CHAPTER 4

UNCLASSIFIED DETAINEES

INTRODUCTION

The federal government's efforts to address the threat posed by Al Qaeda have produced a complex and disorienting landscape of new law. Military jurisdiction is used to sidestep constitutional due process in the criminal justice system. Criminal labels are used to sidestep international laws protecting combatants held in preventive military detention. The executive's mix-and-match approach, which insists on an unprecedented level of deference from the federal courts, has seen bedrock principles of the rule of law transformed into little more than tactical options.

The new normal in punishment and prevention is characterized by the heavy use of extra-legal institutions and the propensity to treat like cases in different ways. Terrorist suspects outside the United States are detained in a new regime of closed detention and interrogation at Guantánamo Bay, in Afghanistan, and on the British island of Diego Garcia. And the administration has established military commissions, outside the existing military and civilian legal systems, to try suspected terrorists for a range of crimes, some of which have never before been subject to military justice.

Within the United States, citizens and others suspected of threatening national security are subject to a blended system of criminal law enforcement and military detention. And despite the successful use of the criminal justice system in multiple national security-related prosecutions, federal officials have warned that military tribunals remain an option if efforts to win criminal convictions in ongoing prosecutions appear to be turning against them. This chapter describes these developments and explores the effects of post-September 11 counterterrorism efforts on the rule of law.

LEGAL BACKGROUND

> *The accumulation of all powers, legislative, executive and judiciary, in the same hands may justly be pronounced the very definition of tyranny.*[380]
>
> **James Madison**, Federalist Papers No. 47

As Madison's famous warning makes clear, the framers' experience with the British Crown had given them abundant reason to fear unchecked executive power. The Declaration of Independence was leveled against the "absolute tyranny" of an executive – King George III and his colonial governors – which had "affected to render the Military independent of and superior to the Civil Power" and had "depriv[ed them], in many Cases, of the Benefits of Trial

by Jury."[381] Writing against these practices, the framers put freedom from arbitrary detention by the executive "at the heart" of the liberty interests the U.S. Constitution protects.[382]

In the United States, the executive thus has a specific, limited set of legal tools under which to detain and prosecute those it suspects of participating in violent activities. First, Congress has enacted a long list of criminal statutes prohibiting certain conduct – from the possession of explosive materials to the provision of material support to a "terrorist" organization.[383] There are likewise civil statutes providing for administrative detention in some circumstances (for certain violations of immigration laws,[384] for example, or for reasons of mental incompetence[385]), and military statutes setting forth the rules of conduct for members of the U.S. armed forces.[386]

Anyone detained, whether for alleged violations of criminal law or for legitimate administrative purposes, is entitled to basic protections to ensure their detention is fair, including the due process guarantees of the Fifth Amendment.[387] In all criminal prosecutions, defendants are also entitled under the Sixth Amendment to the assistance of counsel and to confront witnesses against them. Critically, anyone detained by the executive can seek independent review of the legality of the detention by petitioning for a writ of habeas corpus in federal court. The privilege of habeas corpus cannot be suspended "unless when in cases of rebellion or invasion the public safety may require it,"[388] and even then only when Congress acts to do so.[389]

The executive's power to detain – based on criminal, civil, or military law – is also constrained by international law. A number of international human rights treaties protect the right to independent judicial review of detention – including the International Covenant on Civil and Political Rights and the American Convention on Human Rights.[390] These provisions apply even in cases involving terrorism. As the Inter-American Commission on Human Rights has emphasized:

> [E]ven in emergency situations, the writ of habeas corpus may not be suspended or rendered ineffective…. To hold the contrary view… [would] be equivalent to attributing uniquely judicial functions to the executive branch, which would violate the principle of separation of powers, a basic characteristic of the rule of law and of democratic systems.[391]

In the special context of international armed conflict, the United States must also abide by international humanitarian law – also known as the law of war. International humanitarian law establishes the basic rights that must be afforded any individual caught up in the conflict.[392] The primary instruments of humanitarian law are the four Geneva Conventions of 1949, which the United States has signed and ratified. The Geneva Conventions govern the treatment of wounded and sick soldiers (First Geneva Convention), sailors (Second Geneva Convention), prisoners of war (Third Geneva Convention), and civilians (Fourth Geneva Convention). Under this regime, "[e]very person in enemy hands must have some status under international law."[393] Specifically, one is "either a prisoner of war and, as such covered by the Third Convention, [or] a civilian covered by the Fourth Convention. *There is no intermediate status; nobody in enemy hands can be outside the law*."[394] The United States military has long

acknowledged this principle, explaining that those determined not to be prisoners of war are to be treated as "protected persons" under the Fourth Geneva Convention.[395]

Combatants and civilians are treated differently under humanitarian law. Combatants – defined principally as "members of the armed forces of a Party to a conflict" – may be held as prisoners of war until the end of the hostilities as a means of preventing them from returning to participate in the conflict.[397] Although they may be interrogated, they are required to provide only bare information about their identity and may not be tortured or threatened in any way.

