

THE HISTORICAL AND LEGAL NORMS GOVERNING THE
DETENTION OF SUSPECTED TERRORISTS AND THE
RISKS POSED BY RECENT EFFORTS TO DEPART FROM
THEM

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I. INTRODUCTION

Over the last several years, controversy has surrounded the procedures governing the detention of those the United States military has determined are unlawful enemy combatants involved with terrorist organizations. This Article provides some broader historical and legal context to debates regarding the detention of suspected terrorists and other unlawful enemy combatants that do not wear the uniform of a foreign state but rather roam in disguise targeting civilians. This Article attempts to provide a comprehensive introduction to these issues, but to do so concisely, such that the current procedures governing enemy combatant detentions can be seen in stark relief against the wider backdrop on which this issue has been addressed throughout American history.

This Article begins with an analysis of the legal context in which unlawful enemy combatants have been held and tried, from the Revolutionary War through the post-Civil War period and efforts to try terrorist members of the Ku Klux Klan by military commission and the Supreme Court's cases addressing these issues during and following World War II. The Article then discusses that history in the context of the recent Authorization for the Use of Military Force in the defense against terrorism and the most recent litigation in the Supreme Court regarding terrorist detention procedures—the *Rasul* and *Hamdan* cases—and the federal legislation that led to them and followed them. The Article then describes the large variety of risks posed by departing from historical precedents and the modern laws of war and treating terrorists that have traditionally been considered unlawful enemy combatants as something more akin to ordinary domestic criminals. The Article specifically examines the proposal that such combatants be granted habeas litigation rights beyond the already historically expansive rights granted to them under current federal law. The Article concludes that, in light of these risks, current procedures governing the detention of enemy combatants should be retained, and if they are supplemented at all, such additional procedures should mirror those of the Alien Terrorist Removal Court, which Congress created over a decade ago, well before the events of 9/11, as that

court's design helps ensure the integrity of classified information vital to the successful defense against terrorism.

II. THE CONSTITUTION DOES NOT EXTEND HABEAS LITIGATION RIGHTS TO THOSE THE MILITARY VIEWS AS ENEMY COMBATANTS

The “writ of habeas corpus” has long been available to defendants held by the government. As defined by Black’s Law Dictionary, “habeas corpus” is “[a] writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.”¹

The Constitution provides, in Article I, Section Nine, Clause Two, that “[t]he 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.”

The Constitution, in referring to the writ of habeas corpus, did not create it, and the writ is understood as being granted by statute, as enacted by the legislature.² Professor Erwin Chemerinsky, for example, has explained that “[t]he constitutional provision does not create a right to habeas corpus; rather, federal statutes [do so].”³ As professor Chemerinsky has pointed out, the Founders wrote Article I, Section Nine, Clause Two, in order to ensure that the federal government could not, absent cases of invasion and rebellion, trump state statutes establishing the writ.⁴

The Founders understood that the federal writ could be created and altered by statute. The first Congress enacted the first federal habeas corpus protections in the Judiciary Act of 1789,⁵ and that Act explicitly prohibited the use of the writ of habeas corpus in certain circumstances.⁶ If the Founders had

1. BLACK’S LAW DICTIONARY 715 (8th ed. 2003). The writ of habeas corpus protects against constitutional errors “that [risk] an unreliable trial outcome and the consequent conviction of an innocent person.” *O’Neal v. McAninch*, 513 U.S. 432, 442 (1995).

2. Once the right is granted by statute, the Constitution requires that it be suspended only when “in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2.

3. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 864 (4th ed. 2003).

4. *Id.* at 868 (“[T]he Constitutional Convention prevented Congress from obstructing the state courts’ ability to grant the writ, but did not try to create a federal constitutional right to habeas corpus.”).

5. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

6. *See id.* § 14, 1 Stat. at 81–82 (“[W]rits of habeas corpus shall in no case extend to prisoners in gaol [in jail], unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or as necessary to be brought into court to testify.”).

understood that the Constitution created an absolute right to the writ in all circumstances, it would have been anomalous to enact only a partial creation of the writ by statute.⁷

As described below, the federal habeas writ is understood to derive from legislative power, not judicial power, and its application and scope have been understood to be within the power of Congress.

III. MILITARY COMMISSIONS HAVE BEEN USED TO TRY IRREGULAR FIGHTERS AND OTHER NONCONVENTIONAL ENEMIES THROUGHOUT AMERICAN HISTORY

The Founders, when citing the habeas writ in the Constitution, would have had the experience of its use during the Revolutionary War close in mind. Counsel for Lambdin P. Milligan chronicled that experience in the Supreme Court case of *Ex parte Milligan*,⁸ in which the Court, following the Civil War, held that military detention could not be applied to citizens⁹ in nonrebellious states when the federal courts were available.

In his argument to the Court, Milligan's counsel, who won the case, explicitly acknowledged Congress' authority to create and define the habeas writ, including its authority to provide for the detention of enemy combatants for indefinite periods of time. Using the example of General George Washington, counsel for Mr. Milligan argued:

In order to trace the history and exhibit the character of martial law, reference may be made to several leading precedents in English and American history. . . . The practice of our Revolutionary fathers on this subject is instructive. . . . Though Washington was clothed with almost dictatorial powers, he did not presume to override the civil law, or disregard the orders of the courts, *except by express authority of Congress* or the States. . . . In his file of general orders, covering a period of five years, there are . . . four instances in which civilians [spies] appear to have been tried by a military court,

7. *See also* *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) (stating that judgments about the proper scope of the writ are "normally for Congress to make"); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (confirming that the jurisdiction of federal courts to issue writs of habeas corpus is not inherent and that "the power to award the writ by any of the courts of the United States, must be given by written law").

8. 71 U.S. (4 Wall.) 2 (1866).

9. The holding of *Ex parte Milligan* does not apply to protect *noncitizens* from detention and trial by military courts, such as alien enemy combatants currently held at Guantanamo Bay, Cuba.

and all these trials were expressly authorized by resolutions of Congress. In the autumn of 1777, the gloomiest period of the war, a powerful hostile army landed at Chesapeake Bay, for the purpose of invading Maryland and Pennsylvania. It was feared that the disloyal inhabitants along his line of march would give such aid and information to the British commander as to imperil the safety of our cause. Congress resolved "That the executive authorities of Pennsylvania and Maryland be requested to cause all persons within their respective States, notoriously disaffected, to be forthwith apprehended, disarmed, and secured *till such time as the respective States think they can be released without injury to the common cause.*" The governor authorized the arrests, and many disloyal citizens were taken into custody by Washington's officers, who refused to answer the writ of *habeas corpus* which a civil court issued for the release of the prisoners.¹⁰

General Washington oversaw the detention and review procedures of the military courts largely at his own discretion, as Congress provided no detailed instructions regarding how they should be conducted.¹¹

After the Revolutionary War, military commissions continued to be convened to prosecute unlawful enemy combatants, including spies, saboteurs, and other persons fighting out of uniform. During the Civil War, President Lincoln used the commissions many times to deal with illegal belligerents who engaged in guerilla warfare outside of the command structure of a national army. One of the chief roles of such military commissions was to detain belligerents long enough to discern their enemy combatant status and determine whether they were rogue fighters or acting under orders from an organized military unit of the Confederacy.¹²

During the Civil War, over 13,000 Northern civilians were arrested by the military,¹³ and over 4,000 were tried before

10. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 50–51 (emphasis added).

11. See Maurer Maurer, *Military Justice Under General Washington*, MILITARY AFFAIRS, Spring 1964, at 1, 10 n.8 ("The [military] courts were authorized by the articles of war, but neither the articles nor other enactments of Congress detailed the procedures to be followed.").

12. See MARK E. NEELY JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 169 (1991) (stating that in Missouri and Tennessee, military commissions mostly tried men accused of guerilla activities and that, for the military commissions, "the only real question was . . . whether [the accused] was under orders in a regularly organized military unit").

13. *Id.* at 115.

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military tribunals.¹⁴ During that time, Confederate enemy combatants could easily slip in and out of the Northern states undetected. Their attempts to commit acts of mass terrorism in the North included plots for a Confederate officer to sneak into New York City and set it on fire,¹⁵ a plot to spread yellow fever in New York and Philadelphia by smuggling infected goods,¹⁶ and a scheme to poison New York City's drinking water,¹⁷ each of which could have killed many thousands of people, in circumstances much like the terrorist threat America faces today. In response, Congress, through the Act of March 3, 1863, specifically vested in the President the authority "whenever in his judgment the public safety might require it, to suspend the privilege of the writ in any case arising in any part of the United States"¹⁸

Following the Civil War, John Wilkes Booth and those who helped him—all of whom were not members of the Confederate army—were viewed as terrorists and tried by military commissions.¹⁹

In 1871, terrorist members of the Ku Klux Klan in South Carolina were prosecuted by military commission under proclamations of October 17 and November 10 of that year, issued in accordance with the special authority given by Congress in the Act of April 20, 1871, chapter 22, § 4.²⁰ At that time, a "wave of counterrevolutionary terror . . . swept over large parts of the South between 1868 and 1871," mounted by the Ku Klux Klan, which, as an organization, was "[i]n effect . . . a military force."²¹ Plainclothes Klan terrorists, often in "bands of night riders,"²² instilled terror by whipping, raping, burning,

14. *Id.* at 129.

15. See *Ex parte Quirin*, 317 U.S. 1, 13 n.10 (1942) ("On January 17, 1865, Robert C. Kennedy, a Captain of the Confederate Army, who was shown to have attempted, while in disguise, to set fire to the City of New York, and to have been seen in disguise in various parts of New York State, was convicted on charges of acting as a spy and violation of the law of war 'in undertaking to carry on irregular and unlawful warfare.'").

16. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 151 (1998).

17. See *id.*

18. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 829 (2d ed. 1920) (quoting Enrolling Act, 12 Stat. 731, ch. 81 (1863)).

19. LOUIS J. WEICHMANN, *A TRUE HISTORY OF THE ASSASSINATION OF ABRAHAM LINCOLN AND THE CONSPIRACY OF 1865* 153 (Floyd E. Risvold ed., 1975).

20. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 829–30 (2d ed. 1920).

21. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877* at 425 (1988).

