215.

88. *Id.* at 218 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)). *Korematsu*, unlike *Hirabayashi*, did provoke impassioned dissent from some justices. *See, e.g., id.* at 226 (Roberts, J., dissenting) ("[This] is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated."). And indeed, fifty years after the fact, Congress issued a formal apology to all Japanese-Americans, recognizing that the motivation for internment was "racial prejudice, wartime hysteria, and a failure of political leadership." 50 U.S.C. app. § 1989a(a) (2000).

89. *Korematsu*, 323 U.S. at 245 (Jackson, J., dissenting).

Yet in an opinion issued the same day as *Korematsu*, the Court did grant a writ of habeas corpus to a Japanese-American woman who had submitted to the forced internment, but then pleaded her loyalty to the United States.⁹⁰ The technical basis for the Court's holding was that the applicable act of Congress and presidential order only required Japanese-Americans to be evacuated from the West Coast military zone; they did not require incarceration after evacuation.⁹¹

It is worth noting that by this time the outcome of the war was not seriously in doubt,⁹² so the Court's perceived need to defer completely to the political branches on matters concerning the war effort may have waned. While the Court was not willing to invalidate the internment altogether, it was willing to release individuals whose loyalty was unquestioned.

Certainly the Court was more cognizant of civil liberties concerns after the war concluded than it was when the outcome was still in doubt.⁹³ But even years after the fighting had ended, the Court retroactively approved of virtually unfettered executive authority during wartime. For example, in upholding the Alien Act,⁹⁴ which permitted the summary arrest and detention of resident aliens who were "citizens, denizens, or subjects of [a] hostile nation"⁹⁵—i.e., anyone, not naturalized, of the same nationality as America's enemies—Justice

90. See *ex parte* Endo, 323 U.S. 283, 294, 297 (1944).

91. See *id.* at 300-01. The Court's result in *Endo* has been rightly criticized in the light of *Hirabayashi* and *Korematsu*:

There is a certain disingenuousness in this sequence of three opinions—*Hirabayashi*, *Korematsu*, and *Endo*. There was no reason to think that Gordon Hirabayashi and Fred Korematsu were any less loyal to the United States than was Mitsuye Endo. Presumably they would have been entitled to relief from detention upon the same showing as that made by Endo. But even had Hirabayashi tried to raise that question in his case, he would not have been successful. The Court confined itself to the issue of the curfew, not the requirement to report to the relocation center. It also appears that a majority of the Court at the time of the *Hirabayashi* decision in June 1943 was unwilling to say that one detained in a relocation center would be entitled to release upon a finding of loyalty. It was not until a year and a half later that the Court came around to this view in *Endo*, when the United States' fortunes of war were vastly improved. The traditional unwillingness of courts to decide constitutional questions unnecessarily also illustrates in a rough way the Latin maxim *Inter arma silent leges*: In time of war the laws are silent.

REHNQUIST, *supra* note 43, at 202.

92. See REHNQUIST, *supra* note 43, at 202.

93. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (granting writ of habeas corpus to two prisoners tried before military tribunals in Hawaii during the war; because their offenses were not related to the war and because the civilian courts were open, the Court held that they should not have been tried by a military tribunal).

94. Act of July 6, 1798, 1 Stat. 577 (1798). The Act was allowed to expire in 1801.

95. *Id.* § 1.

Jackson wrote:

Executive power over enemy aliens,^[96] undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security. This is in keeping with the practice of the most enlightened of nations and has resulted in treatment of alien enemies more considerate than that which has prevailed among any of our enemies and some of our allies. This statute was enacted or suffered to continue by men who helped found the Republic and formulate the Bill of Rights, and although it obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation's obligations to its foes could ever be put on a parity with those to its defenders.

The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists.⁹⁷

Recent History

Judicial deference to the political branches during hostilities has continued over the last half-century. During the Korean War, the Court reversed a judgment under the Federal Tort Claims Act⁹⁸ in favor of the families of air force personnel killed during a test flight.⁹⁹ The government had violated an order of the trial court by withholding a report about the cause of the crash.¹⁰⁰ But the Supreme Court held that unless plaintiffs could make a showing of necessity, an unsupported invocation of a national defense privilege would prevail.¹⁰¹ And "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."¹⁰² The Court even agreed to accept the claim of privilege without actually

96. "In the primary meaning of the words, an alien friend is the subject of a foreign state at peace with the United States; an alien enemy is the subject of a foreign state at war with the United States." *Johnson v. Eisentrager*, 339 U.S. 763, 769 n.2 (1950) (quoting *Techt v. Hughes*, 128 N.E. 185, 186 (N.Y. 1920)). Thus, at the time of World War II, any Japanese citizen could have been considered an "enemy alien."

97. *Id.* at 774-75; see also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (upholding the constitutionality of the War Brides Act, permitting the government to exclude, without hearing and solely upon a finding of the Attorney General that her admission would be prejudicial to the interests of the United States, the alien wife of a citizen who had served honorably in the armed forces).

98. Ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

99. See *United States v. Reynolds*, 345 U.S. 1 (1953).

100. See *id.* at 4-5.

101. See *id.* at 10-11.

102. *Id.* at 11.

reviewing the allegedly privileged material.¹⁰³ And recalling the Espionage and Sedition Acts of the First World War, the Court upheld the Smith Act during the “red scare” of the 1950s, essentially criminalizing membership or participation in the Communist party.¹⁰⁴

As recently as the Cold War, the Court displayed its willingness to defer to executive judgment, especially where the executive acted pursuant to congressional authorization. The Court, for example, upheld the power of President Carter to use so-called “blocking orders” against foreign assets as part of his arsenal in negotiating the resolution of the Iranian hostage crisis.¹⁰⁵ The Court, citing Justice Jackson’s “authoritative”¹⁰⁶ concurrence in *The Steel Seizure Cases*,¹⁰⁷ held:

Because the President’s action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.¹⁰⁸

In short, the Court *presumed* that the President’s actions were constitutional.

103. See *id.* at 8, 10 (“Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect . . .”). Fifty years later, when the report was declassified, the surviving plaintiffs learned that not only did it contain no military secrets, the report explicitly assigned fault in the crash to the government. See Petition for Writ of Error *Coram Nobis*, *In re Patricia J. Herring*, No. 02M76 (2002). The Court refused to re-open the case. See Order, *In re Patricia J. Herring*, 123 S. Ct. 2633 (2003). The plaintiffs have now initiated new litigation in United States District Court, alleging that the Justice Department effectively defrauded them out of their rightful damages by deceiving the court. See Matt Katz, *Historic Case Gets New Hearing*, PHILA. COURIER-POST, May 12, 2004, available at <http://www.southjerseynews.com/issues/may/m051204a.htm>.

104. See, e.g., *Dennis v. United States*, 341 U.S. 494, 516-17 (1951).

105. See *Dames & Moore v. Regan*, 453 U.S. 654, 686-89 (1981).

106. REHNQUIST, *supra* note 43, at 219.

107. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an expressed or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.”). The Court in *The Steel Seizure Cases* held that President Truman had exceeded his constitutional authority when he seized the nation’s steel mills to divert their resources towards the war effort in Korea. See *id.* at 587-89.

108. *Dames & Moore*, 453 U.S. at 674 (internal quotation marks and citation omitted).

Deference and Its Consequences

The Court has applied a diminished standard of constitutional scrutiny to so-called military decisions, eschewing the task of weighing rights and constitutional guarantees against claims of military necessity. Where the political branches have acted pursuant to lawful *authority*, the Court has generally deferred to the judgment of those powers, rather than reviewing those actions through a constitutional lens.

The Court's decisions are no doubt defensible. The arguments advanced in *Luther* and *Hirabayashi*, for example, have considerable merit: military decisions are often made quickly, out of necessity, and the decisionmakers' first concern is not—and should not be—the Constitution. The power to wage war is the power to wage war successfully, and the political branches of government are rightly given wide latitude in making military determinations. A court, reviewing the decision months or years later, with the time to study written submissions, question the litigants, and pore over precedents—and judging whether the decision comports with constitutional standards—may decide the action was inappropriate. But for a truly military decision, such extended review may be impractical, if not dangerous. Thus, deference is warranted.

On the other hand, as we shall see in Part IV, many issues brought to the courts, albeit during war time, are not truly military. The danger lies in the government's blanket or naked assertions of military necessity and in its insistence that the courts play no role whatsoever in reviewing government actions taken in war time.

For the separation of powers to be meaningful, the judicial branch must always remain co-equal with the executive and legislative branches. During times of war, courts may properly apply a standard of heightened deference when reviewing the conduct of the political branches, but they must never abdicate their responsibility to conduct that review in the first place.¹⁰⁹

109. Seizing on this notion, Justice Jackson wrote in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the War Brides Case:

Now this American citizen is told he cannot bring his wife to the United States, but he will not be told why. He must abandon his bride to live in his own country or forsake his country to live with his bride.

So he went to court and sought a writ of *habeas corpus*, which we never tire of citing to Europe as the unanswerable evidence that our free country permits no arbitrary official detention. *And the Government tells the Court that not even a court can find out why the girl is excluded. But it says we must find that Congress authorized this treatment of war brides and, even if we cannot get any reasons for it, we must say it is legal; security requires it.*

IV.

If courts were less vigilant in protecting constitutional rights during prior wars than they should have been, the judicial response to post-September 11 measures has been heartening. We offer several reasons for this phenomenon.

First, we live in an era that places a very high value on individual rights: the right to free speech, the right to bear arms, and the right to privacy to name a few. Those rights have been well developed by legal precedent and loom large as fundamental rights afforded to all Americans. During previous wars, by contrast, the guarantees of the Bill of Rights were less ingrained in our collective consciousness.

Second, and relatedly, civil rights organization are considerably more organized now than they were during prior wars. Organizations such as the American Civil Liberties Union, founded in 1920, have insured that many aspects of the measures taken by Congress and the President are challenged in the courts.¹¹⁰

Third, because this war poses unique security risks at home, the scope of executive and legislative action has been very broad. Anti-terror measures strongly implicate our most basic rights and raise substantial questions under the First, Fourth, Fifth and Sixth Amendments.

Fourth, many of the administration's actions, particularly those in the immediate aftermath of the attacks, were taken with one—and only one—goal in mind: to prevent another attack.¹¹¹ That was the mandate given to the Attorney General by the President.¹¹² Department of Justice officials have themselves admitted that their actions in those first days and weeks were severe and, in hindsight, perhaps hasty.¹¹³

Security is like liberty in that many are the crimes committed in its name.

Id. at 550-51 (Jackson, J., dissenting) (emphasis added).

110. See generally ACLU, ABOUT THE ACLU, at <http://www.aclu.org/about/aboutmain.cfm>.

111. As the government asserted in a recent argument to the Supreme Court, “[w]hen the Commander in Chief has dispatched the armed forces to repel a foreign attack on this country, the military’s duty is to subdue the enemy and not prepare to defend its judgments in a federal courtroom.” Respondent’s Brief at 49, *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004) (No. 03-6696).

112. See, e.g., Wayne Washington & Mary Leonard, *America Prepares Shaping Strategy/Proposed Legislation: US Seeks New Power to Track, Detain, Deport*, Boston Globe, Sept. 20, 2001, at A31.

113. Kenneth Karas, co-chief of the organized crime and terrorism unit of the Southern District of New York United States Attorney’s office, recently explained that:

“[I]n those early days, a lot of the material witness warrants and a lot of what was being done was driven by a real concern that the next big one was around the corner. . . . In hindsight, some people might be critical, but at the time we had no idea what was going to happen.”

To their credit, the trial courts have not routinely deferred to the administration's policies in this most recent war. Many courts have held that the administration's actions do not pass constitutional muster, and those that have held otherwise have subjected those actions to serious constitutional scrutiny. The appellate court decisions have been more divided, with some courts opting to revert to the blind deference that characterized the judicial response in prior conflicts. After reviewing the case law, we offer some possible explanations for this trend.