A prisoner of war may not be tried for using violence in the conduct of war (the so-called "combatants' privilege"). He may be tried for war crimes or crimes against humanity, however, under the same justice system applicable to a member of the detaining state's military. (In the United States, members of the military are subject to court martial under the Uniform Code of Military Justice, as described below.) Individuals who do not meet the definition of prisoners of war – including individuals linked exclusively to international terrorist groups – have traditionally been treated as civilians.[398] Civilians who participate "directly" in hostilities may be criminally prosecuted for their conduct under the domestic criminal law of the captor.[399] If there is "any doubt" as to a detainee's status, Article 5 of the Third Geneva Convention requires that the detaining authority provide an individualized status hearing by a "competent tribunal." Until the tribunal makes a determination in the detainee's case, he or she must be regarded as a prisoner of war. The United States has long complied with these procedures,[400] and thousands of such hearings were held in the Vietnam and Gulf Wars.[401]

WHAT IS A PRISONER OF WAR?

Prisoners of war are persons who fall into enemy hands and belong to one of the following categories:

(1) Members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
    (a) They are commanded by a person responsible for his subordinates
    (b) They have a fixed distinctive sign recognizable at a distance;
    (c) They carry arms openly; and
    (d) They conduct their operations in accordance with the laws and customs of war.

Third Geneva Convention (1949), Article 4[396]

Finally, the United States has long maintained a separate body of substantive and procedural rules governing the prosecution and detention of members of the U.S. military and, consistent with the Geneva Conventions, prisoners of war. U.S. military courts, called courts martial, are established by Congress and governed by the Uniform Code of Military Justice (UCMJ).[402] Except for trial by jury, a court martial under the UCMJ has virtually every

protection provided to a civilian defendant prosecuted in the criminal justice system, including the right to appeal to an independent appellate court (with civilian judges) and the right to pursue a final appeal to the U.S. Supreme Court.[403]

EXTRA-LEGAL INSTITUTIONS

The broad contours of at least two of the novel post-September 11 structures are by now well known. First, the executive branch has established an off-shore military detention regime for the evaluation and disposition of international detainees. The detention camp at the U.S. Naval Base at Guantánamo Bay, Cuba is staffed by U.S. military personnel, and populated by some of the individuals seized by U.S. forces and their allies during the war in Afghanistan, as well as individuals seized by the United States in connection with separate counterterrorism operations in Bosnia, Gambia, and Pakistan.

In addition, the executive has established military commissions to try at least some of those held at Guantánamo and, potentially, non-citizen terrorism suspects in the United States.[404] Each of these structures operates outside the substantive and procedural rules applicable in U.S. criminal courts or U.S. courts martial, and outside international law governing the detention of prisoners of war under the Geneva Conventions. The decision whether a detainee is to be held indefinitely in administrative detention or is to be tried in a military commission appears to rest entirely within the discretion of the executive branch.

Guantánamo Bay

In early 2002, the U.S. military removed several hundred individuals from Afghanistan to Guantánamo Bay. There were initial reports that these individuals suffered physical mistreatment, especially during the transfer from Afghanistan, when they were bound hand and foot and forced to wear goggles and ear blocks that deprived them of sight and hearing; many were also required to shave their beards.[405] Since then, many additional detainees have been brought in from Afghanistan and other countries. About 660 detainees are now housed at Guantánamo – including nationals from at least 40 countries, speaking 17 different languages. Three are children, the youngest aged 13. Since the camp opened, about 70 detainees, mainly Afghans and Pakistanis, have been released.[406] The executive has refused to release the names of the detainees and has permitted access only to the International Committee of the Red Cross and some foreign diplomatic officials.

The U.S. government has declined to term any of the Guantánamo detainees either combatants, entitled to prisoner-of-war protections under the Geneva Conventions, or criminal suspects, entitled to the protections of the U.S. criminal justice system. The uncertain legal basis for the Guantánamo camp, and the uncertain status of those held there, has become the subject of widespread international concern.