22. *Id.* at 436.

lynching, assassinating, and even disemboweling their innocent victims.²³

The experience of that period also presaged the dangers of extending habeas litigation rights to enemy combatants. As described by eminent historian Eric Foner, in North Carolina, Governor William W. Holden had about one hundred terrorist Klansmen arrested, and:

[He] ordered the prisoners tried before a military commission, and refused to honor a writ of habeas corpus issued by the state's chief justice. Ironically, Democrats then appealed to the federal courts under the Habeas Corpus Act of 1867, originally enacted to protect blacks and white Unionists. Holden was forced to release the captives, and the campaign against the Klan collapsed.²⁴

As another historian has written, the result of the required legal release of the prisoners was:

Klansmen not only escaped punishment; they turned the law on their erstwhile prosecutors with a series of suits and harassments that drove some of them from the state as fugitives. No sooner had [Colonel George W.] Kirk [the commander of the state militia] brought his prisoners to Raleigh than two of them sued him for false arrest. He was released on bond and returned to his command while other similar suits accumulated against him. In effect he became a refugee from process servers and sheriffs, protected only by his own soldiers.²⁵

IV. THE *QUIRIN* CASE

The next serious challenge to the use of military tribunals to try enemy combatants occurred during World War II.

The 1942 case of *Ex parte Quirin*²⁶ involved a group of saboteurs who were landed by German U-boats on American beaches. Their assignment from the German military authorities was to destroy domestic military targets and war-production facilities. All of the saboteurs were Germans except one, Haupt, who was a naturalized U.S. citizen. After they were captured by

23. See *id.* at 426–28.

24. *Id.* at 440–41.

25. ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* 223 (1971).

26. 317 U.S.1, 28–29 (1942).

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the FBI, the saboteurs were placed in military custody and tried by a military commission. The commission found them all guilty and sentenced all but two of them to death. They then filed petitions for writs of habeas corpus, challenging the authority of the military tribunal, and the tribunal's denial to them during its proceedings of the constitutional rights afforded domestic criminals by the Fifth and Sixth Amendments.²⁷ The Court rejected their arguments.

As the Court explained, those who take up arms against the United States are designated as "enemy combatants," and enemy combatants can be "lawful" or "unlawful." If the latter, they can be dealt with by military courts:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.²⁸

The Supreme Court upheld the military commission's authority, concluding that the President, as Commander in Chief, has the power "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."²⁹

Today, terrorists, just like the plain-clothed Nazi saboteurs in *Ex parte Quirin*, are considered "unlawful" enemy combatants because they fight in disguise, without uniforms, and under

27. *Id.* at 18.

28. *Id.* at 30-31.

29. *Id.* at 28-29.

Quirin, they can be detained and tried by military tribunals. As the U.S. government argued in *Quirin*:

If prisoners of war are denied the privilege of the writ of habeas corpus, it is inescapable that petitioners are not entitled to it. By removal of their uniforms before their capture, they lost the possible advantages of being prisoners of war. Surely, they did not thus acquire a privilege even prisoners of war do not have.³⁰

The Court in *Quirin* also rejected the unlawful combatants' claim that, having been captured by FBI agents on American soil, they enjoyed constitutional rights under the Fifth and Sixth Amendments. The Court stated, "We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury."³¹

Finally, the Court in *Quirin* rejected Haupt's claim of constitutional rights by virtue of his American citizenship. The Court held that American citizenship "does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."³²

All told, President Franklin Roosevelt ordered that military commissions be employed even in an instance in which at least one of the captured German saboteurs was an American citizen.³³ The entire incident from the capture of the German saboteurs, their detention, habeas proceedings, trial by military commission, conviction, appeal, and the execution of six of the eight, took place in fewer than sixty days.³⁴ And the Supreme

30. *Id.* at 12. As one commentator has noted more recently, "Today's terrorists, like the pirates of yore, are widely recognized to be the common enemies of all mankind," and therefore undeserving of any but the most basic protections against murder or torture. Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 *CHI. J. INT'L L.* 121, 138 (2003).

31. *Ex parte Quirin*, 317 U.S. at 45.

32. *Id.* at 37.

33. *Id.* at 18-21.

34. *Oversight Hearing on Habeas Corpus and Detentions at Guantanamo Bay Before the Subcomm. On the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (transcript at 9, on file with the Texas Review of Law & Politics).

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Court upheld such actions in *Quirin*, which remains the law today.³⁵

Supporters of habeas litigation rights for suspected terrorists have argued that the Nazi saboteurs in *Quirin* are distinguishable from the enemy combatants being captured and detained in the defense against terrorism today because there was no question that all the defendants in *Quirin* were indeed German saboteurs, whereas the threatening nature of many enemy combatants currently detained in the defense against terrorism is much less clear.³⁶ To the contrary, however, all eight of the saboteurs in *Quirin* denied that they intended to commit sabotage in the United States, and saboteur George John Dasch and Ernest Peter Burger claimed when they were captured that they came to this country only as a subterfuge to secretly join the fight *against* the Nazis.³⁷ Another German saboteur, Ernest Peter

35. As a result, if detention, trial, and execution, within sixty days, of those determined by the military to be unlawful enemy combatants has been upheld, it is to be expected that simple detentions for the duration of hostilities of those determined by the military to be unlawful enemy combatants—a far lesser ordeal compared to execution—would be upheld as well.

36. The Chairman of the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, for example, said at a June 26, 2007, hearing that “the Supreme Court decisions [in *Ex parte Quirin*] . . . dealt with people whose status as combatants, as foreign enemies, were not questioned . . . [N]o one questioned that they were, in fact, enemy combatants.” *Oversight Hearing on Habeas Corpus and Detentions at Guantanamo Bay Before the Subcomm. On the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (transcript at 9–10, on file with the Texas Review of Law & Politics) (statement of Rep. Nadler).

37. For example, George Dasch said the following under questioning by his military lawyer at his military commission trial:

Q: Now what decision did you come to after you learned the real condition of the German people, their condition of servitude, their lack of freedom, and all? What decision without giving me any details now, did you come to in your own mind?

A: First of all, I reached the decision that just by trying to be honest to yourself, this [Nazism] has to be fought. Secondly, by just common sense, it was made clear to [sic] that effectively I could not fight it while I be in Germany—while I remain in Germany—so therefore I had to find a way to get out of Germany, and that is what I did.

. . . .

Q: At any rate, Mr. Dasch, you did pursue every avenue that was presented as a possible means of getting out of Germany, before you were successful in connecting with the means by which you ultimately got out?

A: Yes, sir; I looked for every possible way there was.

Q: You did ultimately find a way by which you thought you could get out of Germany. Is that correct?

A: Yes, indeed.

. . . .

Burger, also told the FBI when he was captured that he came to this country only to secretly join the Allies' cause.³⁸ Many detainees at Guantanamo Bay, Cuba, have similarly claimed they had no intention to harm Americans.³⁹ And a now well-known al-Qaeda training manual recovered in Manchester, England, and used in the prosecution of Zacarias Moussaoui, explicitly counsels terrorists to claim they were tortured and mistreated

Q: Mr. Dasch, did you have any thought in your mind of in any way aiding Naziism or Hitler when you attempted to follow these various leads in an effort to get out of Germany, after you got out of Germany?

A: No, sir; at no time.

Q: In other words, your sole desire was to get out of Germany by whatever process was necessary to give you an opportunity to fight Naziism and Hitlerism which was then present in Germany?

A: Yes sir.

Q: Is that the sole reason that you entered into this sabotage school work?

A: Yes, sir. That is the only, sole reason I entered the sabotage school.

Transcript of Proceedings Before the Military Commission to Try Persons Charged with Offences Against the Law of War and the Articles of War, Washington, D.C., July 25, 1942, at 2527–29 (Joel Samaha, Sam Root & Paul Sexton eds., 2004), http://www.soc.umn.edu/~samaha/nazi_sabateurs/nazi15.htm (last visited May 20, 2008). Dasch was eventually sentenced to 30 years in prison.

38. Burger, when he was captured by the United States, gave the following signed statement, witnessed by Justice Department officials:

To show our bona fide intentions, I wish to state that George [John Dasch] and I could have disappeared entirely with the money that we brought along from Germany; also we deliberately chose a large hotel in New York City [in which to hide], instead of securing some room where it would have been very difficult to find us, as we had been instructed to do, and as Richard and Henry were planning to do . . . I wish to state in closing that I have given the facts as fairly and as impartially as I can recall. I never had the intention of carrying out the orders given to me by officials of the German Government in connection with the mission on which I was sent to the United States. I have every intention of fighting against the present German regime to the best of my ability. I want to do this, not for reasons of personal profit, but as a result of my own personal convictions. I am willing at any time to cooperate to the fullest extent in any way possible, to assist the United States Government in fighting the present German regime.

(Signed) Ernest Peter Burger

Transcript of Proceedings Before the Military Commission to Try Persons Charged with Offences Against the Law of War and the Articles of War, Washington, D.C., July 10, 1942, at 452 (Joel Samaha, Sam Root & Paul Sexton eds., 2004), http://www.soc.umn.edu/~samaha/nazi_sabateurs/nazi3.htm (last visited May 20, 2008). Burger was eventually sentenced to life in prison.

39. See David Morgan, *U.S. Divulges New Details on Released Gitmo Inmates*, REUTERS, May 14, 2007, <http://www.alertnet.org/thenews/newsdesk/N14322791.htm> ("Pentagon officials said the detainees lied about their past by claiming to be farmers, truck drivers, cooks, small-scale merchants or low-level combatants—assertions that were sometimes backed up by fellow inmates.").

while they were detained and to make these charges through a lawyer.⁴⁰

V. THE *EISENTRAGER* CASE

Eight years after the Supreme Court held in *Quirin* that military commissions could be used to detain and prosecute saboteurs caught on American soil, including one claiming to be an American citizen, the Court in *Johnson v. Eisentrager*⁴¹ held, not surprisingly given the holding in *Quirin*, that aliens held abroad do not have any constitutional right to habeas relief, and they do not enjoy any Fifth Amendment protections either.⁴²

The *Eisentrager* Court explained that, if the Constitution conferred rights on foreign enemy combatants, “enemy elements ... could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against ‘unreasonable’ searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.”⁴³ In the face of arguments that the Constitution was meant to extend its protections to foreign enemies, the

40. See U.S.D.C. Eastern District of Virginia, Exhibit Number AQ01677T, at 179, <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/prosecution/AQ01677T.html> (last visited May 20, 2008) (“Lesson Eighteen - Prisons and Detention Centers . . . 1. At the beginning of the trial, once more the brothers must insist on proving that torture was inflicted on them by State Security [investigators] before the judge. 2. Complain [to the court] of mistreatment while in prison. 3. Make arrangements for the brother’s defense with the attorney, whether he was retained by the brother’s family or court-appointed.”).

41. 339 U.S. 763 (1950).