The First Amendment

The First Amendment appears to have sustained the least damage or threat of damage from the response to September 11.¹¹⁴ Unlike during the Great War, there have been no serious attempts to silence critics of the administration. This undoubtedly accords with a philosophical shift in American values—we simply would not tolerate such censorship of individuals.¹¹⁵ Freedom of the press, however, is regarded much more coolly than is freedom of speech.¹¹⁶ Thus, many of the government's

Siobhan Roth, *Band of Brothers*, LEGAL TIMES, Aug. 18, 2003, at 11. Karas was to be nominated to the bench of the Southern District of New York in September 2003, and as of this writing, his nomination remains on the Senate floor. See Press Release, Schumer, White House, Pataki Reach Agreement on Filling All Vacancies on New York's Federal Bench (July 22, 2003), available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01883.pfhtml; Judicial Nominations for the 108th Congress, at <http://leahy.senate.gov/issues/nominations/cover040104c.htm> (last updated Apr. 1, 2004).

An egregious example of this prosecutorial haste is the case of Abdallah Higazy, an Egyptian student studying in America. Prosecutors suspected Higazy of owning a special pilot's radio—which they thought could have been used to coordinate the attacks—that was left in a hotel room near the World Trade Center. Higazy was detained as a material witness and eventually confessed to owning the radio after thirty days in custody. As it turned out, the radio actually belonged to a pilot who had stayed in the same hotel. Higazy claims that threats from government agents against him and his family caused him to make the false confession. See Patricia Hurtado, *Suspect Freed After Aviation Radio Mystery Near WTC*, NEWSDAY, Jan. 17, 2002.

114. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST., amend. I.

115. In a recent survey of one thousand Americans, only thirty-one percent disagreed with the statement that "[i]ndividuals should be allowed to protest in public against American's involvement in war during a period of active military combat." See CENTER FOR SURVEY RESEARCH & ANALYSIS AT THE UNIVERSITY OF CONNECTICUT, STATE OF THE FIRST AMENDMENT 2003 31 (2003) [hereinafter STATE OF THE FIRST AMENDMENT 2003]. And more generally, ninety-five percent of Americans agreed that "[p]eople should be allowed to express unpopular opinions." *Id.* at 25. But see *United for Peace and Justice v. City of New York*, 243 F. Supp. 2d 19 (S.D.N.Y. 2003), *aff'd* 323 F.3d 175 (2d Cir. 2003) (declining to enjoin New York City from denying a permit to anti-war protesters who wanted to hold a demonstration against the war in Iraq).

116. Forty-three percent of Americans agreed that the media has too much freedom to publish

policies have been aimed at the media, usually by foreclosing press access to proceedings involving any possible connection to terrorism and otherwise withholding information from the public.¹¹⁷

One such policy, ordered by the Attorney General and implemented by Chief Immigration Judge Michael Creppy,¹¹⁸ was the closing of all immigration proceedings designated “special interest” cases. Under the Attorney General’s order, not only are the hearings themselves closed to the public, the press, and members of the immigrant’s family, but public access to the docket itself is restricted.¹¹⁹ Court personnel are enjoined from confirming or denying whether a case is on the docket or scheduled for a hearing.¹²⁰ Under the order, the Attorney General does not need to disclose his reasons for designating certain cases “special interest” cases, nor is any provision made for review of such a determination.¹²¹ Hundreds of immigration proceedings have been closed pursuant to this order.¹²²

In a pair of cases filed in early 2002, a consortium of media groups challenged the closed immigration hearings and demanded access. In *Detroit Free Press v. Ashcroft*,¹²³ Judge Nancy G. Edmunds in the Eastern District of Michigan enjoined the hearings’ closure, holding that the media has a right of access to the immigration proceedings.¹²⁴ In a to-the-point opinion, Judge Edmunds dismissed the government’s rationale for closing the hearings, “even under the most deferential standard of review.”¹²⁵ “Although the structure of the Government’s argument is built on statutory interpretation, jurisdiction, and administrative procedures,” she wrote, “the subtext is all about the

what it wants, and forty-four percent disagreed with the statement, “Newspapers should be allowed to freely criticize the U.S. military about its strategy and performance.” STATE OF THE FIRST AMENDMENT 2003, *supra* note 115, at 28.

117. See generally John Podesta, *Need to Know: Governing in Secret*, in THE WAR ON OUR FREEDOMS, *supra* note 61, at 220-36.

118. The Attorney General’s directive was disseminated in an e-mail from Chief Judge Creppy to all Immigration Judges sent just ten days after the terrorist attacks, and attached instructions for dealing with such so-called “special interest” cases. See Memorandum from Michael Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (Sept. 21, 2001), at <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf>.

119. See *id.*

120. See *id.*

121. Cf. *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 203 (3d Cir. 2002).

122. See Edward Walsh, *High Court Stays Out of Secrecy Fray*, WASH. POST, May 28, 2003, at A4.

123. 195 F. Supp. 2d 937 (E.D. Mich. 2002), *aff’d*, 303 F.3d 681 (6th Cir. 2002).

124. See *id.* at 940; see also *Haddad v. Ashcroft*, 221 F. Supp. 2d 799, 805 (E.D. Mich. 2002), *vacated as moot*, 76 Fed. Appx. 672 (6th Cir. 2003) (unpublished).

125. *Detroit Free Press*, 195 F. Supp. at 947.

Government's right to suspend certain personal liberties in the pursuit of national security."¹²⁶

The Sixth Circuit affirmed Judge Edmunds, holding that "[d]emocracies die behind closed doors."¹²⁷ More importantly, that court rejected a deferential standard of review, emphasizing that government action that curtails a First Amendment right of access is subject to "strict scrutiny," and must be supported by a showing that denial "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."¹²⁸

But the court did leave the door slightly ajar. It held that safeguarding the government's investigation of the September 11 terrorist attack and other terrorist conspiracies did constitute a compelling interest. The court also held, however, that the real fault in the Creppy directive was that it was not narrowly tailored in that there was no requirement for individualized determinations.¹²⁹ It was not enough that the Department of Justice had made that case-by-case determination itself:

Assuming such an evaluation has occurred, we find that problems still remain. The task of designating a case special interest is performed in secret, without any established standards or procedures, and the process is, thus, not subject to any sort of review, either by another administrative entity or the courts. Therefore, no real safeguard on the exercise of authority exists.¹³⁰

If the special interest designation was made in the light of day, subject to effective review, then some immigration hearings could be closed.¹³¹ But the court would not deny the media access on the government's say-so alone.

Similarly, in *North Jersey Media Group v. Ashcroft*,¹³² Chief Judge John W. Bissell of the District of New Jersey also granted injunctive

126. *Id.* at 940.

127. *Detroit Free Press*, 303 F.3d 683.

128. *Id.* at 705 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982)).

129. *See id.*

130. *Id.* at 710.

131. Indeed, Judge Edmunds subsequently affirmed the limited closure of the immigration hearings that were the subject of the *Detroit Free Press* litigation in order to safeguard the source of the government's information. *See Detroit Free Press v. Ashcroft*, Nos. 02-70339, 02-70605, 2002 WL 31317398 at *1 (E.D. Mich. Oct. 7, 2002).

132. 205 F. Supp. 2d 288 (D.N.J. 2002), *rev'd*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

relief to the media.¹³³ But when the case was appealed to the Third Circuit—after the Sixth Circuit had ruled in *Detroit Free Press*—a divided panel reversed.¹³⁴ That court found, largely on the basis of historical analysis, that there is no media right of access to immigration proceedings, and thus the presumption of open hearings was very weak.¹³⁵ Accordingly, rather than adopting the “strict scrutiny” test required by *Detroit Free Press*, only the most deferential standard of review would be applied:

Our judgment is confined to the extremely narrow class of deportation cases that are determined by the Attorney General to present significant national security concerns. In recognition [of] his experience (and our lack of experience) in this field, we will defer to his judgment. We note that although there may be no judicial remedy for these closures, there is, as always, the powerful check of political accountability on Executive discretion.¹³⁶

The judiciary, in other words, had no say in the matter. Despite the split between the Third and Sixth circuits, the Supreme Court has declined to hear any appeal from these decisions.¹³⁷

The government has also moved to severely limit access to information under the Freedom of Information Act (“FOIA”),¹³⁸ an act that supplements the First Amendment by creating a statutory right for Americans to know “what their Government is up to.”¹³⁹ But in *Center for National Security Studies v. United States Department of Justice*,¹⁴⁰ the Justice Department refused to answer a FOIA request seeking the identities of individuals detained in connection with the September 11 investigation.¹⁴¹ The trial court refused to credit the government’s invocation of an exception permitting it to withhold information

133. See *id.* at 305.

134. See generally *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002).

135. See *id.* at 201.

136. *Id.* at 220.

137. See generally *N. Jersey Media Group v. Ashcroft*, 124 S. Ct. 2215 (2003).

138. Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (Supp. 2003)).

139. *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (internal quotation marks and citation omitted).

140. 215 F. Supp. 2d 94 (D.D.C. 2002), *rev’d*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

141. See *id.* at 98. After the September 11 attacks, the Department of Justice changed its policy with respect to responding to FOIA requests. Previously, information would be released unless it was reasonably foreseeable that disclosure would be harmful. Now, government agencies may oppose FOIA requests “whenever there is a legal basis to do so.” Eric J. Sinrod, *The Intersection Between Information and Security*, USA TODAY, Jan. 17, 2003.

compiled for law enforcement purposes that it claimed would endanger the investigation or the safety of any person.¹⁴²

But the Court of Appeals reversed, holding that the district court had failed to sufficiently defer to the executive.¹⁴³ In an opinion echoing *North Jersey Media Group*, a divided panel of the D.C. Circuit held:

It is abundantly clear that the government's top counterterrorism officials are well-suited to make this predictive judgment [of the harm that will result from disclosure]. Conversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security. We therefore reject any attempt to artificially limit the long-recognized deference to the executive on national security issues. . . . It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of courts to second-guess executive judgments made in furtherance of that branch's proper role.¹⁴⁴

As forcefully noted in the dissent, the majority's approach "drastically diminishes, if not eliminates, the judiciary's role in FOIA cases that implicate national-security interests."¹⁴⁵

The Fourth Amendment

It is virtually impossible for a court to entirely abandon its Fourth Amendment obligation to determine whether probable cause exists for the issuance of a warrant and whether a search or seizure is reasonable.¹⁴⁶ Rather than challenging the judiciary's duty to

142. In support of this proposition, the government submitted the identical affidavit that had been found lacking in *Detroit Free Press*. See *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 104.

143. See *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003).

144. *Id.* at 928, 932 (citations omitted). In an impassioned dissent, Judge David Tatel attacked the majority's deferential posture:

While the government's reasons for withholding *some* of the information may well be legitimate, the court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both FOIA itself and the principles of openness in government that FOIA embodies.

Id. at 937 (Tatel, J., dissenting).

145. *Id.* at 951 (Tatel, J., dissenting). Courts have also gone out of their way to avoid "right to know" issues in the wake of September 11. See, e.g., *Kalantar v. Lufthansa German Airlines*, 276 F. Supp. 2d 5 (D.D.C. 2003) (declining to consider whether to release Federal Aviation Administration directive that allegedly requires airline personnel to search all Arab passengers before permitting them to board).

146. The Fourth Amendment provides:

independently examine the probable cause requirement, the Fourth Amendment cases have raised concerns that the warrant requirement has been eviscerated.

One of the first aspects of the government's anti-terror policies to come under judicial scrutiny was the use of material witness warrants to detain individuals who might have information helpful to the government's investigation.¹⁴⁷ Unlike the original use of material witness warrants—to guarantee the attendance of a witness at trial, thereby ensuring a defendant's Sixth Amendment right to compulsory process and to confront adverse witnesses¹⁴⁸—the government began using material witness warrants shortly after September 11 to detain *potential* witnesses.¹⁴⁹ In order for a material witness warrant to issue, the government need only satisfy a judge that the witness has information that is material to a criminal proceeding.¹⁵⁰

It is easy to see how this practice implicates Fourth Amendment concerns: Are these seizures "reasonable?" Because the witness is not being held for trial, but rather as part of an ongoing (and potentially interminable) investigation, there is no fixed term of detention. There is no trial with a date certain; the detainee can be called and recalled before the grand jury over a period of months, or longer. Moreover, there is no countervailing Sixth Amendment right of a criminal defendant. In addition, the material witnesses were held as if they were criminals—in maximum security facilities under lock-down twenty-three hours a day, subject to strip searches, continuous lighting, constant surveillance, subjected to polygraph tests and persistent interrogations, all without access to counsel or family.¹⁵¹

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

147. Material witness warrants are authorized under 18 U.S.C. § 3144 (2003).

148. See *United States v. Awadallah*, 202 F. Supp. 2d 55, 64 (S.D.N.Y. 2002) (Scheidlin, J.), *rev'd*, 349 F.3d 42 (2d Cir. 2003); see also Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483, 485 (2002).