LIFE IN CAMP DELTA

Since April 28, 2002, the Guantánamo detainees have been kept in a newly built camp of wire mesh-sided cells called Camp Delta. The maximum security cells are approximately eight feet by seven feet, and the mesh walls permit communication among neighboring cells.[407] The children are housed separately.[408] The detainees have not been charged with any crimes, and they have no idea how long they will be held or if they will eventually be tried. About 120 have reportedly been rewarded for cooperating with interrogators; they have been moved to a medium security wing, called Camp 4, where they live in groups of ten and are allowed more exercise time, books, and some other liberties. Non-cooperating detainees are allowed between one and four hours of exercise per week – although under the Geneva Conventions, even detainees in disciplinary confinement must be provided a minimum of two hours of exercise a day.[409] Lights are kept on 24 hours.[410] There have been 32 reported suicide attempts.[411]

While U.S. officials have asserted that the Guantánamo prisoners are "battlefield" detainees who were engaged in combat when arrested,[412] some were arrested in places far from Afghanistan. Soon after the camp opened, Guantánamo became home to six Algerians (five claiming naturalized Bosnian citizenship), forcibly transported by U.S. officials from Bosnia to Guantánamo. As discussed in more detail in Chapter 5, Bosnian officials arrested the men in October 2001 on charges of plotting to blow up the U.S. Embassy in Bosnia, and in January 2002 handed them over to the United States in defiance of two separate orders from the Bosnian courts.[413] Also in Guantánamo are two U.K. residents who were arrested in November 2002 during a business trip to Gambia – Bisher al-Rawi and Jamil al-Banna. Al-Rawi, an Iraqi, has lived in the United Kingdom for 19 years, having fled with his father from Saddam Hussein's regime. The British government granted Al-Banna, a Jordanian, refugee status in 2000 based on a risk of persecution in his home country. The Gambian police kept the two men in incommunicado detention for a month, while Gambian and American officials interrogated them. In December 2002, U.S. agents took the men to the U.S. military base at Bagram, Afghanistan, and, in March 2003, transported them to Guantánamo, where they remain.[414] At least one other Guantánamo detainee is reported to have been arrested in Africa.[415]

Of those Guantánamo detainees who were taken from Afghanistan, many were handed over to American forces after being picked up by Northern Alliance warlords or other third parties.[416] In many cases, U.S. officials' certainty as to the detainees' identity has depended on the accounts of Northern Alliance commanders or others who might have exploited U.S. eagerness to capture terrorists as a means of settling personal or factional scores, or harvesting a generous ransom. Indeed, U.S. forces had dropped leaflets promising "millions of dollars for helping… catch Al Qaeda and Taliban murderers… enough money to take care of your family,

your village, your tribe for the rest of your life."[417] In the absence of individualized Article 5 hearings afforded battlefield detainees under the Third Geneva Convention – hearings that determine the status of those detained – there is genuine concern that noncombatants may have been caught up in the Guantánamo net. Many of the detainees' families insist that their detained relatives were involved in legitimate humanitarian work or other activities unrelated to combat or terrorism.[418]

INNOCENTS AT GUANTÁNAMO?

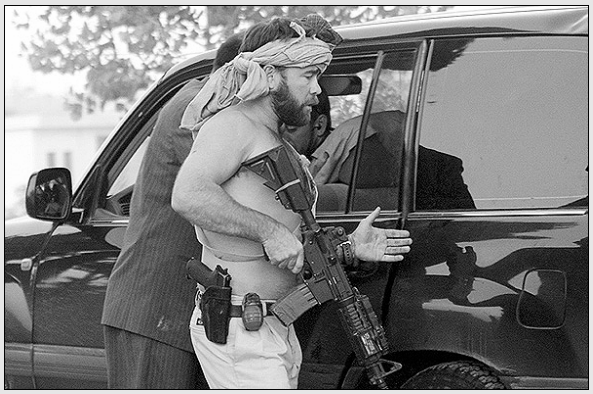
Though the administration had described the Guantánamo detainees collectively as "among the most dangerous, best trained vicious killers on the face of the earth,"[419] U.S. officials have now conceded that at least some are harmless enough to be set free. Four detainees were released in October 2002, for example, three Afghans and a Pakistani. Two of the Afghans appeared upwards of seventy years old. One of them, "Mohammed Sadiq, walked with a cane and claimed to be 90." Another, "Mohammed Hagi Fiz, a toothless and frail man with a bushy white beard, claimed to be 105 years old… [and weighed] 123 pounds. Fiz said he was arrested by American forces eight months ago while being treated at a clinic in the central Afghan province of Uruzgan. Tied up and blindfolded, he was flown by helicopter to Kandahar and later by plane to Guantánamo…. 'My family has no idea where I am… ,' Fiz said. 'All they know is that I went to a doctor for treatment and disappeared."[420]

Having failed to provide Article 5 hearings, the administration has advanced various arguments to explain the basis for the Guantánamo detentions. With respect to Taliban fighters captured during the Afghanistan war, the administration has argued that while these fighters might be the official armed force of Afghanistan (a party to the Geneva Conventions), the Taliban army was a criminal force whose members did not distinguish themselves from civilians, and who made a practice of committing war crimes, in violation of Article 4(A)(2) of the Third Geneva Convention. On this basis, the administration argues that all Taliban soldiers are undeserving of Geneva Convention prisoner-of-war protections.[421]