42. See *id.* at 784–85 (holding no “extraterritorial application of organic law” to aliens). The notion that constitutional rights do not attach to aliens outside our country has been reaffirmed in recent years in cases such as *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

43. *Eisentrager*, 339 U.S. at 784. In the Fourth Amendment context, the Supreme Court has held more recently that the Fourth Amendment does not operate to protect all individuals regardless of their connections to American society. Rather, the Fourth Amendment operates only to protect the “class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The farther an individual is removed from such “community,” then, the weaker the claim he has to constitutional protection. Accordingly, an unlawful belligerent—even within the United States, and certainly an alien outside the United States—has, by taking up arms against the United States, removed himself so far from the national community that he forfeits Fourth Amendment rights altogether. Indeed, the connection terrorists have to the United States is solely that of an enemy combatant to an enemy nation, as the sole reason terrorists are in the United States at all, and not on a battlefield abroad, is because they have chosen to secretly attack their enemy’s civilian population at home.

Court responded: “[n]ot one word can be cited,” and “[n]o decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.”⁴⁴

Justice Jackson observed in *Eisentrager* what granting habeas corpus rights to enemy combatants abroad would accomplish:

[It] would hamper the war effort and bring aid and comfort to the enemy. [Habeas corpus proceedings] would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.⁴⁵

VI. THE AUTHORIZATION OF THE USE OF MILITARY FORCE AGAINST TERRORISTS AND ITS GRANT OF DISCRETION TO THE PRESIDENT

More recently, Congress, acting quickly after the 9/11 attacks, enacted the Authorization for the Use of Military Force (AUMF),⁴⁶ which empowered the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks,” in order to prevent “any future acts of international terrorism against the United States.”⁴⁷ A license to use any amount of force encompasses all of the inherent elements of war-fighting, which necessarily includes the detention of suspected terrorists.

Indeed, in *Hamdi v. Rumsfeld*, the Supreme Court confronted a claim from an American citizen, captured on the battlefield while fighting for al Qaeda in Afghanistan, that his detention without trial as an enemy combatant violated both the

44. *Eisentrager*, 339 U.S. at 784–85 (citation omitted).

45. *Id.* at 779. Such a warning recalls the unfortunate experience of Col. George W. Kirk. See text accompanying note 25.

46. Pub. L. No. 107-40, 115 Stat. 224 (2001).

47. *Id.*

Constitution and Section 4001(a) of Title 18 of the United States Code.⁴⁸ Section 4001(a) proscribes the detention of American citizens “except pursuant to an Act of Congress.”⁴⁹ A majority of the Court rejected these claims, however, and found that Hamdi’s detention satisfied Section 4001(a) because it was authorized by the AUMF, an act of Congress.⁵⁰ The Court also held that it was “of no moment that the AUMF does not use specific language of detention,” because detention was “so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”⁵¹

After receiving from Congress authority to attack al Qaeda and the Taliban, the President created a system for detaining and trying captured unlawful enemy combatants.⁵² Historically, once Congress authorizes war, the President has been understood to be constitutionally authorized to employ his discretion in making tactical decisions necessary to win the war, of which enemy combatant detention decisions are an important part.⁵³ This is because Article II, Section Two of the Constitution states that “The President shall be commander in Chief of the Army and Navy of the United States,” and Article I, Section Eight of the Constitution gives the Congress the power to “declare” war.

Giving Congress the power to “make” war was explicitly *rejected* by the Founders when they debated the text of the Constitution at the Constitutional Convention. The arguments that prevailed instead were those of delegate Charles Pinkney, who, according

48. 542 U.S. 507, 510–16 (2004).

49. *Id.* at 515.

50. *Id.* at 518.

51. *Id.* at 518–19.

52. Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terror, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001).

53. Of course, the Constitution also does not grant the federal judiciary the authority to “make” war. As Attorney General James Speed wrote in his legal opinion supporting the constitutionality of the trial of the co-conspirators in President Lincoln’s assassination:

The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle.

Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President,
<http://www.law.umkc.edu/faculty/projects/ftrials/lincolnconspiracy/commissionorder.html> (last visited May 20, 2008).

to James Madison's notes of the proceedings, "opposed the vesting [of] this power in the Legislature" because the legislature's "proceedings were too slow," and the House of Representatives "would be too numerous [in Membership] for such deliberations."⁵⁴ Rather, "It would be singular for one authority to make war,"⁵⁵ and that singular authority was, and is, the President. Madison himself offered the amendment that struck Congress' power to "make" war in a draft of the Constitution and replaced it with a more modest congressional power to "declare" war.⁵⁶ When delegate Rufus King argued that to "make" war constituted the power to "conduct" it—which King argued was "an executive function"⁵⁷ reserved to the President—the amendment granting Congress only the power to "declare" war was overwhelmingly adopted by the Convention delegates.

The Founders therefore rejected the notion that Congress should conduct war, leaving that power instead to the President as the Commander in Chief.⁵⁸

VII. THE MODERN PROCEDURAL BASELINE FOR THE DETENTION OF ENEMY COMBATANTS: THE GENEVA CONVENTIONS

Although the President has the constitutional power to make war, the conduct of the war is still bound by the modern laws of war. Under the modern laws of war, the treatment of prisoners of war has been governed by the Third Geneva Convention, which was first adopted in 1929⁵⁹ and last revised in 1949.⁶⁰ The United States is a party to the Third Geneva Convention. The

54. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 475 (Adrienne Koch ed. 1966).

55. *Id.* at 476.

56. *Id.*

57. *Id.* at 476, note *.

58. As Alexander Hamilton wrote in the *Federalist Papers*:

Of all the cares or concerns of government, the *direction* of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.

THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

59. Convention of July 27, 1929, Relative to the Treatment of Prisoners of War, 47 Stat. 2021, L.N.T.S 343.

60. 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.

Third Geneva Convention is the baseline by which the procedures governing the determination of enemy combatants and their detention should be judged today.

The Geneva Convention applies to “armed conflict which may arise between two or more of the High Contracting Parties”⁶¹ Clearly, al-Qaeda does not fight for a “contracting party” because it does not fight for any sovereign country. The Convention can apply in armed conflict between a signatory power and a nonsignatory power, but only when the nonsignatory power “accepts and applies the provisions [of the Convention].”⁶² However, al-Qaeda does not accept and apply the Geneva Convention because that treaty protects innocent parties, and al-Qaeda specifically targets innocent parties. Because terrorists do not fight under the flag of any country, and because they have specifically announced that it is their goal to disobey the Conventions and target innocent civilians, they are not entitled to any protections under the Geneva Conventions beyond the most minimal protections granted by Article 3 when they are detained in a conflict within the physical boundaries of a signatory country.⁶³ Further, captured combatants are only legally eligible for prisoner of war (POW) status under the Convention if they satisfy four tests, the last three of which al-Qaeda clearly does not meet: they must be commanded by a person responsible or his subordinates; have a fixed, distinctive emblem recognizable at a distance; carry arms

61. *Id.* art. 2.

62. *Id.*

63. The Supreme Court held in *Hamdan v. Rumsfeld*, that:

[T]here is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a “conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,” certain provisions protecting “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* [outside the scope of combat] by . . . detention.” One such provision prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

126 S. Ct. 2749, 2795 (2006) (emphasis added and citations omitted).

openly; and conduct their operations in accordance with the laws and customs of war.⁶⁴

Even if, as a matter of policy, Congress wished to extend Geneva's protections to terrorists that are not currently provided them under the Conventions, the baseline for the treatment of unlawful enemy combatants would be Article 5 of the Geneva Conventions, which merely provides that a person detained by the military who may be an unlawful enemy combatant shall have their status determined by a "competent tribunal."⁶⁵ Under military regulations implementing the Conventions,⁶⁶ the "competent tribunal" is composed of three commissioned officers, and the detainee has only the following rights: to be allowed to attend sessions of proceedings (except those involving testimony or other matters that would compromise national security if held in the open); to call witnesses if they are reasonably available and to question witnesses called by the tribunal; and to a review of the decision of the competent tribunal only through the office of the Staff Judge Advocate at the Department of Defense.⁶⁷

In sum, under the Geneva Conventions, the detainee:

- does *not* have the right to the aid of any personal representative to help explain the process and assist the accused in his or her defense, and in preparing and presenting information and questioning witnesses;
- does *not* have the right to review a summary of the evidence to be used against him or her in advance of the hearing;
- does *not* have the right to an evaluation of whether any statements used against him or her were the result of coercion;
- does *not* have the right to a review of the determination based on new evidence; and
- does *not* have the right to a review of the decision outside of the Department of Defense.⁶⁸

64. See Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, art. 4(A)(2)(a)-(d), U.N.T.S. 135.

65. See *id.* at art. 5.

66. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees 2, http://www.usppa.army.mil/pdffiles/r190_8.pdf (last visited May 20, 2008).

67. *Id.* at 2-3.

68. *Id.*

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Indeed, to grant unlawful enemy combatants procedural rights much beyond those prescribed by the Geneva Conventions for lawful combatants, far from being a humanitarian gesture, would undermine respect for the laws and customs of war and legitimize and encourage unlawful belligerency and the increased civilian deaths such belligerency brings. The purpose of the Geneva Conventions is to encourage civilized warfare. Rewarding terrorists with protections much beyond those afforded them by the Geneva Conventions—under the theory that, because they disguise themselves as civilians so they can kill civilians, terrorists should be detained under standards more akin to those prevailing under ordinary criminal law—would significantly *undermine* the goals of the Geneva Convention, as extending such protections would result in a situation in which a combatant, if captured, will know he will gain no advantage from fighting *within* the laws of war, but will know instead he will be granted additional protections regardless of whether he obeys the laws of war.

Yet under current federal law, enemy combatant detainees *do* enjoy all of the previously listed rights that are currently denied unlawful enemy combatants under the Geneva Conventions. In contrast to the rights denied detainees under the Geneva Conventions, current federal statutory law provides the following additional rights—well beyond those required by the Conventions—to those detained by the U.S. military.

Under current law:

- a Combatant Status Review Tribunal (CSRT) determines enemy combatant status using a preponderance of the evidence standard. The final review authority must be a civilian officer of the Department of Defense required to be confirmed by the Senate;⁶⁹
- the CSRT must determine whether any statements being considered by the CSRT were obtained by coercion, and if so what their probative value is;⁷⁰

69. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(a)(2), 119 Stat. 2680, 2741.

70. *Id.* at § 1005(b) (“[A] Combatant Status Review Tribunal (CSRT) or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value (if any) of any such statement.”).