149. See Studnicki & Apol, *supra* note 148, at 485-86.

150. See *id.* at 494-95.

151. See *Awadallah*, 202 F. Supp. at 59-61.

Although three district courts have split on the subject,¹⁵² a panel of the Second Circuit unanimously upheld the constitutionality of this use of material witness warrants.¹⁵³ Importantly, the court engaged in a thorough and searching analysis of the practice, balancing the material witness' Fourth Amendment rights against the government's interest in conducting a grand jury generally, and, in particular, "the indictment and successful prosecution of terrorists whose attack, if committed by a sovereign, would have been tantamount to war, and the discovery of the conspirators' means, contacts, and operations in order to forestall future attacks."¹⁵⁴ Having conducted this balancing, the court concluded that the use of material witness warrants to detain witnesses to grand jury proceedings is constitutional. But at the same time, the court was careful to note that such use is permissible only to achieve the end contemplated by the statute: securing the witness' testimony. "The district court noted (and we agree) that it would be improper for the government to use [material witness warrants] for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established."¹⁵⁵ In short, the court upheld a practice that concededly interferes with people's Fourth Amendment rights, but only after conducting a rigorous constitutional review.

Recent amendments to the Foreign Intelligence Surveillance Act ("FISA")¹⁵⁶ and related regulations also raise Fourth Amendment concerns. FISA, passed in 1978, was enacted to permit surveillance of agents of foreign powers operating within the United States; "the collection of foreign intelligence information is the *raison d'être* for the FISA."¹⁵⁷ Under FISA, the government may obtain a warrant to conduct electronic surveillance upon a showing of probable cause that the target of the surveillance is a foreign power or an agent of a foreign power.¹⁵⁸ Accordingly, the showing required to obtain a FISA warrant is

152. Compare *id.* (invalidating use of material witness warrant), with *In re Application for Material Witness Warrant* (John Doe), 213 F. Supp. 2d 287 (S.D.N.Y. 2002) (approving use of material witness warrant), and *In re Grand Jury Material Witness Detention*, 271 F. Supp. 2d 1266 (D. Or. 2003) (same).

153. See *Awadallah*, 349 F.3d at 64. Notably—because the issue was not put before it—the court did not consider the conditions under which the material witness was detained.

154. *Id.* at 59.

155. *Id.*

156. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-1862 (2000 & Supp. 2003)).

157. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 613 (F.I.S.C. 2002), *rev'd sub nom. In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

158. 50 U.S.C. § 1805(a)(3)(A).

significantly different than that required to obtain a warrant to conduct a wiretap in a criminal investigation.¹⁵⁹ Because the standards are so divergent, FISA specifically requires that communications obtained pursuant to a FISA warrant be limited to intelligence gathering.¹⁶⁰ Pursuant to procedures adopted by Attorney General Janet Reno in 1995¹⁶¹ and approved by the Foreign Intelligence Surveillance Court in 2000,¹⁶² a “wall” was erected between the counterterrorism and law enforcement wings of the Department of Justice, and no wiretap information obtained from a FISA wiretap was to flow through the wall.¹⁶³ More importantly, Department of Justice officials were prohibited from making recommendations to intelligence officials about the operation or scope of FISA wiretaps that might enhance criminal prosecutions.¹⁶⁴

However, in the aftermath of September 11, Attorney General Ashcroft issued new regulations that permit information obtained pursuant to FISA warrants to be shared with Department of Justice prosecutors, and permit prosecutors to direct the operation of FISA

159. Ordinary wiretaps are governed by Title III of the Organized Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, tit. III, § 802 82 Stat. 218 (1968) (codified as amended in 18 U.S.C. § 2518). A so-called Title III warrant may not issue unless there is: (a) probable cause to believe that a crime has been committed; (b) probable cause to believe that particular communications concerning the crime will be obtained via wiretapping; (c) a showing that normal investigative techniques have failed or are unlikely to succeed or are too dangerous; and (d) probable cause to believe that the numbers to be tapped are owned by or commonly used by the target. *See* 18 U.S.C. § 2518(3). In addition, Title III contains a minimization requirement that requires the government to stop listening once it is clear that a particular communication is not relevant to its investigation. *See id.* § 2518(5).

160. 50 U.S.C. §§ 1801(h)(1), 1802(a)(1). The term “minimization” is used in both Title III and FISA, but the use is quite different. In Title III, minimization refers to the government’s duty to listen to only that part of a conversation relevant to its investigation. *See* 18 U.S.C. § 2518(5). In FISA, minimization refers to the requirement of separating law enforcement and intelligence-gathering uses of information collected via electronic surveillance. *See id.* § 1801(h).

161. *See* Memorandum from the Attorney General, Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations (July 19, 1995) [hereinafter Reno Memorandum], available at <http://www.fas.org/irp/agency/doj/fisa/1995procs.html>.

162. *See In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 620 (describing history on FISA information sharing).

163. *See id.* at 620. Judges of the FISA court are selected by the Chief Justice of the United States; he designates eleven federal district judges (seven, prior to the USA PATRIOT Act) from seven of the judicial circuits, no fewer than three of whom reside within twenty miles of the District of Columbia, to serve on the court. *See* 50 U.S.C. § 1803(a).

164. *See* Reno Memorandum, *supra* note 161.

wiretaps to aid in criminal prosecutions.¹⁶⁵ The FISA court squarely rejected the new regulation, holding that the rules permitting law enforcement to essentially direct the operation of FISA wiretaps “appear to be designed to amend the law and substitute the FISA for Title III electronic surveillances and Rule 41 searches,”¹⁶⁶ and would result in

criminal prosecutors . . . tell[ing] the FBI when to use FISA (perhaps when they lack probable cause for a Title III electronic surveillance), what techniques to use, what information to look for, what information to keep as evidence and when use of FISA can cease because there is enough evidence to arrest and prosecute.¹⁶⁷

The FISA Court of Review—sitting for the first time, ever—unanimously reversed.¹⁶⁸ In an extensive decision analyzing FISA and the 2001 amendments to FISA contained in the USA PATRIOT Act, the court concluded that the minimization requirements imposed by the lower court (i.e., the “wall” between intelligence and law enforcement personnel) were not required.¹⁶⁹ The court engaged in an extensive Fourth Amendment analysis but did not decide whether FISA warrants were as valid as Title III warrants in all circumstances for constitutional purposes.¹⁷⁰ In a holding that requires no comment, the court concluded:

We acknowledge, however, that the constitutional question presented by this case—whether Congress’ disapproval of the primary purpose test is consistent with the Fourth Amendment—has no definitive jurisprudential answer.

. . . Even without taking into account the President’s inherent constitutional authority to conduct warrantless foreign intelligence surveillance, we think the procedures and government showings required under FISA, *if they do not meet the minimum Fourth Amendment warrant standards, certainly come close.*¹⁷¹

165. See Memorandum from the Attorney General, Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI (Mar. 6, 2002), available at <http://www.fas.org/irp/agency/dog/fisa/ag030602.html>.

166. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 623.

167. *Id.* at 624.

168. See *In re Sealed Case*, 310 F.3d 717, 719, 746 (Foreign Int. Surv. Ct. Rev. 2002).

169. See *In re Sealed Case*, 310 F.3d at 730, 743.

170. See *id.* at 737–42 (“We do not decide the issue, but note that to the extent a FISA order comes close to meeting Title III, that certainly bears on its reasonableness under the Fourth Amendment.”).

171. *Id.* at 746 (emphasis added). Prior to the passage of the USA PATRIOT Act, FISA required that the gathering of foreign intelligence be the “primary purpose” for the government to

The Fifth Amendment

The treatment of those detained in connection with the war on terrorism raises serious Fifth Amendment concerns. By designating some detainees as "enemy combatants," the government has removed these people from the civil justice system altogether, thereby precluding judicial oversight.

This policy raises fundamental questions of due process,¹⁷² those rights that are "of the very essence of a scheme of ordered liberty," the abolishment of which would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"¹⁷³ The Due Process clause protects against conduct, the totality of which "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."¹⁷⁴

Both United States citizens and foreigners have been designated as enemy combatants, with the latter group detained at Camp Delta on Guantanamo Bay, Cuba.¹⁷⁵ Approximately 650 detainees from forty-three countries have been detained at Guantanamo Bay since 2001,¹⁷⁶ although in recent months many have been released,¹⁷⁷ while six

proceed with electronic surveillance under FISA. *See id.* at 732. Under the USA PATRIOT Act, however, the government need only demonstrate that intelligence gathering is a "significant purpose" of the investigation in order to obtain a FISA warrant. *See id.* at 733.

172. The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

173. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

174. *Rochin v. California*, 342 U.S. 165, 169 (1952) (quotation marks, alterations, and citations omitted).

175. Camp Delta was formerly known as Camp X-Ray. *See* Richard J. Wilson, *United States Detainees at Guantanamo Bay: The Inter-American Commission on Human Rights Responds to a "Legal Black Hole,"* 10 HUM. RTS. Q. 2 (2003). Camp X-Ray was a temporary detention facility. In April 2002, construction of a larger and more modern facility, Camp Delta, was completed. Detainees held at Camp X-Ray were transported to Camp Delta. *See* Roy Gutman et al., *Guantanamo Justice?*, NEWSWEEK, July 8, 2002, at 34, 37.

176. *See, e.g., Army Counselor for Terror Prisoners Held*, L.A. TIMES, Sept. 21, 2003, at A5.

177. *See, e.g., U.S. Releases 15 More from Guantanamo*, L.A. TIMES, Apr. 3, 2004, at A16 (reporting that 134 detainees had been released since January 2003, that twelve have been

others—who will be prosecuted in military tribunals as early as the summer of 2004—have been transferred to Camp Echo, also on Guantanamo.¹⁷⁸ Most were captured in or near battlefields in Afghanistan, although at least six Algerians were transferred from Bosnia.¹⁷⁹ All of the detainees have been labeled as “enemy” or “unlawful” combatants rather than as prisoners of war under the Geneva Convention,¹⁸⁰ and may be held until the end of hostilities, unless they are released earlier or charged and tried before military tribunals.¹⁸¹ These detainees are unidentified, have not been charged, have no access to counsel, and are regularly interrogated.¹⁸²

Strictly speaking, the terms of the detainees’ confinement does not present a due process problem. The detainees—all of whom are foreign citizens—are being held as unlawful combatants outside of the criminal justice system, and indeed, outside of the territorial sovereignty of the United States. Thus, they have no Fifth Amendment rights.¹⁸³ Nonetheless, their confinement and how they got there raise questions that implicate due process-like concerns.

Two courts have recently held that they are without jurisdiction to hear petitions for habeas relief brought on behalf of the Guantanamo Bay detainees. In *Rasul v. Bush*,¹⁸⁴ Judge Colleen Kollar-Kotelly of the United States District Court for the District of Columbia held that, under

transferred to their home countries for continued detention, and that approximately 595 remain at Guantanamo).

178. See, e.g., Nancy San Martin, *U.S. Military Opens Doors, Sheds Light on Cuba Camp*, MIAMI HERALD, Apr. 12, 2004, at 1.

179. See Matthew Kaminski, *Anti-Terrorism Requires Nation Building*, WALL ST. J., Mar. 15, 2002, at A10.

180. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

181. As the Court explained in *Quirin*, an unlawful combatant, unlike his lawful counterpart, is subject to interrogation and trial by military tribunal. See *Ex parte Quirin*, 317 U.S. 1, 31 (1942); Geneva Convention, *supra* note 180, art. 4 (describing who is entitled to protections as a prisoner of war); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 594-95 (S.D.N.Y. 2002) (explaining distinction between lawful and unlawful combatants under the Geneva Convention). Prisoners of war, by contrast, are held until hostilities cease, at which time they are released; for these soldiers, “captivity is neither a punishment nor an act of vengeance,” but rather “a simple war measure,” Hamdi v. Rumsfeld, 316 F.3d 450, 465 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004) (quoting W. Winthrop, MILITARY LAW AND PRECEDENTS 788 (2d ed. 1920)).