The blanket labeling as "unlawful" of an entire nation's regular army because of a practice of even widespread war crimes is unprecedented.[422] The United States respected the prisoner-of-war status of German soldiers in World War II, the armed forces of North Korea in the Korean War, North Vietnamese forces (and the guerrilla National Liberation Front) in the Vietnam War, and Iraqi military in both Gulf wars.[423] Further, while the Taliban army did not have uniforms of the type customary in Western armies, there are abundant reports of a trademark black turban worn by Taliban members.[424] There is thus some question about whether the Taliban had a "fixed distinctive sign recognizable at a distance" – the Geneva Convention standard for identifying combatants.[425]

With respect to non-Taliban Al Qaeda fighters, the administration has argued that they have no right under international law to participate in hostilities because Al Qaeda is not the official armed force of a party to the Geneva Conventions. The administration also argues that Al Qaeda fails to meet the minimum standards for a lawful militia or other irregular armed force under Article 4(A) of the Third Geneva Convention because Al Qaeda members do not wear uniforms or otherwise distinguish themselves from the general population, and members

make a practice of attacking civilians in violation of the law of war. But whatever Al Qaeda's status, the United States remains bound to Geneva Convention requirements, which ensure that individuals who are not a part of an official armed force – even if they have "directly" engaged in combat[426] – are subject to criminal prosecution, not indefinite detention without judicial review.[427] In any case, battlefield reports from Afghanistan have indicated that the distinction between Taliban and Al Qaeda forces was not always clear. For example, at least one Taliban unit was an embedded Al Qaeda contingent, apparently "forming part of" the regular Taliban army.[428] For this reason, an Article 5 hearing is essential.



Armed U.S. Forces are not always in uniform. This photograph, taken by the Associated Press, shows a U.S. Special Forces soldier talking to colleagues after an assassination attempt on President Hamid Karzai in Afghanistan on September 5, 2002.

Photo: Tom Gilbert, AP Wide World

As for the Bosnian detainees and others taken into custody far from the battlefield of an armed conflict, the law of war has no bearing; civilians detained by the U.S. government on suspicion of terrorist activities are entitled to the protections surrounding international extradition and criminal prosecution. At least one court has already made this clear. In September 2002, in a case brought by four of the six Bosnian men now held at Guantánamo, the Human Rights Chamber of Bosnia and Herzegovina found that the transfer of the men to U.S. custody without due process and in defiance of a court order was a violation of the European Convention on Human Rights and other applicable law. Bosnian officials had previously indicated that the six could be turned over to the United States if they were wanted on U.S. criminal warrants, but the U.S. Embassy had refused to say whether warrants had issued, and one senior U.S. official dismissed the matter of warrants as a "formality."[429]

THE LEGAL STATUS OF GUANTÁNAMO: "SOVEREIGNTY" VERSUS "COMPLETE JURISDICTION AND CONTROL"

Some family members of the Guantánamo detainees have filed suit in U.S. federal court, asking the courts to review the legal basis for their relatives' detention. In March 2003, the U.S. Court of Appeals for the D.C. Circuit found that the detainees' families had no right to "invoke the jurisdiction of [U.S.] courts to test the constitutionality or the legality of restraints on [the detainees'] liberty,"[430] because they were not being held on U.S. "sovereign" territory. The court based its decision on *Johnson v. Eisentrager*, a 1950 U.S. Supreme Court case involving 21 German nationals in U.S. custody. The Germans had been tried in a U.S. military commission and convicted of war crimes for assisting Japanese forces in China after the surrender of Germany during World War II.[431] In *Eisentrager*, the Supreme Court held that the Germans had no right to petition U.S. courts for habeas corpus because "the scenes of their offense, their capture, their trial, and their punishment" had all occurred outside the sovereign territory of the United States.[432] In the Guantánamo cases, the D.C. court of appeals dismissed as irrelevant the distinguishing fact that the Germans had been charged and tried under applicable law (the Guantánamo detainees have not).[433] Rather, the court of appeals found that under the terms of the perpetual lease agreement signed by Cuba and the United States in 1903 (a lease that cannot be terminated without the consent of both parties),[434] "ultimate sovereignty" of Guantánamo is reserved to Cuba. Despite the fact that the lease also gives the United States "complete jurisdiction and control" over the territory – authority that the United States has exercised for more than a century – the court held that the U.S. courts had no power to review the United States' current actions there.[435]