- the detainee has the right to a personal representative “to assist the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT;”⁷¹
- the CRST must be scheduled within 30 days after detainee’s personal representative has had an opportunity to review the government’s information and consult with the detainee;⁷²
- an official Recorder shall present to the Tribunal an unclassified report summarizing any evidence to suggest the detainee should not be considered an enemy combatant, and such report must be given to the detainee’s personal representative in advance of any Tribunal hearing;⁷³
- the detainee has the right to present evidence and question witnesses, aided by a personal representative, who will also assist the detainee in obtaining unclassified documents and witnesses;⁷⁴
- a CSRT review is reopened “ . . . for periodic review of any new evidence . . . ”⁷⁵
- an appeal of a CSRT determination can be made to the D.C. Circuit Court of Appeals to ensure proper process was followed and that it was “consistent with the Constitution and laws of the United States;”⁷⁶
- there can be a review by the Supreme Court;⁷⁷ and
- if a determination of unlawful enemy combatant status is upheld, and a military commission charges a terrorist with war crimes, then that decision of the military commission can be appealed to a Court of Military Commission Review, that decision can be appealed to

71. Memorandum from the Deputy Secretary of Defense re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006) at 2, <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>, (last visited May 20, 2008).

72. *Id.* at 5.

73. *Id.* at 7.

74. *Id.*

75. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(a)(3), 119 Stat. 2680, 2741.

76. *Id.* at § 1005(e)(2)(C)(ii).

77. *Id.*

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the D.C. Circuit Court of Appeals to ensure proper process was followed by the military commission and that it was “consistent with the Constitution and laws of the United States,”⁷⁸ and an appeal can be made to the Supreme Court.

Indeed, on July 20, 2007, the D.C. Circuit Court of Appeals, in *Bismullah v. Gates*,⁷⁹ made clear that, under the current statutory law, the court will make a very robust examination of any CSRT decision, stating:

the record on review [of a CSRT decision] consists of all the information a Tribunal is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense . . . and defined by the Secretary of the Navy as “such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant,” which includes any information presented to the Tribunal by the detainee or his Personal Representative.⁸⁰

While some concerns regarding process have been raised by one former participant in one CSRT,⁸¹ the D.C. Circuit Court of Appeals, just several days earlier, had already held that a federal reviewing court will have available to it all reasonably available information in the possession of the U.S. government, whether or not such information was used by or presented to the CSRT itself, when it conducts its review to ensure the integrity of the CSRT process.⁸² The D.C. Circuit also held that “the Government may withhold from [detainee’s] counsel . . . *but not from the court*, certain highly sensitive information,”⁸³ thereby ensuring that the federal court will review all information

78. *Id.*

79. 501 F.3d 178 (D.C. Cir. 2007).

80. *Id.* at 180.

81. See *Upholding the Principle of Habeas Corpus for Detainees: Hearing Before the H. Armed Services Comm.*, 110th Cong. (2007) (statement of Lt. Col. Stephen E. Abraham) (“I was given no assurances that the information provided for my examination represented a complete compilation of information or that any summary of information constituted an accurate distillation of the body of available information relating to the subject.”). Mr. Abraham is a former staff person at the Office for the Administrative Review of the Detention of Enemy Combatants who was charged with coordinating with government agencies, including certain Department of Defense and other organizations, to gather or validate information relating to detainees for use in CSRTs.

82. *Bismullah*, 501 F.3d at 185–86.

83. *Id.* at 180 (emphasis added).

relating to a CSRT's combatant status decision, including the most highly sensitive information available to the government.

Consequently, today, as a result of the Military Commissions Act (MCA), as interpreted by the D.C. Circuit decision in *Bismullah*, those who are suspected of being unlawful enemy combatants enjoy the benefits of review procedures that are dramatically greater than the review procedures enjoyed by even lawful enemy combatants that wear the uniform of their country and follow the laws of war. Pursuant to current federal law, the CSRT procedures governing enemy combatant detentions require much more due process⁸⁴ and more judicial involvement than is required by either the Constitution or American international law obligations. Even as Congress determined in enacting current law that captured unlawful enemy combatants, held outside the United States, are not entitled to the same level of constitutional protections as criminal defendants tried in the American civilian justice system, it is worth noting that, today, the CSRT process is already virtually identical to that to which civilian American citizens are subject when they are defendants in the detention phase of an ordinary arrest, and subject to the process of bail denial.⁸⁵

84. Generally, the Supreme Court has held that what matters when dealing with a person challenging his detention by the United States is not the label that is attached to the judicial review (for example, the term "habeas," or otherwise), but simply whether there is a meaningful opportunity for review. In *Swain v. Pressley*, the Court stated that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." 430 U.S. 372, 381 (1977). And in *INS v. St. Cyr*, the Court specifically acknowledged that "Congress could, without raising any constitutional questions, provide an adequate substitute [for a traditional district court-level habeas petition] through the courts of appeals." 533 U.S. 289, 314 & n.38 (2001).

85. As Andrew McCarthy has pointed out:

A CSRT is not a trial; it is a wartime detention hearing. Its goal is to determine that there is a reasonable basis to believe the detainee is an alien unlawful enemy combatant who would resume fighting the U.S. if released But, sure, let's compare the federal criminal justice system, where civilian defendants are fully vested with constitutional rights. At the arrest stage, defendants are detained on the basis of a complaint—a *hearsay account* of second- and third-hand information provided to the court by an investigating agent. If the government seeks to deny the defendant bail pending trial, the court then holds a detention hearing at which *the rules of evidence do not apply*, meaning *hearsay is liberally permitted*, witnesses need not be called . . . and *there is no requirement that the government disclose exculpatory evidence*.

Is that due process? Yes. The organized bar doesn't like it, but the courts have upheld it. The rationale is straightforward: The issue at a detention hearing is whether the defendant is dangerous and whether he is a flight-risk.

Andrew C. McCarthy, *The Profession v. Gitmo*, NAT'L REV. ONLINE, June 25, 2007, <http://author.nationalreview.com> (follow "McCarthy, Andrew C.: Archive" hyperlink; then follow "The Profession v. Gitmo" hyperlink).

How that dramatic departure from the Geneva Convention's procedures came to pass is discussed in the following section.

VIII. THE *RASUL* CASE, THE DETAINEE TREATMENT ACT, THE *HAMDAN* CASE, AND THE MILITARY COMMISSIONS ACT

The “enemy litigiousness” referred to by Justice Jackson in the *Eisenstrager* case had been successfully avoided for another fifty-four years following that decision, until the Supreme Court decided *Rasul v. Bush*⁸⁶ in the midst of the current defense against terrorism.

In *Rasul*, the Court did not question *Eisenstrager*'s holding that the Constitution did not afford habeas rights to alien enemy combatants abroad, but it did hold that suspected terrorists detained by the United States at the United States Naval Base in Guantanamo, Cuba—all of whom were not American citizens or resident aliens—had a statutory right under the federal habeas statute in effect at the time to pursue habeas corpus relief in the federal courts. The Supreme Court's decision in *Rasul* was the first time in recorded history that any court of any nation at war had held that its enemies captured in battle had a right to access its domestic courts and could sue a nation's Commander in Chief to challenge their detentions.

Regardless of its merits as a case of statutory interpretation, the *Rasul* decision opened the floodgates to waves of lawsuits against the U.S. government by the very same unlawful enemy combatants the Supreme Court in *Quirin* said are “offenders against the law of war subject to trial and punishment by military tribunals.”⁸⁷ The result of the *Rasul* decision was that virtually every detainee held at Guantanamo Bay filed a lawsuit against the President, the Secretary of Defense, and other military commanders, seeking to force the military to release them.⁸⁸

86. 542 U.S. 466 (2004).

87. *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942).

88. See *Oversight Hearing on Habeas Corpus and Detentions at Grantanamo Bay Before the Subcomm. On the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (transcript at 9, on file with the Texas Review of Law & Politics) (statement of Gregory G. Katsas, Principal Deputy Assoc. Att'y Gen., U.S. Dep't of Justice) (“During that time [2004–2006], more than 200 habeas actions were filed on behalf of more than 300 of the Guantanamo detainees. The Department of Defense was forced to reconfigure its operations at a foreign military base, in time of war, to accommodate hundreds of visits by private habeas counsel. To facilitate their claims, detainees urged the courts to dictate conditions on the base ranging from the speed of Internet access to the extent of mail deliveries. Through a series of interlocutory habeas actions, military-

Because the Supreme Court's decision in *Rasul* was based only on an interpretation of a federal statute—28 U.S.C. § 2241—and not the Constitution, Congress was free to address legislatively the litigation problems caused by the *Rasul* decision. While Congress chose not to abide by the traditional rule, articulated in *Eisentrager*, that no federal court review at all would be available to enemy combatants held outside American shores, Congress struck what it considered to be a compromise at the time, in which detainee litigation in federal court would be placed within some limits. In the Detainee Treatment Act of 2005 (DTA),⁸⁹ Congress established a process of formal administrative review of enemy combatant status for those detained at Guantanamo Bay.

That process was again thrown into disarray by yet another statutory interpretation decision handed down by the Supreme Court in *Hamdan v. Rumsfeld*.⁹⁰ In that case, the Court focused on an alleged ambiguity in the language of § 1005 of the DTA and concluded that it did not apply to any of the actions pending on the date of its enactment.⁹¹ The Court held that the DTA would apply only prospectively, so that all of the existing habeas litigation in the federal district courts could continue.⁹²

As a result of the *Hamdan* decision, Congress again clarified federal unlawful enemy combatant detention policy in the Military Commissions Act of 2006 (MCA) to make clear that its provisions applied to all pending cases as well as future cases.⁹³ The D.C. Circuit Court of Appeals upheld the federal court litigation restrictions in the DTA and the MCA in *Boumediene v. Bush*.⁹⁴

commission trials were enjoined before they had even begun. . . . [W]hatever burdens were imposed by briefly extending habeas to the few hundred detainees recently held at Guantanamo Bay, these would pale in comparison to the havoc in larger conflicts were the habeas statute generally extended to aliens held abroad as wartime enemy combatants. In World War II, for example, the United States held over two million such enemy combatants. For military operations of that scale, imposing the litigation standards that prevailed at Guantanamo Bay between 2004 and 2006 would be unthinkable.”).

89. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §1001, 119 Stat. 2680, 2740, amended by Military Commissions Act of 2006, Pub. L. No. 109-366, §9, 10, 120 Stat. 2636, 2637.

90. 126 S. Ct. 2749 (2006).

91. *Id.* at 2763, 2764.

92. *Id.* at 2764–65.

93. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

94. 476 F.3d 981 (D.C. Cir. 2007).