182. See Wilson, *supra* note 175.

183. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 273-75 (1990) (holding that the Fifth Amendment’s protections do not extend to aliens outside the territorial boundaries of the United States).

184. 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. 2003).

Eisentrager,¹⁸⁵ habeas relief is available only to United States citizens and aliens within the territorial United States or its sovereign territory.¹⁸⁶ Because Guantanamo Bay is outside of the United States, the aliens held there have no recourse to United States courts.¹⁸⁷ The Court of Appeals affirmed: "The consequence is that no court in this country has jurisdiction to grant habeas relief . . . to the Guantanamo detainees, even if they ha[d] not been adjudicated enemies of the United States."¹⁸⁸ The British high court, commenting on a suit brought by a British citizen detained at Guantanamo Bay, summarized the problem: "What appears to us to be objectionable is that Mr [sic] Abassi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal."¹⁸⁹

Seizing on this objection, the Ninth Circuit Court of Appeals recently held that it *does* have jurisdiction over habeas petitions arising from the confinement of prisoners on Guantanamo Bay.¹⁹⁰ Judge Stephen Reinhardt, joined by United States District Judge Milton Shadur, held that *Eisentrager* was no bar to jurisdiction. In their view, *Eisentrager* permits United States courts to exercise jurisdiction whenever our government controls a territory, regardless of whether it has "sovereign" control.¹⁹¹ The majority was particularly troubled by the government's assertion that by detaining prisoners at Guantanamo, they could avoid judicial review of the detentions altogether.

We recognize that the process due "enemy combatant" habeas petitioners may vary with the circumstances and are fully aware of the unprecedented challenges that affect the United States' national

185. See *supra* Part III.

186. See *Rasul*, 215 F. Supp. 2d at 68.

187. See *id.* at 72-73; see also *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

188. *Al Odah*, 321 F.3d at 1141; see also *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1046-50 (C.D. Cal. 2002) (holding that United States courts have no jurisdiction over habeas petitions filed on behalf of Guantanamo Bay detainees), *aff'd in part, on other grounds vacated in part*, 310 F.3d 1153 (9th Cir. 2002), *cert. granted*, 124 S. Ct. 534 (2003).

189. *The Queen (In re Abassi & Anor) v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Dep't*, EWCA Civ. 1598, ¶ 66 (C.A. 2002), *available at* 2002 WL 31452052.

190. See *Gherebi v. Bush*, 352 F.3d 1278, 1300 (9th Cir. 2003).

191. See *id.* ("Although we agree with the government that the legal status of Guantanamo constitutes the dispositive factor in our jurisdictional inquiry, we do not find that [*Eisentrager*] requires sovereignty rather than simply the existence of territorial jurisdiction, which unquestionably exists here."). The dissent "reluctant[ly]" concluded that *Eisentrager* did control. *Id.* at 1313 (Graber, J., dissenting).

security interests today, and we share the desire of all Americans to ensure that the Executive enjoys the necessary power and flexibility to prevent future terrorist attacks. However, even in times of national emergency—indeed, particularly in such times—it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike. Here, we simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any person, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement.¹⁹²

The Supreme Court has agreed to review this important jurisdictional question.¹⁹³

The judiciary has also been virtually excluded from reviewing the detention of United States citizens detained within the United States. At least three individuals—two American citizens and an alien arrested and detained in the United States—have been designated enemy combatants and imprisoned in naval brigs. Yaser Hamdi, the first designee, surrendered to the Northern alliance forces in Afghanistan and was taken to Guantanamo Bay, where his American citizenship was discovered.¹⁹⁴ The President has designated him as an “enemy combatant.”¹⁹⁵ He is not currently charged with any crime, is not permitted to see a lawyer, and is being held indefinitely and, until recently,¹⁹⁶ incommunicado at the naval brig in Charleston, South Carolina.¹⁹⁷

A petition for habeas relief was filed on Hamdi's behalf.¹⁹⁸ The district court initially permitted Hamdi access to a lawyer to pursue his petition.¹⁹⁹ The Fourth Circuit reversed, holding that the district court had not fully considered the “sweeping implications” of affording

192. *Id.* at 1283.

193. *See* *Rasul v. Bush*, 124 S. Ct. 534 (2003).

194. *See* *Hamdi v. Rumsfeld*, 316 F.3d 450, 460 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004).

195. *See id.* at 461.

196. *See* Jerry Markon, *Military to Watch Prisoner Interview*, WASH. POST, Jan. 31, 2004, at B3. Hamdi met with his attorneys on February 3, 2004, in a session tape-recorded by military personnel. *See* Jerry Markon, *Terror Suspect, Attorneys Meet for 1st Time*, WASH. POST, Feb. 4, 2004, at B3 [hereinafter Markon, *Terror Suspect*].

197. *See* Markon, *Terror Suspect*, *supra* note 196. Hamdi had previously been held at a naval brig in Norfolk, Virginia. *See id.*

198. *See* *Hamdi v. Rumsfeld*, 296 F.3d 278, 279 (4th Cir. 2002).

199. *See id.* at 280.

counsel to an enemy combatant.²⁰⁰ On remand, the district judge ordered production of some additional material regarding Hamdi's designation in order to consider—in *camera*—those sweeping implications.²⁰¹ But the Fourth Circuit again reversed.²⁰² After a searching analysis of the Supreme Court's wartime jurisprudence, the court concluded that "[f]or the judicial branch to trespass upon the exercise of 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."²⁰³

Although the court conceded that "judicial deference to executive decisions made in the name of war is not unlimited,"²⁰⁴ and indeed, that "[t]he detention of United States citizens must be subject to judicial review,"²⁰⁵ it also held that a two page conclusory hearsay affidavit filed by Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, who wrote that Hamdi was "affiliated with a Taliban military unit and received weapons training," was sufficient to justify the detention.²⁰⁶ "Asking the executive to provide more detailed factual

200. *See id.* at 282-83.

201. *See Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 528-29 (E.D. Va. 2002).

202. *See Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004).

203. *Id.* at 463. The *Hamdi* opinion garnered significant criticism, even from within the Fourth Circuit:

In resting its decision on [a] factually and legally untenable ground, the panel reneged on the promise it hastily made to the parties at the litigation's inception.

It promised the citizen seized by the government "meaningful judicial review" of his claim that he was not an enemy combatant, pointedly refusing to "embrace a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." But it ultimately provided that citizen a review that actually entailed absolutely no judicial inquiry into the facts on the basis of which the government designated that citizen as an enemy combatant.

...
But as the panel disowned its promise to the detainee to provide him meaningful judicial review, so also did it disown its promise to the Executive to accord him the substantial deference to which he is constitutionally entitled for his wartime decisions as to who constitute enemies of the United States. The panel promised the Executive that the Judiciary would not sit in full review of his judgments as to who is an enemy combatant of the United States, but it adopted a rule that will henceforth do just that, cast the Judiciary as ultimate arbiter, in each and every instance, of whether the Executive has properly so classified a detainee.

Hamdi v. Rumsfeld, 337 F.3d 335, 358-59 (4th Cir. 2003) (Luttig, J., dissenting) (quoting *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002)) (alterations in original omitted).

204. *Hamdi*, 316 F.3d at 464.

205. *Id.* (citation omitted).

206. *See id.* at 472, 473.

assertions would be to wade further into the conduct of war than we consider appropriate and is unnecessary to a meaningful judicial review of this question.”²⁰⁷ The executive, in other words, did not even have to present “some evidence” in support of its designation:

[W]e hold that, despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration. Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in an [sic] zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner’s detention.²⁰⁸

Thus, while the court asserted that complete deference was not required, its words and actions were at odds. The court refused to hear evidence in support of, or in opposition to, Hamdi’s petition—the hearsay declaration of a Department of Justice official was sufficient.

The second American designated as an “enemy combatant” was Jose Padilla, a Brooklyn-born United States citizen, arrested on May 8, 2002, at O’Hare airport, shortly after arriving from Pakistan. He was arrested on information obtained from a captured member of al Qaeda who linked him to a plot to create and detonate a so-called “dirty bomb.”²⁰⁹ Padilla was originally held in New York as a material witness, but was transferred two days prior to a scheduled court hearing and designated an “enemy combatant.”²¹⁰ He is now being held in a military brig in South Carolina; he has not been charged,²¹¹ and, like Hamdi, was held incommunicado until recently.²¹²

207. *Id.* at 473.

208. *Id.* at 476.

209. A dirty bomb is a device that uses conventional explosives to distribute radioactive material, much like radioactive shrapnel. See Tony Karon, *The “Dirty Bomb” Scenario*, TIME ONLINE EDITION, June 10, 2002, available at <http://www.time.com>.

210. See *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002).

211. See *id.* at 569.

212. See News Release, United States Dep’t of Defense, *Padilla Allowed Access to Lawyer* (Feb. 11, 2004) [hereinafter *Padilla News Release*], at <http://www.defenselink.mil/releases/2004/nr20040211-0341.html>; see also John J. Lumpkin, *Pentagon Allows Padilla to See Lawyer*, WASH. POST, Feb. 11, 2004, at <http://washingtonpost.com>. According to the Defense Department’s News Release, the Department permitted the meeting after it completed its interrogation of Padilla and determined that access to a lawyer would not “interfere with intelligence collection” from that enemy combatant. *Padilla News Release*, *supra*. Padilla’s meeting with his attorney took place on March 3, 2004, and was tape-recorded by a military observer. See Bruce Smith, *Lawyers Finally Meet with Dirty Bomb Suspect*, CHI. SUN-TIMES, Mar. 4, 2004, at 30.

Padilla's attorney, appointed when he was held as a material witness, filed a petition for a writ of habeas corpus challenging Padilla's designation as an enemy combatant.²¹³ Chief Judge Michael Mukasey of the Southern District of New York, in an opinion drawing heavily on *Quirin*, held that the President was well within his constitutional authority to designate an American citizen as an enemy combatant, and potentially, to try that citizen before a military tribunal.²¹⁴ But, Judge Mukasey also held that his designation is not beyond judicial review—it requires a showing that “there is some evidence to support [the President's] conclusion that Padilla was, like the German saboteurs in *Quirin*, engaged in a mission against the United States on behalf of an enemy with whom the United States is at war.”²¹⁵ Moreover, Judge Mukasey permitted Padilla to consult with an attorney to challenge the sufficiency of the government's proffered evidence.²¹⁶

On appeal, a divided panel of the Second Circuit went further, squarely holding that “the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat.”²¹⁷ The court's decision was based largely on the perceived absence of congressional authorization for the detention, notwithstanding the need to show the appropriate deference:

We agree that great deference is afforded the President's exercise of his authority as Commander-in-Chief. We also agree that whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts. Because we have no authority to do so, we do not address the government's underlying assumption that an undeclared war exists between al Qaeda and the United States.²¹⁸

213. See *Padilla*, 233 F. Supp. 2d at 571.

214. See *id.* at 593-96, 610.

215. *Id.* at 608.

216. See *id.* at 604.

217. *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003). That Padilla was arrested in the United States distinguishes Padilla's case from *Hamdi*'s, as both courts of appeal noted. See *id.* at 698 (stating “we do not address the detention of an American citizen seized within a zone of combat in Afghanistan, such as the court confronted in *Hamdi v. Rumsfeld*”); *Hamdi v. Rumsfeld*, 316 F.3d 450, 465 (4th Cir. 2003) (stating “[w]e have no occasion . . . to address the designation as an enemy combatant of an American citizen captured on American soil”); see also *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring) (“To compare this battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges.”).

218. *Padilla*, 352 F.3d at 712 (citations omitted).