Military Commissions

> *We all want to fight terrorism . . . [but] shredding the Constitution – which applies to all 'persons,' not just citizens – isn't the way to do it.* [436]
>
> **Robert A. Levy**, Cato Institute

President Bush triggered an avalanche of public debate when he issued an executive order on November 13, 2001, announcing the establishment of military commissions (the November Order).[437] The November Order authorizes the creation of military commissions for trying non-citizens suspected of "violations of the laws of war and other applicable laws."[438] The order applies to a non-citizen if the president unilaterally finds "reason to believe that such individual… has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore," that could harm the United States.[439] The prosecutor and the adjudicating panel in such proceedings will be military officers answerable only to the president. The president will also be responsible for final review of any verdict.[440] Under the order, proceedings may be conducted partly or entirely in secret, using secret evidence and witnesses (including hearsay evidence from unidentified informants).[441]

The Defense Department subsequently issued more detailed procedural rules for the commissions in a March 21, 2002 Military Commission Order,[442] and an April 30, 2003 set of

Military Commission Instructions.[443] Both sets of rules evidence some effort to address a number of concerns raised by bipartisan critics of the commissions. The rules affirm the presumption of innocence;[444] require that guilt be proven beyond a reasonable doubt;[445] provide for military defense counsel at government expense; and permit limited participation by civilian defense counsel at the defendants' expense.[446] Despite these improvements, however, military commission proceedings provide markedly fewer fairness safeguards than either U.S. criminal or military court proceedings. First, the commission structure will be under the president's complete control, with no appeal to any civilian court. Second, despite White House assurances that military commissions would be used to try only "enemy war criminals" for "offenses against the international laws of war,"[447] the chargeable offenses expand military jurisdiction into areas never before considered subject to military justice. This unprecedented jurisdictional reach is achieved by broadening the definition of "armed conflict"[448] – the Geneva Convention term that establishes when "the law of war" is triggered – to include isolated "hostile acts" or unsuccessful attempts to commit such acts, including crimes such as "terrorism" or "hijacking" that traditionally fall within the ordinary purview of the federal courts.[449] Third, the government has broad discretion to close proceedings to outside scrutiny in the interest of "national security."[450]

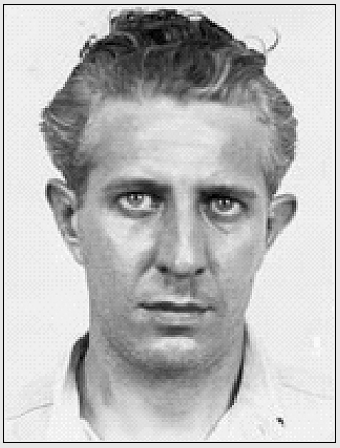
COMPARING FAIRNESS PROTECTIONS

RIGHTS	U.S. CRIMINAL COURT	U.S. COURT MARTIAL	MILITARY COMMISSION
Jury	Yes	No	No
Counsel of defendant's choice	Yes	Yes	No
Know all evidence against the defendant	Yes	Yes	No
Obtain all evidence in favor of the defense	Yes	Yes	No
Attorney-client confidentiality	Yes	Yes	No
Speedy trial	Yes	Yes	No
Appeal to an independent court	Yes	Yes	No
Remain silent	Yes	Yes	Yes
Proof beyond a reasonable doubt	Yes	Yes	Yes

Finally, the military commission rules impose substantial restrictions on the nature of legal representation to which defendants are entitled. Commission defendants will be represented by assigned military lawyers – even if they do not want them.[451] While defendants will also be entitled to (eligible) civilian lawyers, there are strong personal and professional disincentives for civilians to serve. Unless a defendant or his family or friends can provide

financing, civilian defense lawyers will receive no fees and will themselves have to cover all personal and case-related expenses.[452] Civilian defense lawyers must be U.S. citizens and eligible for access to information classified "secret."[453] During the trials, civilian lawyers may not leave the site without Defense Department approval; and they may not discuss the case with outside legal, academic, forensic, or other experts. [454] Furthermore, civilian lawyers (as well as their clients) can be denied access to any information – including potential exculpatory evidence – to the extent the prosecution determines it "necessary to protect the interests of the United States."[455] The Defense Department may (without notice) monitor attorney-client consultations; and lawyers will be subject to sanction if they fail to reveal information they "reasonably believe" necessary to prevent significant harm to "national security."[456]

The scope of these restrictions – and the extent to which they are inconsistent with well-settled rules of legal ethics – have provoked a troubled debate within the legal profession. The National Association of Criminal Defense Lawyers has taken the position that it is "unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation."[457] In contrast, the National Institute of Military Justice has urged qualified civilian defense counsel to "give serious consideration" to participating, on the ground that the "highest service a lawyer can render in a free society is to provide qualified independent representation for those most disfavored by government."[458] The American Bar Association made no specific recommendation regarding civilian counsel participation, but adopted a resolution "call[ing] upon" Congress and the executive to ensure that defendants in military commission trials "have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC), and [to] oppos[e] any qualification requirements or rules that would restrict the full participation of CDC who have required security clearances."[459]