IX. THE SHRINKING DETAINEE POPULATION CURRENTLY CONSISTS OF THE MOST DANGEROUS SUSPECTED TERRORISTS

The DTA and the MCA afford unlawful enemy combatants far more procedural protections to review their detentions than required by the Constitution or the Geneva Conventions. Even so, the enemy combatant detainee population had begun to dwindle significantly well before those procedural protections were enacted, leaving only the most dangerous in continued detention.

Military commanders have no incentive to take prisoners unless there are strong military reasons for doing so. Keeping detainees takes resources away from assets and personnel available for other missions, including warfare. There is little reason for the military to hold combatants without sound reasons to believe they have valuable intelligence or would rejoin the battle if released. Consequently, the military has always vetted captives at the time of capture and periodically thereafter, and many individuals have been subsequently found not to be combatants based on CSRT decisions.

In 2004, there were 520 detainees classified as “enemy combatants” following CSRT reviews of 558 detainees, of which 38 detainees were classified as “no longer enemy combatants.” Administrative Review Boards determined the following regarding detainees in each year: in 2005, 14 were released, 119 transferred, and 330 detained;⁹⁵ in 2006, 0 were released, 55 transferred, and 273 detained;⁹⁶ and in progress in 2007, 0 were released, 6 transferred, and 20 detained.⁹⁷ Today, there are approximately 275 detainees at Guantanamo Bay.⁹⁸

The best evidence is that the vast majority of the detainees who remain at Guantanamo Bay pose threats to American or coalition forces.⁹⁹ According to the Defense Department’s

95. News Release, United States Department of Defense, Administrative Review Board Summary: ARB-1 (Jan. 30, 2006), available at <http://www.defenselink.mil/news/Jan2006/d20060130arb.pdf>.

96. News Release, United States Department of Defense, Administrative Review Board Summary: ARB-2 (Jan. 30, 2006), available at <http://www.defenselink.mil/news/arb2.pdf>.

97. Memorandum from the Office for the Administrative Review of the Detention of Enemy Combatants (July 2, 2007) (on file with the Texas Review of Law & Politics).

98. *Pentagon Releases 10 Saudi Detainees*, WASH. POST, Dec. 30, 2007, at A9.

99. As the *New York Times* recently reported:

[A] new study of detainees in 2004 and 2005 requested by the Pentagon argues that many were a proven threat to United States forces. They included

document entitled “High Value Terrorist Detainees at Guantanamo,” the following individuals are among those currently being detained: Khalid Sheikh Muhammed, the “driving force behind the attacks on 11 September 2001 as well as several subsequent plots against US and Western targets worldwide,” and one of al-Qaeda’s “most capable senior operatives;” Hambali, who “helped plan the first Bali bombings in 2002 that killed more than 200 persons;” Abu Zubaydah, who was recruited by Osama Bin Laden to be one of al-Qaeda’s senior travel facilitators and oversaw the “Khaldeen group” training camp and guesthouses between 1995-2000 used to train three of the 9/11 hijackers; Ahmed Khalfan Ghailani, “one of the FBI’s Most Wanted terrorists” and “one of al-Qa’ida’s top forgers;” Mustafa al-Hawsawi, “one of two key financial facilitators entrusted by 11 September mastermind Khalid Shaykh Muhammad (KSM) to manage the funding for the hijackings;” Abd al-Rahim al-Nashiri, who “was the mastermind and local manager of the bombing in October 2000 of the USS Cole;” Abu Faraj al-Libi, who served as “a communications conduit for al-Qa’ida managers to [Osama Bin Laden] from August 2003 until his capture in 2005;” Walid bin Attash, who “alternated between serving as a bodyguard for [Osama Bin Laden] and participating in combat against the Northern Alliance;” Ramzi Bin al-shibh was a “key facilitator for the attacks

fighters of Al Qaeda, veterans of terrorism training camps and men who had experience with explosives, sniper rifles and rocket-propelled grenades, it said. The report, by a terrorism study center at West Point, is essentially a rebuttal by the military of growing assertions by advocates for detainees that the American naval station at Guantanamo Bay, Cuba, is filled with hapless innocents and low-level cooks and other support personnel who pose no real threat. [The report] paints a chilling portrait of the detainees, asserting that publicly available information indicates that 73 percent of them were a “demonstrated threat” to American or coalition forces. In all, it says, 95 percent were at the least a “potential threat,” including detainees who had played a supporting role in terrorist groups or had expressed a commitment to pursuing violent jihadist goals. The study is based on information from detainees’ hearings in 2004 and 2005 . . . The report is an analysis of previously released military summaries of the unclassified evidence used in 516 of the military’s hearings that determine whether detainees are properly held as enemy combatants. It was written at the request of the Pentagon by the Combating Terrorism Center at the United States Military Academy at West Point, a teaching and research center . . . Lt. Col. Joseph H. Felter, the director of the Combating Terrorism Center and a West Point faculty member, said the new report was an independent evaluation conducted without Pentagon supervision.

William Glaberston, *Pentagon Study Sees Threat in Guantanamo Detainees*, N.Y. TIMES, July 26, 2007, at A16.

on 11 September 2001 During the eight months before the attacks, [he] was the primary communications intermediary between the hijackers in the United States and al-Qa'ida's leadership in Afghanistan and Pakistan;" Majid Khan, who assisted Khalid Sheikh Muhammed "with his research into the feasibility of a plan to blow up gas stations in the United States" and research on poisoning U.S. water reservoirs; Ali Abd al-Aziz Ali, the "communications intermediary between al-Qa'ida and 'shoe bombers' Richard Reid and Saajid Badat;" Mohammed Nazir Bin Lep, who was "slated to be a suicide operative for an al-Qa'ida 'second wave' attack targeting Los Angeles;" and Mohd Farik Bin Amin, who was "tapped . . . to be a suicide operative for an al-Qa'ida attack targeting Los Angeles."¹⁰⁰

X. RECENT EFFORTS TO EXTEND HABEAS LITIGATION RIGHTS TO ENEMY COMBATANT DETAINEES AND THE RISKS THEY POSE

Even as the detainee population has increasingly shrunk to include only the most dangerous suspected terrorists, some in Congress have proposed overlaying an addition layer of habeas litigation on top of the existing system for reviewing detention decisions regarding the remaining enemy combatants held by the military.¹⁰¹

100. DefenseLINK, Detainee Biographies, <http://www.defenselink.mil/pdf/detaineebiographies1.pdf> (last visited May 20, 2008).

101. H.R. 2826, introduced in the 110th Congress, would both preserve the structure created by the DTA and the MCA that currently governs the detention of unlawful enemy combatant terrorists and also allow those terrorists the benefit of any and all habeas provisions that exist in the rest of the federal code, thereby providing terrorists with even more legal protections than are afforded ordinary criminal defendants who are American citizens. In a March, 2007 editorial, the *New York Times* listed "Restore Habeas Corpus" at the top of its "Must-Do List" for the 110th Congress. *The Must-Do List*, N. Y. TIMES (editorial), March 4, 2007, § 4, at 11.

H.R. 2826 would grant habeas litigation rights to terrorists who are not captured "in a zone of active combat involving the United States Armed Forces." *See, e.g.*, H.R. 2826, 110th Cong., § 1, 7 (2007). Its use of the undefined term "zone of active combat" will leave courts with the precedent of *Quirin*, in which it was argued by attorneys for the eight Nazi saboteur spies who landed on the shores of Florida and Long Island that they were "not in the zone of military operations" because they were not near any military facilities, and that "[t]he Florida and Long Island seacoasts were not and are not in any true sense zones of active military operations." *Ex parte Quirin*, 317 U.S. 1, 7, 8–9 (1942).

Granting habeas litigation rights to terrorists captured outside a "zone of combat" would also mean that Ali Saleh Kahlan al-Marri would not be able to be treated like an unlawful enemy combatant—as he was so declared on May 31, 2003—because he was captured in Peoria, Illinois, and is now detained in a Navy brig in South Carolina, even though, as the *Washington Post* reported:

[FBI] agents discovered extensive research on Marri's computer about purchasing large quantities of chemicals used to manufacture hydrogen

The debate regarding whether the current procedures that govern the detention of enemy combatants should be preserved, or whether they should be supplemented with procedures more akin to those that govern the detention of ordinary domestic criminals, was placed into stark relief at a recent hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties in the U.S. House of Representatives. At that hearing, Subcommittee Chairman Jerrold Nadler, who represents the district in New York that contained the World Trade Center, and Bradford Berenson, a former White House counsel, engaged in the following exchange:

Rep. NADLER: . . . I don't know how you can pick up someone in New York and say that his rights are different or less because he is accused of being an enemy combatant, based on whatever information, as opposed to he is accused of being a murderer . . .

Mr. BERENSON: On that view, we need to be clear about what that means. It means that, if we had captured Mohammed Atta on September 10th, we would have had no choice but to treat him as a criminal defendant, which would have [meant] no interrogation, no intelligence, and the World Trade Center coming down.

Rep. NADLER: That is exactly right.¹⁰²

Under the principle articulated by Chairman Nadler, anyone suspected of being the organizer of a terrorist attack based on intelligence information, even if that person is not an American

cyanide, a deadly compound [and] [i]n an almanac in Marri's apartment, agents found that information about railroads, U.S. dams and reservoirs had been bookmarked . . . Marri's files contained more than 1,000 credit card numbers, most already used in frauds, and long lists of Web sites about computer hacking and obtaining false identifications," among even more intelligence information the government obtained before Marri was declared an enemy combatant. Marri is currently being detained in a Navy brig in South Carolina.

Susan Schmidt, *Trail of an "Enemy Combatant": From Desert to U.S. Heartland*, WASH. POST, July 20, 2007, at A9.

Consequently, such efforts to grant additional habeas litigation rights to enemy combatants would likely prevent the detention of terrorists as unlawful enemy combatants precisely when they are most dangerous, namely when they have been caught and are being detained outside the battlefield—that is, outside a “zone of active combat”—and after they have already successfully infiltrated American society in disguise.

102. *Oversight Hearing on Habeas Corpus and Detentions at Guantanamo Bay Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (transcript at 50, on file with the Texas Review of Law & Politics).

citizen and is here illegally,¹⁰³ should be treated as a common criminal, meaning the suspected terrorist's right to remain silent pending trial in federal court would have to be respected, and there would be no hope of preventing the attack, even if it meant the death of thousands of people. In an age of weapons of mass destruction—when a handful of terrorists can now cause harm on a scale only nations once could¹⁰⁴—such a principle can only invite more tragedy than it would prevent.