Yet, relying on the *Steel Seizure Cases*,²¹⁹ the court determined that the executive lacks the inherent constitutional authority to detain an American citizen captured in the United States as an enemy combatant, and that congress had not conferred such power on him.²²⁰ Notably, the court declined to regard a joint resolution of Congress that empowered the president to “use necessary and appropriate force . . . ‘in order to prevent any future acts of international terrorism against the United States’” as sufficient authorization.²²¹ Accordingly, the court ordered Padilla to be released, transferred to civilian authorities to be criminally prosecuted, or, if appropriate, detained as a material witness.²²²

The Supreme Court subsequently granted certiorari in both *Hamdi* and *Padilla*.²²³ Taken together, these cases speak to the proper scope of presidential authority to detain American citizens, regardless of where they are captured. As Professor Harold Koh has described it, a resolution of these cases will determine whether there is such a thing as an “extra-legal person”—that is, a person to whom the law does not apply.²²⁴ And, in *al Odah* and *Rasul*, the Court will address whether there are “extra-legal zones.”²²⁵ In hearing these four cases, the Court will have the opportunity to address the contours of the rule of law during war time. The granting of certiorari in these cases signals the Supreme Court’s willingness to involve itself as a co-equal branch of government during wartime, something that it has been reluctant to do during past wars. As Judge Wesley, dissenting in *Padilla*, explained:

219. See *supra* note 107 and accompanying text.

220. Relying on *The Prize Cases*, Judge Richard Wesley dissented, arguing that the executive has the inherent authority to “prosecute armed conflicts when, as on September 11, 2001, the United States is attacked.” *Padilla*, 352 F.3d at 728 (Wesley, J., dissenting). Judge Wesley also would have held that, absent inherent authority, the congressional joint resolution sufficiently authorized the President to detain Padilla. See *id.* at 729 (Wesley, J., dissenting).

221. *Id.* at 729 (quoting Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)); see also *id.* at 725-26 (reprinting the congressional joint resolution as Appendix B to the opinion).

222. See *id.* at 724.

223. See *Rumsfeld v. Padilla*, 124 S. Ct. 1353 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004).

224. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1498 (2003) (“[I]nstead of declaring a state of emergency, or announcing broadscale changes in the rules by which the United States had previously accepted and internalized international human rights standards, the administration has opted instead for a two-pronged strategy of creating *extralegal zones*, most prominently the U.S. Naval Base at Guantanamo Bay, Cuba, where scores of security detainees are held without legal recourse, and *extralegal persons*—particularly those detainees labeled ‘enemy combatants,’ who, even if American citizens on American soil, are effectively accorded no recognized legal avenue to assert either substantive or procedural rights.”).

225. See *id.* at 1510-11; see also *supra* note 184 and accompanying text.

Mr. Padilla's case reveals the unique dynamics of our constitutional government. Padilla is alleged to be a member of an organization that most Americans view with anger and distrust. Yet his legal claims receive careful and thoughtful attention and are examined not in the light of his cause—whatever it may be—but by the constitutional and statutory validity of the powers invoked against him.²²⁶

The Sixth Amendment

By and large, the government has been loathe to make blanket policies that are potentially violative of the Sixth Amendment,²²⁷ although the closed immigration hearings and military tribunal cases implicate similar rights. Nonetheless, Sixth Amendment questions have arisen on an ad hoc basis.

For example, Judge John Koeltl of the Southern District of New York recently dismissed several counts of an indictment against Lynne Stewart, the lawyer to Sheikh Omar Abdel Rahman, the so-called "blind cleric" who orchestrated the 1993 World Trade Center bombing.²²⁸ Although Stewart's case did not directly raise a Sixth Amendment violation—since she, and not her client, had been indicted—it certainly raised Sixth Amendment concerns, as Stewart was indicted because she was Abdel Rahman's attorney.

Stewart was indicted for providing "material support or resources to a foreign terrorist organization"²²⁹ by, among other things, announcing to the press that her client had withdrawn his support for a then-existing cease-fire among militant Islamic groups.²³⁰ Stewart was thus charged with providing "personnel" or "communications equipment"²³¹—*i.e.*, herself and the press—to Abdel Rahman and his terrorist group.²³² Judge Koeltl dismissed these charges, holding that the government had

226. *Padilla*, 352 F.3d at 733 (Wesley, J., dissenting).

227. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

228. *See United States v. Sattar*, 272 F. Supp. 2d 348, 383 (S.D.N.Y. 2003).

229. 18 U.S.C. § 2339B(a)(1) (2003).

230. *See Sattar*, 272 F. Supp. 2d at 355.

231. 18 U.S.C. § 2339A(b) (2003) (defining "material support or resources" to include the provisions of, among other things, communications equipment and personnel).

232. *See Sattar*, 272 F. Supp. 2d at 354-55.

“fail[ed] to explain how a lawyer, acting as an agent of her client . . . could avoid being subject to criminal prosecution.”²³³ The court recognized that a lawyer must be free to represent her client without the spectre of prosecution even, as in Stewart’s case, when her representation falls outside of the usual boundaries of the attorney-client relationship.²³⁴

One case has directly raised Sixth Amendment issues. Zacarias Moussaoui, the so-called “twentieth hijacker,” has been charged for his role in connection with the September 11 attacks themselves,²³⁵ and has opted to act as his own counsel.²³⁶ In the preparation of his defense, Moussaoui has sought access to alleged terrorist ringleader Ramzi bin al-Shibh. Moussaoui believes that Al-Shibh, who is now in federal custody, can provide exculpatory evidence.²³⁷ The government has argued that national security would be compromised by allowing Moussaoui access to Al-Shibh.²³⁸

In a heavily redacted opinion, Judge Leonie Brinkema of the Eastern District of Virginia agreed with Moussaoui, holding that the Sixth Amendment right to compulsory process is not outweighed by claims that the government’s intelligence-gathering efforts would be

233. *Id.* at 359. In *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002), the case of the so-called “American Taliban,” the court reached the opposite conclusion, holding that someone who offered himself in direct service to a terrorist organization in fact had provided “personnel.” *See id.* at 572-73. But in that case, the defendant had offered himself up as a soldier in the army of the terrorist organization, not as a lawyer representing a terrorist in a court of law. *See id.* at 545-47.

234. Stewart’s statements to the press, for example, were made after Abdel Rahman had been tried, convicted and sentenced, and had exhausted all of his appeals. *See Sattar*, 272 F. Supp. 2d at 354-55. In November 2003—four months after Judge Koeltl dismissed the charges—the government filed a superseding indictment charging Stewart with providing material support to an international plot to kill and kidnap people in a foreign country. *See* 18 U.S.C. § 2339(a). The new indictment still charges Stewart with providing “personnel” to the conspiracy, but now the “personnel” alleged in the indictment is Sheikh Abdel Rahman (her client), not Stewart herself. The indictment also expanded the conspiracy charged to include the 2000 bombing of the U.S.S. Cole and the 1993 World Trade Center bombing. Stewart has moved to dismiss the superseding indictment. *See* Mark Hamblett, *New Lynne Stewart Charges Raise Hurdle for Government*, N.Y.L.J., Apr. 12, 2004, at 1; Patricia Hurtado, *Terror Case Defense*, NEWSDAY (Nassau), Apr. 10, 2004, at A11.

235. It is alleged that Moussaoui planned to hijack an airplane on September 11, 2001, and fly it into the White House. *See United States v. Moussaoui*, No. CR. 01-455-A, 2003 WL 21263699, *1 (E.D. Va. Mar. 10, 2003).

236. *See United States v. Moussaoui*, No. CR. 01-455-A, 2003 WL 1877700, *1 (E.D. Va. Feb. 28, 2003).

237. *See Moussaoui*, 2003 WL 21263699 at *1.

238. *See id.* at *2.

undermined.²³⁹ The Fourth Circuit dismissed the government's appeal for lack of jurisdiction.²⁴⁰

Judge Brinkema's decision recognizes the tension between a defendant's Sixth Amendment rights and the government's legitimate security concerns.

When the Government elected to bring Moussaoui to trial in this civilian tribunal, it assumed the responsibility of abiding by well-established principles of due process. To the extent that the United States seeks a categorical, "wartime" exception to the Sixth Amendment, it should reconsider whether the civilian criminal courts are the appropriate fora in which to prosecute alleged terrorists captured in the context of an ongoing war.²⁴¹

On remand, the government continued to refuse to provide Moussaoui access to bin Al-Shibh, and Judge Brinkema responded by determining

239. See *id.* at *5-6. As noted, Judge Brinkema's opinion in *Moussaoui* was released to the public only after heavy redaction, including Al-Shibh's identity. However, media sources unanimously report that Al-Shibh is the subject of the ruling. See, e.g., Editorial, *The Trial of Zacarias Moussaoui*, N.Y. TIMES, July 28, 2003, at A16.

240. See *United States v. Moussaoui*, 333 F.3d 509, 517 (4th Cir. 2003), *reh'g denied*, 336 F.3d 279 (4th Cir. 2003). Although the panel originally held that Judge Brinkema's order was a discovery order not susceptible to interlocutory appeal, there was spirited debate on this issue when the government moved for rehearing by the *en banc* court. Chief Judge William W. Wilkins, concurring in the denial of rehearing, accused the dissenters of "allow[ing] the importance of the issues involved in the underlying merits of this appeal to cloud their judgment on the purely legal question of jurisdiction." *Moussaoui*, 336 F.3d at 279-80 (Wilkins, J., concurring).

In three separate opinions urging rehearing *en banc*, the dissenters argued that Judge Brinkema's decision was appealable under the Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16 (2000). At the same time, the dissenters met Judge Wilkins' remarks, writing that "[w]e must not, in resolving this jurisdictional question, turn a blind eye to reality. The courts have placed one suspected al Qaeda operative in touch with another, and then denied to the United States the right to promptly appeal that decision." *Moussaoui*, 336 F.3d at 285 (Wilkinson, J., dissenting).

In addition, Judge Michael Luttig authored a strong dissent, arguing that review of Judge Brinkema's order was not only proper, it "is necessary in the interests of national security, as has been represented to us on behalf of the President of the United States." *Id.* at 286 (Luttig, J., dissenting). This remark caused Judge Wilkins to characterize the dissenters' views as follows:

My colleague apparently would have us simply rule in favor of the government in all cases like this one. From his limited review of the petition for rehearing and suggestion for rehearing *en banc*, the accuracy of which he assumes, he believes—because the Government asserts national security interests and because he speculates about national security interests the Government does not assert—that it is our duty to exercise jurisdiction without waiting to determine whether any sanction that might be imposed would be acceptable to the Government. Siding with the Government in all cases where national security concerns are asserted would entail surrender of the independence of the judicial branch and abandonment of our sworn commitment to uphold the rule of law.

Id. at 281-82 (Wilkins, J., concurring)

241. *Moussaoui*, 2003 WL 21263699 at *6 (citations omitted).

an appropriate sanction.²⁴² Although she did not accept the defense's argument that the case should be dismissed, Judge Brinkema did rule that Moussaoui could not be subject to capital punishment, nor could the government introduce any evidence at trial that Moussaoui participated in or had knowledge of the September 11 attacks.²⁴³ Such a sanction, Judge Brinkema reasoned, would render bin Al-Shibh's testimony immaterial; the government's refusal to produce bin al-Shibh would therefore not offend Moussaoui's right to a fair trial.²⁴⁴

In another heavily redacted opinion, the Fourth Circuit crafted a curious compromise. It held that Moussaoui is entitled to bin Al-Shibh's testimony because his (Moussaoui's) Sixth Amendment right to compulsory process outweighs the government's privilege.²⁴⁵ If the government intended to persist in refusing to produce bin Al-Shibh, as it had vowed to do, the court recognized that "dismissal of the indictment is the usual course."²⁴⁶ Rather than dismiss the case against Moussaoui, however, the court cobbled together a less drastic solution: Moussaoui would be given access to, and could present to the jury, a compilation of summaries of reports of bin Al-Shibh's statements taken by the government. These statements, the court reasoned, were a fair proxy for the ability to depose bin Al-Shibh.²⁴⁷ The death penalty, therefore, would remain an option.

Rather than pursue a public trial in a civilian court with the required panoply of constitutional rights, the government may soon opt to detain Moussaoui as an enemy combatant like Hamdi, Padilla, and the Guantanamo Bay detainees.²⁴⁸ Moussaoui's prosecution, when and if it occurs, would then be before a military commission.