THE PRECEDENT FOR MILITARY COMMISSIONS: *EX PARTE QUIRIN*

Photo: Richard Quirin

The executive branch has argued that military tribunals have an established history in the United States, and in particular that the "language of [the president's November 2001] order is similar to the language of a military tribunal order issued by President Franklin Roosevelt."[460] In the World War II case that the current executive refers to, *Ex Parte Quirin*,[461] the U.S. Supreme Court upheld the jurisdiction of a military commission to try eight German army soldiers, including one U.S. citizen, for violations of the law of war. (All were found guilty, and six were executed.) But the circumstances of the *Quirin* defendants were quite different from those of the "enemy combatants" apparently subject to military prosecution today. The *Quirin* defendants surrendered to the FBI, admitting that they were members of the official armed force of a state with which the United States was in a declared war. They snuck "behind enemy lines," landing from a military submarine. Two of the four crimes they were charged with – "relieving, harboring or corresponding with the enemy," and "spying" – were specifically defined in the Articles of War passed by Congress; these Articles had authorized trial "either by court martial or military commission."[462] Meanwhile, several U.S. civilians who had allegedly conspired with the Nazi saboteurs in *Quirin* were arrested and tried in U.S. criminal courts, not in military commissions.[463] Today, Congress has neither declared general war, nor authorized the president's planned military commissions. The "enemy combatants" so far designated do not appear to be members of any uniformed armed force, yet they are subject to military prosecution for offenses never before considered war crimes.[464] They are not also entitled to confidential communications with their counsel; access to all relevant evidence; and review of the lawfulness of the proceedings in the U.S. Supreme Court – all of which were afforded to the *Quirin* defendants.

International Reaction

> *[International cooperation in fighting terrorism would be] imperiled when foreign governments don't trust us to respect the basic rights of the people we ask them to send us.*[465]
>
> **General James Orenstein**, Former Associate Deputy Attorney

On July 3, 2003, the Defense Department announced that six current detainees at Guantánamo were eligible for trial by military commission. Among these six were U.K. citizens Moazzam Begg and Feroz Abassi, and Australian citizen David Hicks.[466] Although the identities of the

other three have yet to be revealed, the U.S. government reportedly does not consider the six to be "important terrorist figures."[467] As American officials explained: "[T]he first group of people charged would be low-level suspects, who, in exchange for plea bargains, might be persuaded to divulge information."[468]

The designation of citizens from two close U.S. allies sparked serious protests in both countries. The U.K. government advanced "strong reservations about the military commission," which it vowed it would "continue to raise… with the U.S."[469] Some 200 Members of Parliament signed a petition calling for repatriation of the British detainees for trial in the United Kingdom.[470] Feroz Abassi's mother had earlier sought a court order directing the British Foreign and Commonwealth Office to intercede on her son's behalf. Though a British appeals court declined to grant relief in November 2002, the three-judge panel strongly criticized U.S. policy: "What appears to us to be objectionable is that Mr. Abassi is subject to indefinite detention in territory over which the United States has exclusive control, with no opportunity to challenge the legitimacy of his detention before any court or tribunal." The court expressed the hope that the "anxiety we have expressed will be drawn to their attention."[471]

The United States had indicated that it would extradite the British detainees to the United Kingdom if "[t]hey can handle the prosecution," but the U.K. government concluded it could not guarantee prosecution because of the difficulty in obtaining evidence admissible in a British court.[472] Ultimately, U.K. Attorney General Lord Goldsmith sought and obtained some concessions for the U.K detainees – most important, promises not to seek the death penalty or to monitor their consultations with counsel, and to consider letting them serve their sentences in U.K. prisons.[473] The United States offered the same concessions to the Australian government regarding David Hicks.[474]

FALSE CONFESSIONS?