After 9/11, it became evident that it was necessary to take a fresh look at how to combat terrorism, and more importantly how to prevent it. The law enforcement model, which focuses on punishing crimes after they have occurred and protecting the rights of those who have yet to be convicted of crime, had been virtually the only tool used by the United States against terrorists prior to 9/11, and it had clearly failed to protect America from attack. As the 9/11 Commission concluded, “The law enforcement process is concerned with proving the guilt of persons apprehended and charged . . . It was not designed to ask if the events might be harbingers of worse to come. Nor did it allow for aggregating and analyzing facts to see if they could provide clues to terrorist tactics more generally”¹⁰⁵

As Andrew McCarthy and Alykhan Velshi have written, the criminal law approach to combating terrorism was a disaster:

[D]uring the eight-year period under consideration [1993–2001], the virtually exclusive U.S. response [to terrorism] was criminal prosecution. This proved dismally inadequate, particularly from the perspective of American national security. The period resulted in less than ten major terrorism prosecutions. Even with the highest conceivable conviction rate of 100 percent, *less than three dozen terrorists* were neutralized—at a cost that was staggering and that continues to be paid, as several of these cases remain in appellate or habeas litigation. Stopping less than three dozen terrorists is a

103. As the 9/11 Commission Report concluded, “Mohammed Atta overstayed his tourist visa and then failed to present a proper vocational school visa when he entered in January 2001.” NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 564 n.33 (2004) [hereinafter THE 9/11 COMMISSION REPORT].

104. It is worth remembering that the 9/11 attacks killed more Americans than the Japanese attack on Pearl Harbor. The 9/11 hijackers succeeded in crippling our economy after violating American immigration laws, avoided detection for years inside our borders (within which time they learned to fly airplanes), hijacked four airplanes within minutes of each other, and took American authorities completely by surprise.

105. THE 9/11 COMMISSION REPORT, *supra* note 103, at 73.

patently insufficient bottom line in dealing with a global threat of such proportions.

....

Put succinctly, where they are the sole or principal response to terrorism, trials in the criminal justice system inevitably cause more terrorism: they leave too many militants in place and they encourage the notion that the nation may be attacked with relative impunity.¹⁰⁶

XI. THE RISKS OF APPLYING A CRIMINAL DEFENDANT MODEL TO TERRORIST DETENTIONS

There are many risks posed by granting habeas litigation rights to enemy combatant detainees and resorting to a criminal defendant model.

First, granting habeas litigation rights to detainees would allow forum shopping among a large variety of federal courts and the filing of habeas petitions in the court detainees judge will be most favorable to their cause, as any federal court can hear a habeas case as long as the officials detaining the enemy combatant can be served with the requisite papers. As the leading treatise on federal procedure states:

[P]hysical presence is no longer a jurisdictional requirement for habeas corpus. A person in custody in State A who is challenging a detainer from State B can sue in either state ... [H]abeas acts upon the person holding the prisoner, and not the prisoner himself. So long as the custodian can be reached by service of process, which was assumed to be true of the defendants in the Guantanamo setting, jurisdiction under the habeas statutes is present.¹⁰⁷

In these federal habeas cases, the federal judge would also have complete discretion to order the military to produce information, and if information is ordered produced,¹⁰⁸ the

106. Andrew C. McCarthy & Alykhan Velshi, We Need a National Security Court 6–9 (July 15, 2007) (unpublished manuscript, available at www.defenddemocracy.org/research_topics/research_topics_show.htm?doc_id=510024). Terrorism trials take months to complete, often following many years of pretrial discovery and court proceedings; typically, the appeals also take years to complete. *Id.* at 6 n.9.

107. 17B Charles Alan Wright, Arthur R. Miller, et al., FED. PRAC. & PROC. § 4268.1 (3d ed. 1998). “Detainer” simply means “[t]he action of detaining, withholding, or keeping something in one’s custody.” BLACK’S LAW DICTIONARY 479 (8th ed. 2004).

108. As the leading treatise on federal procedure states:

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enemy combatant would have a right to taxpayer-funded counsel.¹⁰⁹ Similarly, the federal judge would have complete discretion to order the subpoenaing of witnesses, including those who would have to be pulled away from their service in the military.¹¹⁰ And a single federal judge in a habeas case could order the release of a terrorist even before appeals are concluded.¹¹¹

In light of that, granting suspected terrorists habeas litigation rights would inevitably lead to more terrorists' being erroneously released. As Bradford Berenson has written:

The record is already clear that the *existing level of process* afforded at Guantanamo has resulted in several dozen erroneous releases. . . . [W]e know now that in many instances we were duped: there are now numerous documented instances where individuals we had in custody have returned to

Former ambiguities about the use of discovery in habeas corpus have been resolved by Rule 6 of the Habeas Corpus Rules. The basic provision is that of Rule 6(a), which allows either party to a habeas corpus action to use the devices of discovery made available by Civil Rules 26 to 37 "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so . . ." Discovery may be ordered in connection with an evidentiary hearing but it may also be permitted before a hearing. The rule is deliberately not specific about what discovery methods should be used or how discovery procedures should be administered and leaves this to the judge.

17B *id.* § 4268.4.

109. *See id.* ("The rule makes provision for appointment of counsel for the petitioner in appropriate cases in which discovery is allowed. . . . The Habeas Corpus Rules require the appointment of counsel if an evidentiary hearing is required and the prisoner qualifies for appointed counsel under 18 U.S.C. § 3006A. Counsel must be appointed even earlier if the court grants leave for discovery and counsel is necessary, as ordinarily will be true, for the effective utilization of discovery."). 18 U.S.C. § 3006A provides that "each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section." 18 U.S.C. § 3006A (2006).

110. *See* 17B Wright et al., *supra* note 107, § 4268.4 ("The rules do not speak to the subpoenaing of witnesses for a hearing and this is left to local practice.").

111. *See* 17B *id.* § 4268.5 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 774 (1987)) ("Whether a prisoner who has applied for habeas corpus is to be released pending review of the district court's order is governed by Appellate Rule 23. If the district court has granted the writ, Rule 23(c) 'creates presumption of release from custody in such cases, but that presumption may be overcome if the judge rendering the decision, or an appellate court or judge, 'otherwise orders.'"). Appellate Rule 23(c) provides:

While a decision ordering the release of a prisoner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety.

FED. R. APP. P. 23(c). "Release on recognizance" means "[t]he pretrial release of an arrested person who promises, usu. in writing but without supplying a surety or posting bond, to appear for trial at a later date." BLACK'S LAW DICTIONARY 1316 (8th ed. 2004).

the battlefield and continued to attack our soldiers and others. Where the effect of an erroneous release could be to unleash future Mohammed Attas and increase the risk of another 9/11, we should think long and hard before adopting policies that will undoubtedly increase the instances of such errors.¹¹²

Under current procedures, at least thirty detainees who were erroneously released from the Guantanamo Bay detention facility have since returned to fighting against the U.S. and its allies, attacking American soldiers, and plotting the deaths of civilians. About a dozen released detainees have been subsequently killed back on the battlefield, while others were recaptured.¹¹³

112. *Oversight Hearing on Habeas Corpus and Detentions at Grantanamo Bay Before the Subcomm. On the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (written testimony at 30, on file with the Texas Review of Law & Politics) (Bradford A. Berenson).

113. Two released detainees became regional commanders for Taliban forces. As news reports have recently reported:

The Pentagon on Monday released the names of six former Guantanamo detainees who U.S. officials say re-emerged as Islamist fighters in Afghanistan after their release from the U.S. military prison in Cuba.

The Defense Department said three of those released from the prison for suspected militants resurfaced as senior Islamist fighters in Afghanistan while a fourth was later identified as having been a Taliban deputy defense minister.

The six were among 30 former detainees who the Pentagon said have rejoined the fight against U.S. and coalition forces since their release from Guantanamo. All told, about 390 detainees have been released or transferred from the prison.

...

Pentagon officials said the detainees lied about their past by claiming to be farmers, truck drivers, cooks, small-scale merchants or low-level combatants—assertions that were sometimes backed up by fellow inmates.

Morgan, *supra* note 39. See also John Mintz, *Released Detainees Rejoining the Fight*, WASH. POST, Oct. 22, 2004, at A1 (“The latest case emerged two weeks ago when two Chinese engineers working on a dam project in Pakistan’s lawless Waziristan region were kidnapped. The commander of a tribal militant group, Abdullah Mehsud, 29, told reporters by satellite phone that his followers were responsible for the abductions. Mehsud said he spent two years at Guantanamo Bay after being captured in 2002 in Afghanistan fighting alongside the Taliban. At the time he was carrying a false Afghan identity card, and while in custody he maintained the fiction that he was an innocent Afghan tribesman, he said. U.S. officials never realized he was a Pakistani with deep ties to militants in both countries, he added “We would fight America and its allies,” he said in one interview, “until the very end.”); Griff Witte, *Taliban Leader Once Held by U.S. Dies in Pakistan Raid*, WASH. POST, July 25, 2007, at A1 (“A top Taliban commander who became one of Pakistan’s most wanted men after his release from U.S. detention at Guantanamo Bay, Cuba, died Tuesday as security forces raided his hideout, officials here said. . . . Mehsud was captured in northern Afghanistan in late 2001, after the U.S. invasion in October that year. Following 25 months in the U.S. detention center at Guantanamo Bay, he was released in March 2004, according to the Defense Department. He apparently succeeded in concealing his identity while there. . . . In Afghanistan, he helped coordinate operations against U.S.-led forces”).

Second, experience also tells us that providing classified or other sensitive information to al-Qaeda members in federal court leads to breaches of security that tip off the terrorists and thwart their capture. As Stuart Taylor Jr. has written:

Consider the list of almost 200 unindicted co-conspirators, including the then-obscure Osama bin Laden, that prosecutors in the 1995 trial of 11 subsequently convicted Islamist terrorists were legally required to send to defense counsel. “That list was in downtown Khartoum within 10 days,” U.S. District Judge Michael B. Mukasey of Manhattan, who tried the case, recalled in a recent panel discussion. “And he [bin Laden] was aware within 10 days ... that the government was on his trail.”