242. See *id.* at *5-6.

243. See *United States v. Moussaoui*, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003), *vacated and remanded by* *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2003).

244. See *id.*

245. See 365 F.3d at 310.

246. *Id.* At 312.

247. *Id.* at 315-16. Indeed, the panel stated that it "shall not, indeed . . . must not, question the Government's determination that permitting the witnesses to be deposed would put our nation's security at risk." *Id.* at 328 (Gregory, J., concurring in part and dissenting in part).

248. See generally David Crawford & Jess Bravin, *German Terror Suspect is Acquitted*, WALL ST. J., Feb. 6, 2004, at A15 ("In the case of Mr. Moussaoui, after the government refused to let defense lawyers interview Mr. Binalshibh, a judge dismissed capital charges. The government has appealed the ruling, but should it lose, many within the Bush administration urge that Mr. Moussaoui be transferred to military custody, where as a noncitizen he could be tried by a tribunal lacking many of the protections afforded by civilian courts."). The German terror suspect referenced in the title of the just-cited article, Abdelghani Mzoudi (who had been charged with, amongst other things, three thousand counts of accessory to murder in connection with the September 11 attacks),

The Differing Responses of District and Appellate Courts

One unavoidable trend that runs through these decisions is that trial courts have, on the whole, been less willing to accept the government's unsupported assertions of necessity and national security than have the appellate courts—although some of the most recent appellate decisions have not only challenged the executive's decisions, but in some case have invalidated them. While there are many possible explanations for this phenomenon, we describe several that we feel may be of particular interest.

First, trial courts are in the business of judging credibility, and are deeply uncomfortable deferring to those who offer conclusory allegations without factual support. All too often in a trial judge's experience, a bit of probing reveals that conclusory allegations are baseless.

Second, trial courts have daily experience with the application of constitutional rights, rather than a more distanced philosophical or theoretical familiarity. For example, a trial court knows the vast difference in the development of factual and legal issues when a party is represented by counsel as opposed to a litigant acting without the benefit of counsel. Similarly, a trial court must assess whether the government has established sufficient probable cause to issue a warrant. Often a judge will decide that probable cause is lacking or will ask for the submission of additional evidence to support the request for a warrant. Another daily experience is the trial process itself. Trial judges regularly decide what information is privileged and/or confidential. They review material *in camera* to make these determinations. They consider whether the government must make certain information available to a defendant and the impact that failing to disclose information has on the trial process. There are many more such examples, but the point is clear—the application of rights, in the real world, can make a big difference with respect to life or death, freedom or the loss of it, the right to work or be deprived of work, or the right to individualized justice rather than the application of unfair stereotypes (*e.g.*, racial profiling) or generalizations.²⁴⁹

was acquitted in part because the Department of Justice refused him access to the same Ramzi bin Al-Shibh that would have allegedly exonerated Moussaoui. *See id.*

249. There is historical support for this argument. In *Masses Publ'g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), for example, then-District Judge Learned Hand issued an injunction against New York State's postmaster general, requiring him to extend full mailing privileges to *The Masses*, a Socialist paper. *See id.* at 543. In an opinion that history has treated very unfavorably, see, for example, Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment*:

Third, the political views of appellate judges play a more important role in their selection and confirmation. Most of the close questioning of judicial nominees is saved for appellate judges. Their academic writings or judicial decisions are scrutinized for the political views they express. Those holding certain views are screened out by one political party or the other. Most confirmation battles concern appellate court nominees, not district court nominees.²⁵⁰ Thus, district court judges may be less politically committed than their appellate counterparts, and less burdened by those commitments.²⁵¹ Along the same lines, many appellate judges may believe their judicial record will be scrutinized yet again if they are ever considered for the highest court, and are therefore more reluctant to take an unpopular position.

A related question is why some appellate panels have applied the same sort of deference as in wars past, while others have engaged in a more searching analysis of the actions of the political branches. Of all the possible explanations that come to mind, chief among them is that as time passes and the events of September 11 recede, it is easier (although still not easy) to be both dispassionate and objective. The same thing happened in earlier wars, with the courts more willing to challenge executive authority with the passage of time. For example, the Court decided *Hirabayashi* in the thick of World War II. Just one year later—

Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1, (1990), the Court of Appeals reversed. See *Masses Publ'g Co. v. Patten*, 246 F. 24, 39 (2d Cir. 1917). Similarly, the Supreme Court's decision granting a writ of habeas corpus in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), affirmed the judgment of the District Court of Hawaii, which the Ninth Circuit had reversed, see *id.* at 312, 324.

250. In recent years, for example, Democrats in Congress have rejected the nomination of Robert Bork to the Supreme Court, see Sarah Pollack, *The Mother of All Supreme Court Nomination Battles* (July 29, 2003), available at <http://www.cbn.com>, and have effectively blocked—by filibuster or otherwise—seven nominees to federal appeals courts on the basis that these candidates are “too conservative.” See generally Thomas Ferraro, *Daschle to Block Nominees*, PHILA. INQUIRER, Mar. 31, 2004, at A2. Earlier, Republicans in Congress blocked the nomination of Bonnie Campbell to the Eighth Circuit Court of Appeals, and delayed the confirmation of numerous other Clinton nominees for years at a time. Judge Richard Paez, for example, endured a then-record 1,506-day wait between his nomination and confirmation to the Ninth Circuit. See Mickey Kaus, *No Justice, No Paez*, Mar. 11, 2000, at <http://slate.msn.com/> (quoting reporter Richard Simon); see generally PEOPLE FOR THE AMERICAN WAY, ORDERING THE COURTS: RIGHT-WING ATTACKS ON JUDICIAL INDEPENDENCE IN 2000, at http://www.pfaw.org/pfaw/dfiles/file_314.pdf (last visited May 22, 2004).

251. This political reality takes on added significance in the context of civil liberties cases, where ideologues on both the left and the right tend towards libertarianism and are less sympathetic to the government's arguments. Compare Robert H. Bork, *Civil Liberties After 9/11*, COMMENTARY, July-Aug. 2003, at 29, with John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”: A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002), and ACLU, *Insatiable Appetite: The Government's Demand for New and Unnecessary Powers After September 11* (2002), available at www.aclu.org.

but after American forces landed on Normandy beach and in the Philippines, and the Japanese threat had all but subsided—the Court essentially reversed itself in *Endo*. Two years later (and after the Japanese surrender), the Court was even more critical of executive action in *Duncan v. Kahanamoku*. Nearly three years after the September 11 attacks, both the Taliban and Saddam Hussein have been deposed, and most importantly, there has not been another terrorist incident on U.S. soil. As the exigency of war decreases, the judiciary is less reluctant to do its job.²⁵²

Another interesting question is why judges have been less deferential toward government actions taken during the current “War on Terrorism” than toward actions taken by the political branches during the Civil War and World Wars I and II. This question, too, offers interesting grounds for speculation. First, World War II was the last war declared by Congress. That extra authorization may have given more Constitutional coverage or legitimacy to all actions taken by either the legislative or executive branch.²⁵³ Second, and more likely, in earlier conflicts, the nation felt that it was at war. While this distinction is not

252. There are other possible explanations for the turn-about in appellate case law. For one, some of the judges authoring these decisions are self-acknowledged liberals. For example, the Ninth Circuit decision finding *habeas* jurisdiction over Guantanamo Bay was authored by Stephen Reinhardt, who was in the majority in the Ninth Circuit’s recent decision striking down the phrase “under God” in the Pledge of Allegiance. See *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), *cert. granted sub nom. Elk Grove United School Dist. v. Newdow*, 124 S. Ct. 384 (2003). Indeed, in a recent interview, Judge Reinhardt identified “[t]he overly-restrictive view of individual rights and liberties that is prevalent in today’s judiciary and limits the ability of the federal courts to play their intended role properly” as his least favorite aspect of being a federal judge. Howard Bashman, *20 Questions for Circuit Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit*, (Feb. 2, 2004), at http://20q-appellateblog.blogspot.com/2004_02_01_20q-appellateblog_archive.html#107569802077271073. Another possibility is that the correct results in the various cases were different, and that some policies were appropriately reviewed under heightened deference, while others were properly reviewed *de novo*. But we doubt this is the case. For one, that increasingly rigorous review of the political branches’ actions correlates closely with the passing of time is apparent. For another, some appellate decisions squarely contradict others. Compare, e.g., *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted* 124 S. Ct. 534 (holding that there is no *habeas* jurisdiction over Guantanamo Bay), with *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003) (holding that there is).

253. The Fourth Circuit rejected this view in *Hamdi*:

We have emphasized that the unconventional aspects of the present struggle do not make its stakes any less grave. Nor does the nature of the present conflict render respect for the judgments of the political branches any less appropriate. We have noted that the political branches are best positioned to comprehend this global war in its full context, and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches.

Hamdi v. Rumsfeld, 316 F.3d 450, 464 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004) (internal quotation marks and citations omitted).

easy to define, an illustration may suffice. In the earlier wars, the United States was at war in the sense that its citizens were mobilized and deployed either to defend the homeland or to fight uniformed armies abroad. There were identifiable combatants who would either win or lose, and the war would end with a surrender, a treaty or a decisive and devastating victory. Sacrifice at home was visible. Rationing was required so that military supplies could be produced and shipped as needed. Blackout curtains were required and curfews were not uncommon. Everyone had a relative or neighbor involved in the war effort. There was a draft.

The “War on Terror” is different. Surely we entered the war because our homeland was attacked. But it was attacked by outlaws, not a foreign state. No country has declared war on the United States and this war will not end with a surrender or a treaty. Indeed it may never end; it may become a way of life. Life goes on at home as it did before the attacks. The lights are on twenty-four hours, people trade in the stock market, take exotic vacations, and continue to spend their money on such “necessities” as digital cameras, Blackberries, diamonds and sports cars. This is in no way intended to demean the sacrifice that American soldiers have made in support of their country. Rather, we recognize that while those soldiers fight overseas, life on the home front is much as it was before.

Another reason why the judicial reaction to the current war has been different than in the past is that the vast majority of active judges have never fought in a war or even served in the military. They grew up during the Vietnam War, which many viewed as an unjust war. They lived through Watergate and developed a distrust of government. The natural skepticism arising from these experiences may make them instinctively less deferential to actions taken by the political branches than were their predecessors.

And finally, the decisions made in wartime have not withstood the test of time. As every law student knows, *Korematsu* is a major embarrassment, trumped only by *Dredd Scott v. Sandford*,²⁵⁴ *Plessy v. Ferguson*,²⁵⁵ and *Lochner v. New York*.²⁵⁶ In sum, whatever the reason, the trial judges today appear more willing to scrutinize the actions taken by the political branch with an eye on the Constitution.

254. 60 U.S. (19 How.) 393 (1856), *overruled by constitutional amendment by* U.S. CONST. amend. XIV.

255. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954).

256. 198 U.S. 45 (1905), *overruled in part by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

V.

The political branches are well aware of the role of the judiciary, and of the twin concepts of separation of powers and checks and balances. Because they are also aware that effective judicial review might frustrate them from pursuing policies believed to be necessary to the war effort, the political branches have sought to insulate their actions from judicial oversight. They have done this in three ways: (1) by preventing the judiciary from performing its traditional role as neutral magistrate and by eliminating public hearings or trials; (2) by lowering the standards controlling the government's ability to seize information, thereby limiting the power of the judiciary to require adherence to Constitutional standards; and (3) by intimidating judges so as to discourage them from fulfilling their traditional functions of judicial review and the exercise of discretion.

Since September 11, 2001, we have lived with the rhetoric of war. When voices were raised to question, if not criticize, provisions of the USA PATRIOT Act, Attorney General Ashcroft said, "to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve."²⁵⁷ Judges are not exempted from this message. To the contrary, the comment might just as well have been aimed at them. It is not easy to be accused of, in effect, aiding the terrorists.²⁵⁸ Yet if a judge concludes that liberty has been lost because of a government action, and says so, that is the very accusation she may face.