Before learning that his son was slated for a military commission trial, Azmat Begg, Moazzam Begg's father, had described receiving an "ominous message" from his son, saying he was going to do "something drastic which was going to affect the whole family." Begg's father expressed fear that this "might mean that his son had made a false confession to secure better treatment, or at least a resolution to his long months of doing nothing and being charged with nothing at Guantánamo Bay."[475] According to his family, by July 2003, Begg had been held in a "windowless cell" in Bagram, Afghanistan, for a year, and in Guantánamo Bay for an additional five months.[476] The possibility that prolonged detention and questioning might produce such a false confession is a familiar concern to law enforcement, sometimes referred to as the "wear down" process.[477] One forensic psychologist has concluded, for example, that "an innocent suspect could be made to admit almost anything under the pressure of continuous questioning and suggestion."[478] By way of comparison, in the famous New York Central Park "Jogger Case," five defendants were convicted based on their false confessions of rape. The boys, 14 to 16 years old, had been "in custody and interrogated on and off for 14 to 30 hours"[479]; law enforcement manuals generally caution against interrogations lasting longer than two hours.[480]

Soon after these offers were extended, on August 11, 2003, U.S. officials suggested that the three 'allied' detainees were "expected to plead guilty to war crimes… and to renounce terrorism and assist investigators in exchange for a firm release date."[481]

The perception of special treatment for the U.K. and Australian defendants has provoked resentment in other countries. An Egyptian commentator, for example, noted that exempting British and Australian suspects from the death penalty invites accusations of "selective justice," and "risk[s] further condemnation on an already sensitive issue."[482] Indeed, as noted by Khalid al-Odah, a former Kuwaiti air force pilot whose son Fawzi is at Guantánamo: "Now that the [Iraq] war has ended, the [Kuwaiti] government is becoming more active on this issue…. The fact that the British raised issues made the Kuwaitis push more." [483] On August 21, 2003, ten national law society and bar leaders from Sweden, Scotland, Northern Ireland, Australia, England and Wales, and Canada issued a public letter stating that "only two legally acceptable courses of action" were now open to the United States with regard to the Guantánamo detainees: trial in normal U.S. civilian courts or repatriation for trial in their home countries.[484] "In our view it is not for the US government to 'concede' basic rights as a favour. All detainees are entitled to a fair and lawful trial as of right."[485]

DIFFERENT TREATMENT OF LIKE CASES

> *Indeed… any American citizen seized in a part of the world where American troops are present – e.g., the former Yugoslavia, the Philippines, or Korea – could be imprisoned indefinitely… if the Executive asserted that the area was a zone of active combat.*[486]
>
> *Hamdi v. Rumsfeld* (**Motz, J., dissenting**)

A second feature of the new normal in punishment and prevention is the different treatment of individual cases with seemingly identical features. The choice to subject someone to military or criminal detention, to declare someone an "enemy combatant" or a prisoner of war, seems unconstrained by any guiding set of principles. As one Justice Department official put it: "There's no bright line."[487]

John Walker Lindh and Yaser Hamdi

The executive branch has accused both John Walker Lindh and Yaser Hamdi of supporting terrorism and participating in hostilities against the United States in Afghanistan. Both are U.S. citizens, captured in Afghanistan in late 2001 by Northern Alliance warlord Abdul Rashid Dostum, and handed over to U.S. forces shortly thereafter. Yet the executive brought criminal charges against Lindh through the normal civilian criminal justice system, affording Lindh all due process protections available under the Constitution, once he was brought to the United States. Hamdi, in contrast, has remained in indefinite incommunicado detention for 16 months. He has never seen a lawyer.

John Walker Lindh

Lindh traveled to Afghanistan in 2002, according to his plea bargain statement, with the purpose of "assist[ing] the Taliban government in opposing the warlords of the Northern Alliance."[488] He arrived at the front on September 6, 2001, five days before the September 11 attacks.[489] Northern Alliance forces captured Lindh in November 2001, and turned him over to U.S. custody on December 1. Later that month he was returned to the United States. Federal prosecutors soon brought a ten-count criminal indictment against Lindh in federal district court in Virginia, charging him with conspiring with Al Qaeda to kill U.S. nationals, and other offenses.[490] Lindh's counsel immediately sought to suppress the government's strongest evidence – confessions Lindh had purportedly made while shackled, cold, hungry, dehydrated and in feverish pain from an untreated leg wound, and after having requested access to a lawyer.[491] FBI agents persisted in interrogating Lindh even after learning that Lindh's family had retained counsel for him, apparently ignoring repeated warnings from a Justice Department lawyer that evidence obtained by such questioning would likely be inadmissible in court.[492]

A VOICE FROM THE JUSTICE DEPARTMENT

In December 2001, Jesselyn Radack, a lawyer in the Justice Department's Professional Responsibility Advisory Office, advised interrogators in Afghanistan by e-mail that continued FBI questioning of Lindh would "not [be] authorized by law," because Lindh's family had retained legal counsel for him. In March 2002, after federal district court Judge T.S. Ellis III requested copies of all Justice Department correspondence about the Lindh interrogations, Radack discovered that the Department had submitted only two of the dozen or more e-mails she had written. She later insisted that "[t]he e-mails were definitely relevant… [because t]hey undermined the public statements the Justice Department was making about how they didn't think Lindh's rights were violated." Radack also charged that "[s]omeone deliberately purged the e-mails from the file. In violation of the rules of federal procedure, they were going to withhold these documents from the court." Eventually, the Justice Department did provide the most important of the emails for submission to the judge. Soon after, Radack left the Justice Department to work at a private law firm. When the e-mails were anonymously leaked to Newsweek in June 2002, the Justice Department opened a criminal investigation of Radack.[493]