In another judge’s case, Mukasey recalled, “there was a piece of innocuous testimony about the delivery of a battery for a cellphone”; this tipped off terrorists to government surveillance “and as a result [their] communication network shut down within days and intelligence was lost to the government forever, intelligence that might have prevented who knows what.” Yet another cost of the criminal-justice approach: For 11 years, federal marshals had to provide 24-hour protection to the two judges.¹¹⁴

And as Andrew McCarthy and Alykhan Velshi have written:

Under discovery rules, the government is required to provide to accused persons, among many other things, any information in its possession that can be deemed “material to preparing the defense.”¹¹⁵ Moreover, under current construction of the *Brady* doctrine, the prosecution must disclose any information that is even arguably material and exculpatory,¹¹⁶ and, in capital cases, any information that might induce the jury to vote against a death sentence, whether it is exculpatory or not (imagine, for example, the government is in possession of reports by vital, deep-cover informants explaining that a defendant committed a terrorist

114. Stuart Taylor Jr., *The Case for a National Security Court*, NAT’L J., Feb. 27, 2007, at 15.

115. FED. R. CRIM. P. 16(a)(1)(E)(i).

116. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See also* *United States v. Bagley*, 473 U.S. 667, 682 (1985) (discussing materiality as information with potential to undermine confidence in the outcome); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (“[S]howing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal”); *id.* at 437 (holding that, even when the prosecutor’s office and the investigating agency do not know of exculpatory information, they have an obligation to seek out and disclose any such information that may be in the wider government’s possession).

act but was a hapless pawn in the chain-of-command).¹¹⁷ . . . This is a staggering quantum of information, certain to illuminate not only what the government knows about terrorist organizations but the intelligence community's methods and sources for obtaining that information. When, moreover, there is any dispute about whether a sensitive piece of information needs to be disclosed, the decision ends up being made by a judge on the basis of what a fair trial dictates, rather than by the executive branch on the basis of what public safety demands. . . . To the extent classified information is implicated, it is also theoretically subject to the constraints of the Classified Information Procedures Act.¹¹⁸ Nevertheless, and palpably, people who commit mass murder, who face the death penalty or life imprisonment, and who are devoted members of a movement whose animating purpose is to damage the United States, are certain to be relatively unconcerned about violating court orders (or, for that matter, about being hauled into court at all).

. . . .

Clearly, however, foreign intelligence services (understandably, much like our own CIA) will necessarily be reluctant to share information with our country if they have good reason to believe that information will be revealed under the generous discovery laws that apply in U.S. criminal proceedings.¹¹⁹

Third, granting al-Qaeda detainees habeas litigation rights would also give them the power to compel witnesses under federal rules of civil procedure and pull American troops away from the battlefield. When enemy combatant detentions are at issue, the most relevant witnesses will typically be the soldiers who captured the detainee. America's own soldiers or those of our allies could be recalled from the battlefield or from civilian life to be cross-examined by the very enemy combatants whom they captured.¹²⁰

117. *Brady*, 373 U.S. at 87. See also *Moore v. Illinois*, 408 U.S. 786, 794–95 (1972).

118. Classified Information Procedures Act Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app §3 (2006)). In Article III courts, the Classified Information Procedures Act allows the government to substitute a summary of classified documents for the documents themselves. *Id.* §4. As a result, a criminal prosecution can go forward with neither the defendant nor his counsel ever seeing the actual classified documents. Military Rule of Evidence 505 is largely similar to the Classified Information Procedures Act and also permits the government to use substitution procedures in court-martial proceedings. MIL. R. EVID. 505(g)(2).

119. McCarthy & Velshi, *supra* note 106, at 9–12 (citations omitted).

120. As Stuart Taylor Jr. has written:

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Fourth, terrorist expectations of federal court relief, and the advice of lawyers to remain silent, would thwart vital interrogations that have led to stopping terrorist attacks on innocent civilians. The havoc caused by previous experience with unlimited lawsuits brought by terrorists has been summarized as follows:

[D]uring the brief habeas experience between 2004, when *Rasul* was decided, and 2006, . . . habeas litigation impeded interrogations critical to preventing further terrorist attacks. One of the detainees' coordinating counsel [Michael Ratner] boasted about this in public: "*The litigation is brutal for [the United States]. It's huge. We have over one hundred lawyers now from big and small firms to represent these detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they're doing. You can't run an interrogation . . . with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there?*"¹²¹

Navy Vice-Admiral Lowell Jacoby addressed the effect of court proceedings on interrogation in a declaration attached to the United States' brief in the *Padilla* litigation in the Southern District of New York. Vice-Admiral Jacoby was the Director of the Defense Intelligence Agency at the time. He noted in the Declaration that "[p]roviding [Jose Padilla] access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break—probably irreparably—the sense of

Should a Marine sergeant be pulled out of combat in Afghanistan and flown around the world to testify at a detention hearing about when, where, how, and why he had captured the detainee? What if the Northern Alliance or some other ally made the capture? And should the military be ordered to deliver high-level Qaeda prisoners to be cross-examined by other detainees and their lawyers?

Taylor, *supra* note 114.

121. *Oversight Hearing on Habeas Corpus and Detentions at Guantanamo Bay Before the Subcomm. On the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (transcript at 8–9, on file with the Texas Review of Law & Politics) (statement of Gregory G. Katsas, Principal Deputy Assoc. Att'y Gen., U.S. Dept. of Justice) (emphasis added). The public statement referenced occurred on March 21, 2005, and was published in Mother Jones. Onnesha Roychoudhuri, *The Torn Fabric of the Law: An Interview with Michael Ratner*, <http://www.motherjones.com/news/qa/2005/03/ratner.html> (last visited May 20, 2008).

dependency and trust that the interrogators are attempting to create.”¹²²

Finally, a separate host of dangers would materialize if habeas litigation rights granted to enemy combatants could be asserted to challenge decisions to transfer them to other countries. As described in a recent declaration of Joseph Benkert, Principal Deputy Assistant Secretary of Defense for Global Security Affairs in the Department of Defense:

[T]he United States also transfers GTMO [Guantanamo Bay] detainees, under appropriate circumstances, to the control of other governments for possible detention, investigation, and/or prosecution when those governments are willing to accept responsibility for ensuring, consistent with their laws, that the detainees will not continue to pose a threat to the United States and its allies. Such governments can include the government of a detainee’s home country, or a country other than the detainee’s home country that may have a law enforcement, prosecution, or other interest in the detainee.

....

Once a [Department of Defense] transfer of a GTMO detainee is proposed, including for possible detention, investigation, and/or prosecution, the views of interested United States Government agencies are considered. For such a transfer, it is the policy of the United States, consistent with the approach taken by the United State in implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, not to repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured. Therefore, if a transfer is deemed appropriate, a process is undertaken, typically involving the Department of State, in which appropriate assurances regarding the detainee’s treatment are sought from the country to whom the transfer of the detainee is proposed. . . . *If a case were to arise in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government unless the concerns were satisfactorily resolved. Circumstances have arisen in the*

122. Declaration of Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency at 8, *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), *adhered to, on reconsideration sub nom. Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *aff’d in part, rev’d in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev’d* 542 U.S. 426 (2004), *available at* http://www.pegc.us/archive/Padilla_vs_Rumsfeld/Jacoby_declaration_20030109.pdf.

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*past where the Department of Defense elected not to transfer detainees to their country of origin because of torture concerns.*¹²³

Were the diplomatic assurances regarding transfers to be revealed in court in habeas litigation, the dangers posed to both the American people and the transferees themselves were described in the declaration of Clint Williamson, Ambassador at Large for War Crimes Issues, as follows:

The paramount goal is to ensure, to the maximum extent reasonably possible, that transferring a detainee out of U.S. Government control prior to the cessation of hostilities will not increase the risk of further attacks on the United States or its allies. . . . Since 2002, approximately 395 detainees have departed Guantanamo for other countries including Afghanistan, Albania, Australia, Bangladesh, Bahrain, Belgium, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kuwait, Libya, Maldives, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sudan, Sweden, Tajikstan, Uganda, the United Kingdom, and Yemen.

. . . .

The views of the Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual Human Rights Reports, and of the relevant regional bureau, country desk, or U.S. Embassy are important in evaluating foreign government assurances and any individual persecution or torture claims, because they are knowledgeable about matters such as human rights, prison conditions, and prisoners' access to counsel.

. . . .

In instances in which the United States transfers an individual subject to assurances, it would pursue any credible report and take appropriate action if it had reason to believe that those assurances would not be, or had not been, honored. . . . *The Department of State's ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat its dealings with the foreign government with discretion.* Consistent with the diplomatic sensitivities that surround the Department's communications with foreign governments concerning allegations relating to torture, the Department of State does not unilaterally make public the specific assurances or other precautionary measures obtained in order to avoid the chilling effects of making such discussions public and the

123. Declaration of Joseph Benkert 2-4 (June 8, 2007) (on file with the Texas Review of Law & Politics) (emphasis added).

possible damage to our ability to conduct foreign relations. . . . There also may be circumstances where it may be important to protect sources of information (such as sources within a foreign government) about a government's willingness or capability to abide by assurances concerning humane treatment or relevant international obligations. *If the Department were required to disclose . . . its communications with a foreign government relating to particular mistreatment or torture concerns, that government, as well as other governments, would likely be reluctant in the future to communicate frankly with the United States concerning such issues.*¹²⁴

The disclosure in federal court of diplomatic assurances, which may reveal past abuses a foreign country may have since overcome, would certainly deter open communication between the U.S. and other countries generally, which would inevitably allow the U.S. less information about countries to which detainees are transferred, which could only hurt detainees' prospects for humane treatment following future transfers.

XII. THE EXAMPLE OF THE ALIEN TERRORIST REMOVAL COURT

In light of the risks posed by extending additional litigation rights to detained enemy combatants, several commentators have suggested that an entirely new "National Security Court,"¹²⁵ composed of Article III judges, be created to review detention decisions in a manner in which the aforementioned risks would be minimized. If any steps are taken towards granting courts additional authority to review detention decisions at all, those steps might more easily follow those Congress already took in 1996 when it created a currently existing special reviewing court to supervise the removal of alien terrorists.

In 1996, even before the development of a wider conflict with terrorists, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).¹²⁶ That statute created the Alien Terrorist Removal Court (ATRC), which is empowered to make decisions regarding the removal from this country of aliens believed to be deportable on the grounds they are complicit in terrorist activity as evidenced by classified

124. Declaration of Clint Williamson Ambassador at Large for War Crimes Issues 2-3, 5-7 (June 8, 2007) (on file with the Texas Review of Law & Politics) (emphasis added).

125. *E.g.*, Taylor, *supra* note 114; McCarthy & Velshi, *supra* note 106, at 6-9.

126. Pub. L. No. 104-132, 110 Stat. 1214, 1258.

information. These procedures govern aliens who are already in the United States.