Excluding the Judiciary

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act was passed six weeks after September 11, by a vote of 98-1 in the

257. *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 313 (2001) (testimony of Attorney General John Ashcroft), available at 2001 WL 26188084. This message was not lost on Congress, where the USA PATRIOT Act passed without any serious opposition. Attorney General Ashcroft gave a brief statement on behalf of the Act, but he took no questions. Three brief statements were made by Senators in favor of passage; none were made in opposition.

258. See, e.g., *Osama's Favorite Judge*, WALL ST. J., June 4, 2002, at A20.

Senate.²⁵⁹ The legislation, drafted by the Justice Department, was never seriously debated by Congress.²⁶⁰

The Act was designed to strengthen domestic police power and surveillance to prevent a repeat of the September 11 attacks. One of the key vehicles that Congress chose to achieve these goals was to eliminate the judiciary's role in approving investigations. For example, prior to the Act's passage, a governmental official could only obtain information from an Internet Service Provider with a warrant or court order, or on the consent of the customer.²⁶¹ Under the USA PATRIOT Act, however, the same authorities can use an administrative subpoena—that is, their own signature—to obtain a variety of account information, including the name and address on the account, usage records, and payment information such as credit card or bank account numbers.²⁶²

Executive orders and regulations have also been used to eliminate court supervision. A week after the passage of the USA PATRIOT Act, the Justice Department issued a new Bureau of Prisons regulation authorizing the government to eavesdrop on attorney-client communications.²⁶³ The monitoring may occur whenever the Attorney General determines that “reasonable suspicion exists to believe that a[n] . . . inmate may use the communications with attorneys . . . to . . . facilitate acts of terrorism.”²⁶⁴ The term “inmate” is defined to include anyone “held as [a] witness, detainee[], or otherwise,” and obviously includes those held as material witnesses or by the Immigration and Naturalization Service (“INS”).²⁶⁵ No warrant is required for this eavesdropping, and thus there is no need to obtain judicial approval.²⁶⁶

The USA PATRIOT Act also permits the detention of aliens without probable cause (and without presentment to a court), albeit for limited periods of times.²⁶⁷ If the Attorney General certifies that he has reasonable grounds to believe that an alien has engaged in terrorism-

259. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 18 U.S.C., 22 U.S.C., 28 U.S.C., 31 U.S.C., 47 U.S.C., 50 U.S.C. and Fed. R. Crim. P.).

260. See, e.g., Adam Clymer, *Bush Set to Sign: Measure Provides Tools White House Sought, with Some Limits*, N.Y. TIMES, Oct. 26, 2001, at A1.

261. See 18 U.S.C. § 2703(c) (1994) (as amended by The Communications Assistance for Law Enforcement Act, Pub. L. 103-441, § 207(a)(1)(A), 108 Stat. 4629 (1994)).

262. See 18 U.S.C. § 2703(b), (c)(2) (2000) (as amended by The USA PATRIOT Act § 210).

263. See 28 C.F.R. §§ 500-501 (2002).

264. *Id.* § 501.3(d).

265. *Id.* § 500.1(c). The INS is now known as the Bureau of Citizenship and Immigration Services, and is part of the new Department of Homeland Security. See 6 U.S.C. § 277; Homeland Security Act of 2002, Pub. L. 107-296, § 451, 116 Stat. 2135, 2195-97 (2002).

266. See 28 C.F.R. § 501.3(d) (2002).

267. See 8 U.S.C. § 1226(c)(2), (e) (2004).

related activities (defined as the “use of any weapon . . . with intent to endanger . . . the safety of one or more individuals or to cause substantial damage to property”),²⁶⁸ the alien may be detained for up to seven days without charges or the commencement of proceedings.²⁶⁹ If removal proceedings are not commenced after seven days, the alien can be held without charges indefinitely, upon the Attorney General’s certification that the person’s release “will threaten the national security of the United States or the safety of the community or any person.”²⁷⁰ Similarly, the Attorney General issued a regulation on September 17, 2001, permitting the INS to detain any alien, legal or illegal for any reason without any charge.²⁷¹ This detention may be extended for an unspecified “additional reasonable period of time” in the event of an “emergency or other extraordinary circumstance.”²⁷² In either case, the court has no role in determining whether there is probable cause to detain the alien or to review the decision to permit and continue the detention.

Thus, the detention of approximately twelve hundred foreign nationals residing in the United States was accomplished without any judicial finding on whether these detentions were necessary.²⁷³ The executive branch, alone, decided who would be detained, refused to release the names of the detainees, insisted on closed hearings and avoided any court review.²⁷⁴ As we have noted, the Sixth Circuit Court of Appeals has ruled that these secret hearings violate the First Amendment. The thrust of this ruling was the need to permit the judiciary to evaluate the necessity for the closed hearings and act as a check on unfettered executive power. Three appellate judges (and one district judge, sitting by designation) have disagreed with the government’s argument that its actions arise from military necessity, two have supported the government.²⁷⁵ But regardless of whether the

268. 8 U.S.C. § 1182(a)(3)(B)(iii)(V) (2003).

269. See USA PATRIOT Act § 412.

270. *Id.*

271. See 66 Fed. Reg. 48334 (interim rule codified at 8 C.F.R. § 287.3(d) on Sept. 20, 2001).

272. See 8 C.F.R. § 287.3(d) (2003).

273. See Christopher Drew & Adam Liptak, *Immigration Groups Fault Rule on Automatic Detention of Some Asylum Seekers*, N.Y. TIMES, Mar. 31, 2003, at B15.

274. See Susan Sachs, *U.S. Deports Most of Those Arrested in Sweeps After 9/11*, N.Y. TIMES, July 11, 2002, at A20.

275. That is to say, the unanimous three-judge panel in the *Detroit Free Press* (Circuit Judges Damon Keith and Martha Craig Daughtrey, and District Judge James G. Carr of the Northern District of Ohio, sitting by designation) and the dissenter in *North Jersey Media Group* (now-Chief Judge Anthony Scirica) have found a right of access to the closed immigration hearings. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 682-83 (6th Cir. 2002); *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 221 (3d Cir. 2002). Only the two-judge majority of the Third Circuit panel in *North*

hearings are open or closed, the fact remains that twelve hundred foreign nationals are being detained with only minimal judicial oversight.

Foreign nationals arrested *outside* of the United States are being held at Guantanamo Bay. Surely one reason for this peculiar geographic placement is to avoid judicial review of the aliens' seizure, their unlimited detention, and the conditions of their confinement. As demonstrated by the cases discussed in Part IV, *supra*, some courts have acknowledged that they have no power to review actions taken in Guantanamo Bay as it is not a part of the United States.

And then there are the "enemy combatants," held within the United States but outside the bounds of the civilian justice system. Why was Padilla removed from the civilian courts? As described earlier, Padilla was first arrested as a material witness, but two days before a scheduled court hearing, he was designated an "enemy combatant" and removed from the civil courts to military custody. In his new designation as a military prisoner, the government contends that the court has no role in reviewing his designation as an "enemy combatant," the legitimacy of his confinement or his entitlement to any rights under the Constitution, although he is an American citizen. The Second Circuit held otherwise, but the government is pressing its position, and Padilla remains in a naval brig awaiting the Supreme Court's decision.

In a more recent case, the President designated a Qatari citizen, Ali Saleh Kahlah al-Marri, as an enemy combatant just a week before a suppression hearing was scheduled in his criminal case, after a connection between al-Marri and al Qaeda was uncovered.²⁷⁶ Al-Marri—who had been in jail since the Fall of 2001 on identity-theft charges unrelated to any suspected acts of terrorism—was removed from the civilian justice system and transferred to a naval brig in South

Jersey Media Group (then-Chief Judge Edward Becker and Judge Morton Greenberg) have held otherwise. See *N. Jersey Media Group*, 308 F.3d at 199.

276. See *United States v. Al-Marri*, No. 03-10044 (C.D. Ill. June 23, 2003), available at <http://news.findlaw.com/hdocs/docs/almarri/almarri62303exord.pdf> (attaching order designating Al-Marri an enemy combatant). See generally *Another "Enemy Combatant,"* (June 23, 2003), at <http://www.cbsnews.com/stories/2003/06/23/attack>. Al-Marri, like Hamdi and Padilla before him, filed a petition for a writ of habeas corpus. The district court in Illinois declined to issue the writ, finding that it had no jurisdiction to hear the case with Al-Marri now residing in South Carolina. See *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003). The Seventh Circuit affirmed in March 2004, see *Al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004), and, as of this writing, Al-Marri has neither appealed the Seventh Circuit's decision—though it is at odds with parts of the Second Circuit's decision in *Padilla v. Bush*, 352 F.3d 695, 704-10 (2d Cir. 2003) (holding that, by naming a cabinet officer as a respondent, a prisoner may litigate in any federal judicial district)—nor filed a new petition in South Carolina.

Carolina, where the authorities believe he can be more effectively interrogated.²⁷⁷

Finally, even within the civilian courts, the government is seeking to prevent a defendant from exercising his constitutional rights. Ironically, Judge Brinkema's decision has put Zacarias Moussaoui in a classic "Catch 22." If Moussaoui wants to be tried in the civilian courts, he must surrender his Sixth Amendment right to compulsory process; if he insists on exercising that right, his prosecution will be moved to a military tribunal and he will not only lose his right to compulsory process, but many other constitutional rights as well.²⁷⁸

Limiting the Power of the Judiciary

Several sections of the USA PATRIOT Act limit, if not eliminate, the judiciary in the exercise of its power to ensure that government actions comply with the requirements imposed by the Constitution. Until now, all seizures of persons or tangible things were governed by the Fourth Amendment. The only exception to the requirement that the government demonstrate probable cause to believe that the target of the warrant is involved in criminal activity was in the area of foreign intelligence, where the special FISA court was permitted to apply a relaxed standard, albeit one that still required a showing of probable cause that the target of the surveillance is a foreign power or an agent of a foreign power.²⁷⁹

Now, when reviewing certain applications for seizing records (electronic or paper), the courts can no longer insist on a showing of probable cause, as the Fourth Amendment would require. Section 215 of the Act, for example, permits the seizure of a subject's library or bank

277. At the time of al-Marri's designation, Attorney General Ashcroft explained, "An individual with that kind of situation is an individual who might know a lot about what could happen, might know the names of individuals, information being so key to intelligence and prevention. . . . Prevention being our No. 1 objective, we decided we would be best served with him detained as an enemy combatant."

Al Qaeda Suspect Declared "Enemy Combatant," at <http://www.cnn.com/2003/LAW/06/23/qatar.combatant> (June 24, 2003) (quoting Attorney General John Ashcroft).

278. See generally DefenseLINK, U.S. Department of Defense, News Release, DoD Issues Military Commission Instructions, at http://www.defenselink.mil/news/May2003/b05022003_bt297_03.html (describing defendant's rights and procedures for use in military tribunals). A detainee recently filed suit challenging the tribunal system set up by the government, and, in particular, that the tribunal's decisions are not to be reviewable by civilian courts. See Petition for Writ of Mandamus, *Swift v. Rumsfeld*, No. CV04-0777L (W.D. Wash. Apr. 7, 2004); see generally John Mintz, *Yemeni's Attorney Tries to Halt Tribunals*, WASH. POST, Apr. 8, 2004, at A15. But see *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864).

279. See 50 U.S.C. § 1805 (2000 & Supp. 2003).

records based solely on a showing that the seizures “relate to” an investigation of terrorism or clandestine intelligence.²⁸⁰ This provision applies to anyone who resides in the United States, citizen or non-citizen. It is important to note that the Act defines “terrorism” as any “acts dangerous to human life,” which could include classic domestic crimes of murder, rape or robbery.²⁸¹ Furthermore, this section contains a gag order provision that prohibits the bank or library from revealing that it has produced documents.²⁸² Without knowledge that its records have been seized, it is overwhelmingly likely that the subject of the seizure will be unable to challenge the search or seizure in a court. Along the same lines, § 213 of the Act allows for the execution of a search warrant without giving notice to anyone that the search has occurred—a so-called “sneak and peek” warrant.²⁸³ Once again, if a person is unaware that her home or office has been searched, it is highly unlikely that the search will be challenged in court.²⁸⁴

While not eliminating the judicial role entirely, several sections of the Act have moved certain judicial functions into the FISA court. As noted earlier, the eleven judges on this court were all selected by the Chief Justice of the United States.²⁸⁵ Unlike the rest of the federal judiciary, this court only meets in secret session.²⁸⁶ There is no clerk’s office and no records are docketed.²⁸⁷ This court, alone, is an exception to our adversarial system of justice—only the government appears before it.²⁸⁸ From 1979 to 2001, the “court approved . . . all but five of more than 14,000 surveillance applications.”²⁸⁹ Sixty-six percent of all federal wiretap applications are now presented to the FISA court, rather than the courts of general jurisdiction.²⁹⁰ “The number of FISA

280. USA PATRIOT Act § 215.

281. *Id.* § 802(a)(4).