The ATRC is a specialized court that employs strict procedures to protect classified information, and it can consist of the very same Article III judges designated to serve on the Foreign Intelligence Surveillance Court.¹²⁷ The same procedures protecting classified information apply in both courts.¹²⁸

Proceedings before the ATRC are designed to allow the Department of Justice to present classified evidence in camera and ex parte to prove that an alien is deportable because he or she engaged in terrorist activity. To initiate such a case, the Attorney General must certify that probable cause exists that the alien's removal under conventional proceedings "would pose a risk to the national security of the United States."¹²⁹

As it turns out, the government has not yet used the ATRC. That is because, according to the Department of Justice, "[i]n the experience of the [Department], most suspected alien terrorists are nonresident aliens removable in conventional . . . proceedings for conventional immigration violations (such as overstaying a visa) that can be easily proven without the use of classified evidence."¹³⁰ However, the Department went on to say why special protective procedures that allow for the use of classified evidence should remain available:

127. See 8 U.S.C. § 1532(a) (2006) ("The Chief Justice of the United States shall publicly designate 5 district court judges from 5 of the United States judicial circuits who shall constitute a court that shall have jurisdiction to conduct all removal proceedings. The Chief Justice may, in the Chief Justice's discretion, designate the same judges under this section as are designated pursuant to section 103(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(a)).").

128. See 8 U.S.C. § 1532(d) (2006) ("The provisions of section 103(c) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(c)) shall apply to removal proceedings in the same manner as they apply to proceedings under that Act."); 50 U.S.C. § 1803(c) ("The record of proceedings under this Act, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence.").

129. 8 U.S.C. § 1533(a)(1)(D)(iii) (2006).

130. OFFICE OF THE ATTORNEY GENERAL, REPORT TO THE CONGRESS REGARDING THE ALIEN TERRORIST REMOVAL COURT 2 (Apr. 12, 2002) (on file with the Texas Review of Law & Politics). This report was submitted in accordance with § 313 of the Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, 115 Stat. 1394, which added a new requirement that the Attorney General must submit a report "concerning the effect and efficacy of alien terrorist removal proceedings, including the reasons why proceedings pursuant to the section have not been used by the Attorney General in the past and the effect on the use of these proceedings." 8 U.S.C. § 1534(l).

Despite the fact that it has not been used, the ATRC remains a potentially important component of our enforcement apparatus. It was created to help the United States avoid the dilemma of either allowing alien terrorists to remain in the United States, on the one hand, or endangering national security by disclosing classified evidence in their removal proceedings, on the other. . . . In our view, the ATRC remains a potentially critical tool.¹³¹

The Report of the National Commission on Terrorism has articulated the same conclusion, stating, “The U.S. Government should not be confronted with the dilemma of unconditionally disclosing classified evidence or allowing a suspected terrorist to remain at liberty in the United States.”¹³² As a result, the National Commission on Terrorism officially recommended that “The Attorney General should further direct that where national security requires the use of secret evidence in administrative immigration cases, procedures for cleared counsel and unclassified summaries, such as those provided in the ATRC, should be used.”¹³³

Much like the current system for reviewing detention decisions, the statute creating the ATRC provides several protections for the accused, including the requirement that the alien be provided an unclassified summary of the classified evidence.¹³⁴ While such a procedure does not divulge classified information to the accused, the United States Court of Appeals for the Third Circuit, in *Kiareldeen v. Ashcroft*,¹³⁵ while not directly addressing the provisions of the ATRC regarding the provision of unclassified summaries,¹³⁶ has strongly indicated that the

131. Office of the Attorney General, *supra* note 130, at 3–4.

132. NAT'L COMM'N ON TERRORISM, COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM 32 (2000), available at www.gpo.gov/nct.

133. *Id.*

134. 8 U.S.C. § 1534(e)(3) (2006).

135. 273 F.3d 542 (3d Cir. 2001).

136. In *Kiareldeen*, an alien filed a petition for a writ of habeas corpus challenging the constitutionality of his detention pending resolution of removal proceedings, on grounds that United States used but failed to disclose to him classified evidence obtained by the FBI's Joint Terrorism Task Force. *Id.* at 544. The court was reviewing a district court's award of attorney's fees to the alien under the Equal Access to Justice Act (EAJA), which allows the award of attorneys' fees to a prevailing party unless “the court finds that the position of the United States was substantially justified.” 28 U.S.C. § 2412(d)(1)(A). The Third Circuit reviewed the award of attorneys' fees and reversed, finding that the position taken by the United States was substantially justified under the EAJA, and that the district court's decision to the contrary constituted “a clear error of judgment in the

government's interest in protecting classified information must be preserved, even during the course of proceedings pending which a suspected alien terrorist remains detained by the government.

In *Kiareldeen*, the Third Circuit reviewed a case in which, in the course of proceedings to remove an alien, the Immigration and Naturalization Service (INS) relied on, and showed to the judge in camera and ex parte, classified evidence based on multiple foreign intelligence information sources obtained by the FBI's Joint Terrorism Task Force. This information showed that Kiareldeen was a member of a foreign terrorist organization; that he was involved in a meeting planning the 1993 attack on the World Trade Center one week prior to the actual attack, at which a suicide bombing was discussed; and that he later threatened to kill Attorney General Janet Reno for her role in convicting those responsible for the 1993 bombing of the World Trade Center.¹³⁷ The INS provided Kiareldeen with several unclassified summaries of the classified evidence of the FBI, which explained that this type of information regarding terrorist investigations is "classified to protect against disclosure that would permit a terrorist or suspected terrorist organization, group, or individual to avoid preventive or detection measures, or would reveal FBI or other intelligence agency sources and methods by which such information is obtained."¹³⁸

Kiareldeen argued in the habeas corpus proceeding that he had been unlawfully detained by the INS on the basis of classified information that was not disclosed to him for national security reasons.¹³⁹ The district court had described the unclassified summaries as "lacking in either detail or attribution to reliable sources,"¹⁴⁰ but the Third Circuit pointedly

conclusion it reached upon a weighing of the relevant factors." 273 F.3d at 556, 554 (citing *Morgan v. Perry*, 142 F.3d 670, 683 (3d Cir. 1998)).

137. *Kiareldeen*, 273 F.3d at 546.

138. *Id.*

139. *Id.* at 547–48. The government, on the other hand, contended it had a duty to oppose Kiareldeen's position challenging the constitutionality of 8 U.S.C. § 1229a(b)(4)(B) as it was applied to him. *Id.* The statute provides in relevant part: "The alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter." 8 U.S.C. § 1229a(b)(4)(B) (2006).

140. See *Kiareldeen v. Reno*, 71 F.Supp.2d 402, 414 (D.N.J. 1999).

responded: “That the FBI would be unwilling to compromise national security by revealing its undercover sources, is both understandable and comforting. That a court would then choose to criticize the FBI for being unwilling to risk undermining its covert operations against terrorists is somewhat unnerving.”¹⁴¹ The Third Circuit further chastised the district court:

It completely disregards the often complex determinations involved in releasing confidential counter-terrorism intelligence into the public arena through its introduction into both administrative hearings and court proceedings. Such a criticism implies that the government may only utilize information against an individual in a civil context, such as in deportation procedures, if it also intends to commence criminal proceedings against that same individual. Such a fettering of the Executive Branch has no support in either case law or statute.¹⁴²

The statute creating the ATRC also provides for appellate review by the United States Court of Appeals for the District of Columbia Circuit,¹⁴³ the same court that is currently developing expertise in the area of enemy combatant detention law and policy as the one court authorized to hear appeals of enemy combatant detentions.¹⁴⁴

Another advantage of the ATRC process over the alternative approach of granting potential terrorists habeas litigation rights is that, whereas current habeas rules would allow a single federal judge to cause a detainee to be released even prior to the resolution of an appeal of the judge’s decision,¹⁴⁵ the statute that governs the ATRC provides that if the judge decides that an alien should not be removed and the Attorney General appeals such decision, the alien “shall remain in custody.”¹⁴⁶ Also, whereas allowing detainees to mount a habeas challenge to decisions to transfer them to the custody of other countries

141. *Kiareldeen*, 273 F.3d at 552.

142. *Id.* at 553.

143. 8 U.S.C. § 1535(a)(1) (2006).

144. Military Commission Act of 2006, Pub. L. No.109-366, § 950(g), 120 Stat. 2600, 2618.

145. FED. R. APP. P. 23(c) (“While a decision ordering the [habeas] release of a prisoner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety.”).

146. 8 U.S.C. § 1537(a)(1)–(2) (2006).

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would allow a federal judge to prevent such a transfer, the statute that governs the ATRC provides that:

[I]f the Attorney General, in consultation with the Secretary of State, determines that removal of the alien to [a] country . . . would impair a treaty obligation or adversely affect United States foreign policy, the Attorney General shall cause the alien to be removed to any country willing to receive such alien. . . .

. . . .
. . . If no country is willing to receive such an alien, the Attorney General may, notwithstanding any other provision of law, retain the alien in custody. . . . Any alien in custody pursuant to this subparagraph shall be released from custody solely at the discretion of the Attorney General and subject to such conditions as the Attorney General shall deem appropriate.”¹⁴⁷

For these reasons, should Congress decide to grant enemy combatants detained in the defense against terrorism even more procedural rights than the unprecedented protections they already enjoy, the procedures governing the already existing Alien Terrorism Removal Court could, with minimal alterations, allow that court to also address enemy combatant detention decisions while ensuring the integrity of classified information essential to preventing terrorist attacks.

XIII. CONCLUSION

As this Article has outlined, determinations of enemy combatant status have been within the province of the military since the Revolutionary War, and they were widely used in the South following the Civil War in defense against terrorist members of the Ku Klux Klan. During World War II, the judgments of military tribunals regarding the detention of even a U.S. citizen were upheld by the Supreme Court, under circumstances in which at least two of the Nazi saboteur’s designs were in serious question.

Today, the Geneva Conventions recognize that unlawful enemy combatants that disguise themselves as civilians and target civilians are not even deserving of the rights enjoyed by prisoners of war. Yet even as the number of enemy combatants

147. 8 U.S.C. § 1537(b)(2)(B)–(C) (2006).

detained by the U.S. military has significantly dwindled over time, Congress, following unprecedented federal judicial involvement in enemy combatant detention decisions, has granted current and future detainees unprecedented rights to have their detention decisions reviewed in federal court, although it has stopped short of granting detainees full habeas litigation rights. This Article has argued that taking the latter step would pose grave risks to the safety and security of Americans, and if any steps are taken toward additional review procedures at all at this time, they should mirror those of the Alien Terrorist Removal Court, which Congress created over a decade ago, well before the events of 9/11, as its design helps ensure the integrity of classified information vital to the successful defense against terrorism.