282. *See id.* § 215.

283. *See* 18 U.S.C. § 3109 (2000) (knock and announce statute); *see also* *United States v. Banks*, 124 S. Ct. 521 (2003) (addressing requirements imposed by the knock and announce statute and Fourth Amendment).

284. This provision has drawn so much criticism that a recent amendment to a congressional appropriations bill, introduced by Republican representative C. L. Otter, cuts off all funding for “sneak and peek” warrants. The Otter amendment received broad bipartisan support, and was passed 309-118 in the House. *See* H. Amdt 292 to H.R. 2799, 108th Cong. (2003).

285. 50 U.S.C. § 1803(a) (2003); *see also supra* note 163.

286. *See id.* § 1803(c) (2003).

287. *See id.*

288. *See id.* § 1802.

289. Stephen J. Schulhofer, *No Checks, No Balances: Discarding Bedrock Constitutional Principles, in THE WAR ON OUR FREEDOMS*, *supra* note 61, at 81.

290. *See* Ann Beeson, *On the Home Front: A Lawyer’s Struggle to Defend Rights After 9/11*, in *THE WAR ON OUR FREEDOMS*, *supra* note 61, at 300.

applications per year has risen from about 200 in 1979 to nearly 1,000 in 2001²⁹¹ to more than 1700 in 2003.²⁹² The point is simple—the policy is to avoid judicial interference whenever possible.

Even the standards to be applied by the the FISA court are being relaxed. The USA PATRIOT Act, for example, permits the the FISA court to authorize a pen registers²⁹³ or trap and trace devices²⁹⁴ to monitor telephonic or electronic communication based on a “certification” by a law enforcement officer (i.e., the executive branch) that the information sought is “related” to a law enforcement purpose, namely the obtaining of foreign intelligence information.²⁹⁵ The government need not show probable cause, nor must it certify, as was the former requirement, that it has reason to believe that the surveillance is to be conducted on a line or device used to communicate with someone involved in international terrorism or intelligence. Thus, the government can track an American citizen’s telephone and internet usage on the mere certification that the investigation is related to foreign intelligence or terrorism. There is a real question as to whether this new standard meets the reasonableness requirement of the Fourth Amendment.

Intimidating the Judiciary

A third effort to neutralize the judiciary is the intimidation of judges. In order to avoid the risk of close judicial review, recent legislation and comments by some members of Congress seem designed to intimidate judges. If successful, there is a risk that judges will merely rubber-stamp the actions of the political branches to avoid confrontation. Although the intimidation efforts are not all directed to terrorism-related cases, they collectively create an atmosphere of mistrust and bullying designed to encourage the judiciary to decide cases in the way that the political branches want them to be decided.

On April 10, 2003, Congress passed the Prosecutorial Remedies and Tools Against the Exploitation of Children Today (“PROTECT”)

291. *Id.* at 300-01.

292. *See FBI Said Buried by Security Demands*, WASH. TIMES, Apr. 16, 2004, available at <http://www.washingtontimes.com>.

293. A pen register records the number dialed on outgoing calls. *See* 18 U.S.C. § 3127(3) (2004).

294. A trap and trace device records the telephone number of incoming calls. *See* 18 U.S.C. § 3127(4).

295. *See* USA PATRIOT Act § 214.

Act.²⁹⁶ Although the Act's name seems to suggest it is addressed only to crimes against children, an amendment to the PROTECT Act limits judicial discretion in sentencing *in all cases*.²⁹⁷ The Act explicitly eliminates the power of judges to depart below the sentence range proscribed in the United States Sentencing Guidelines for certain types of crimes.²⁹⁸ In addition, the Act directs the United States Sentencing Commission to amend the Sentencing Guidelines and policy statements "to ensure that the incidence [sic] of downward departures [from the applicable Guideline range] are substantially reduced."²⁹⁹ The Act further requires that when reviewing a district court's decision to impose a sentence below the Guideline range, the appellate court conduct a de novo review of that decision to depart.³⁰⁰ Prior to the Act, the sentencing judge's decision was reviewed for abuse of discretion, a highly deferential standard.³⁰¹ The PROTECT Act now limits the number of judges who may serve on the Sentencing Commission to three (*i.e.* a minority of the seven member Commission), whereas prior to the amendment "at least three" of the Commissioners were required to be judges, thereby virtually ensuring that judges constituted the majority of the Commission.³⁰²

While these actions evince a deep distrust of the judiciary's exercise of discretion, they are perhaps not the worst of it. The Act requires the Attorney General to submit a report to Congress, within fifteen days of a court's grant of a downward departure, containing the name of the district judge who departed and the stated reason for the downward departure.³⁰³ All judges who impose a sentence outside of the Guidelines range are "reported" to the executive (*i.e.*, Department of Justice) and then the legislative (*i.e.*, Congress) branches.³⁰⁴

296. Pub. L. No. 108-21, 117 Stat. 650 (2003).

297. See generally *id.* § 401.

298. See *id.* § 401(a)(2).

299. *Id.* § 401(m)(2)(A).

300. In a recent decision, *United States v. Thurston*, 338 F.3d 50 (1st Cir. 2003), *superseded by* 358 F.3d 51 (1st Cir. 2003), an appellate court reversed a district court's downward departure based on the defendant's extraordinary charitable acts applying the new standard of de novo review. See *id.* at 60-72. On remand, rather than impose the sentence mandated by the Court of Appeals, the district judge recused himself. See *United States v. Thurston*, 286 F. Supp. 2d 70, 72 (D. Mass. 2003).

301. This deferential standard was explicitly approved by the United States Supreme Court in its unanimous decision in *Koon v. United States*, 518 U.S. 81, 113 (1996).

302. See PROTECT Act § 401(n).

303. See *id.* § 401(l).

304. See *id.*

The judiciary's reaction to the PROTECT Act has been swift. Chief Justice William Rehnquist noted, in a speech to the Board of Directors of the Federal Judges Association, that "[t]here can . . . be no doubt that the subject matter [of the Attorney General's Report], and whether [it] target[s] the judicial decisions of individual federal judges, could amount to an unwarranted and ill-considered effort to *intimidate individual judges in the performance of their judicial duties*."³⁰⁵

Former Judge John Martin of the Southern District of New York wrote in a New York Times op-ed, "[f]or a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice."³⁰⁶ In a recent opinion, Judge Marilyn Hall Patel, Chief Judge of the Northern District of California, wrote "the wisdom of the years and breadth of experience accumulated by judges and the Sentencing Commission in adjudicating criminal cases and sentencing defendants is shucked for the inexperience of young prosecutors and the equally young think-tank policy makers in the legislative and executive branches."³⁰⁷

Relatedly, on July 28, 2003, the Attorney General issued a directive amending a section of the United States Attorneys' Manual to require that U.S. Attorneys report all "downward departure" sentencing decisions.³⁰⁸ The effect of this change will be to shift the decision of whether to appeal a departure to the Department of Justice and away from the field offices. When he learned of this memorandum, Senator Edward Kennedy accused the Attorney General of engaging in an "ongoing attack on judicial independence" and requiring federal prosecutors "to participate in the establishment of a blacklist of judges who impose lesser sentences than those recommended by the sentencing guidelines."³⁰⁹

Finally, in the most troubling move of all, in late July 2003, certain Congressmen "announced a new task force to scour the output of federal

305. William H. Rehnquist, Remarks at the Meeting of the Federal Judges Association Board of Directors (May 5, 2003) (emphasis added), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html; see also Anne Gearan, *Rehnquist Warns on Cataloging Sentencing*, A.P. ONLINE, May 5, 2003.

306. John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31.

307. *United States v. Mellert*, No. CR 03-0043, 2003 WL 220252007, at *2 (N.D. Cal. July 30, 2003).

308. See Edward Walsh & Dan Eggen, *Ashcroft Orders Tally of Lighter Sentences—Critics Say He Wants 'Blacklist' of Judges*, WASH. POST, Aug. 7, 2003, at A1.

309. *Id.* (quoting Senator Edward M. Kennedy).

judges for evidence of what they call 'judicial abuse.'"³¹⁰ "Violators—judges who legislate from the bench, *as the task force sees it*—will suffer exposure, public pressure and denunciation, and may be called before Congress to explain themselves."³¹¹ Example of judicial activism cited by the new task force were the Supreme Court's decision that struck down a Texas law banning homosexual sodomy,³¹² a Ninth Circuit decision holding that the phrase "under God" in the Pledge of Allegiance violates the Establishment clause of the First Amendment,³¹³ and the Massachusetts Supreme Judicial Court's decision legalizing gay marriages.³¹⁴ According to House Majority Leader Tom DeLay, "[w]e in the House are putting America's judges on alert: We are watching you."³¹⁵ Representative Ron Lewis even introduced the so-called "Congressional Accountability for Judicial Activism Act of 2004," which would permit Congress to overrule the Supreme Court "to the extent that [the Court's] judgment concerns the constitutionality of an Act of Congress" by two-third vote.³¹⁶ Ironically, Representative Lewis suggested that his proposal was "designed to preserve equal dignity among branches of government."³¹⁷

We have examined these legislative and executive actions, and the comments of certain legislators, for a good reason. We began this Article by framing our question in terms of the standard by which a judge should review the propriety of governmental action taken in wartime. The distrust of the judiciary, as demonstrated by the actions we describe, makes it difficult for judges to do their jobs. Judges are only human, and decisions that could arguably affect the safety of the nation are among the most difficult to make. Whatever the standard of review should be, it is surely something more than absolute obedience. But it is difficult not to be intimidated when threatened with public exposure and denunciation.

310. Todd J. Gillman, *GOP Group Plans to Turn up Scrutiny on Federal Judges*, DALLAS MORNING NEWS, July 27, 2003, at 1 (quoting Congressman Lamar Smith); *Judiciary Under Attack*, THIRD BRANCH, Aug. 2003, at 3.

311. See Gillman, *supra* note 310 (emphasis added).

312. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

313. See *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), *cert. granted sub nom. Elk Grove United School Dist. v. Newdow*, 124 S. Ct. 384 (2003).

314. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

315. Gillman, *supra* note 310.

316. H.R. 3920, 108th Cong. § 2(2) (2004).

317. Press Release, Accountability for Judicial Activism Act Introduced in House (Mar. 9, 2004), at http://www.house.gov/apps/list/press/ky02_lewis/Activism.html.

Conclusion

We return, finally, to the concept of judicial responsibility. A judge has a sworn duty to “support and defend the Constitution and laws of the United States.”³¹⁸ This obligation does not disappear or shrink in difficult times. Short of a truly military decision (e.g., those made on the battlefield), which are not within the purview of the courts, the judiciary must continue in its traditional role of reviewing the decisions of the political branches to ensure that they adhere to the spirit and letter of the Constitution. While the issues raised in cases dealing with the War on Terrorism are not easy—because by definition they call into question actions the government believes are necessary to protect the homeland—judges must not shrink from their vital role.

Though a cliché, the saying “if we lose our liberties fighting this war, the terrorists will have won,” comes close to being true. If we abandon the rule of law, the terrorists may not have won, but we surely have lost. More elegantly stated, “[t]errorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves.”³¹⁹ Our review of the case law reveals that the judiciary has not always faithfully defended the Constitution and has often recognized that failure with regret, after the crisis has passed. This time, we hope that the judiciary will not fail.

318. 5 U.S.C. § 3331 (2000).

319. Aharon Barak, *Forward: a Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 151 (2002).