Having initially touted Lindh's prosecution as a "major terrorist case,"[494] the government began negotiating to settle the case. Lindh agreed to cooperate with government investigators and to plead guilty to "supplying services as a foot soldier for the Taliban against the Northern Alliance while carrying a rifle and two grenades." All other charges were dismissed, including allegations that Lindh had taken up arms against the United States.[495] Because the case did not go to trial, the evidence of Lindh's ill-treatment after capture was never examined in court. He was sentenced to up to 20 years in prison.

Yaser Hamdi

Northern Alliance forces captured Yaser Hamdi, an American citizen raised in Saudi Arabia, in November 2001, and handed him over to U.S. custody soon after. In January 2002, U.S. officials brought Hamdi to Guantánamo, where his interrogators later discovered his U.S. citizenship. In April 2002, the military transported him from Guantánamo to a U.S. military base in Norfolk, Virginia. In contrast with its treatment of Lindh, however, the executive declined to bring criminal – or any specific – charges of misconduct. Instead, the president designated Hamdi an "enemy combatant."[496]

On June 11, 2002, Hamdi's father, Isam Fouad Hamdi, filed a habeas corpus petition on Hamdi's behalf, as "next friend," seeking review of the lawfulness of his son's detention.[497] To enable the petitioner to pursue his case, federal district court judge Robert G. Doumar ordered the government to allow a public defender to meet with Hamdi in private. The government appealed, and the U.S. Court of Appeals for the Fourth Circuit vacated the original order. It remanded the matter to the district court to reconsider the extent to which the court had jurisdiction to review Hamdi's detention as a designated "enemy combatant."[498] On August, 16, 2002, Judge Doumar rejected the executive's contention that only minimal judicial review of this designation was appropriate and ordered Justice Department attorneys to produce for the court's private review the factual evidence underlying the "enemy combatant" determination. The court also demanded to know the "screening criteria utilized to determine [Hamdi's] status," as well as information regarding those who had made the determination.[499] Judge Doumar told the government attorneys that he would not be a "rubber stamp"[500] for the executive.

On appeal, the Fourth Circuit again vacated Judge Doumar's order.[501] While ruling largely in the executive's favor, the appeals court began by rejecting the "sweeping proposition . . . that with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."[502] Still, it found "sufficient" basis upon which to conclude that "Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by… the Constitution and… [is] consistent with the… laws of Congress," based on the purportedly "undisputed" fact that "Hamdi was captured in a zone of active combat operations in a foreign country," and has been "determine[ed] by the executive… [to be] allied with enemy forces."[503]

Dissenting from the denial of Hamdi's request for rehearing en banc (by the entire court), several Fourth Circuit judges harshly criticized the panel's factual premise. As Judge Michael Luttig explained: "*[I]t simply is not 'undisputed' that Hamdi was seized in a foreign combat zone*… since Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances."[504] Judge Diana Gribbon Motz pointed out the "chilling" ramifications of the panel's ruling: "[A]ny of the 'embedded' American journalists, covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, could be imprisoned indefinitely without being charged with a crime or provided access to counsel if the Executive designated that person as an 'enemy combatant.'" [505]

Hamdi's lawyers anticipate seeking U.S. Supreme Court review in the fall. Hamdi remains at the military brig in Virginia, held in incommunicado detention. There is no information on his condition.

James Ujaama and José Padilla

José Padilla and James Ujaama are both U.S. citizens accused of plotting with Al Qaeda to prepare for terrorist operations in the United States. They were both arrested in the United States. Ujaama was indicted and then entered a plea agreement with prosecutors. Padilla, however, has never been formally charged with any offense. Instead, the president designated him an "enemy combatant," and the Defense Department took him into military custody.

James Ujaama

U.S. citizen James Ujaama was initially arrested and detained under the federal material witness statute on July 22, 2002.[510] On August 28, 2002, he was indicted on two counts of conspiracy to provide material support and resources to Al Qaeda in the form of training, facilities, computer services, safe houses, and personnel. The Justice Department alleged that he had planned with others to construct a firearms and military training camp in Oregon.[511] On April 14, 2003, Ujaama entered a guilty plea to a charge of providing goods and services to the Taliban. He acknowledged that he had assisted a co-conspirator's travel to Afghanistan, that he had delivered currency to and installed software programs for Taliban officials in Afghanistan, and that he had participated in a website that raised money for Taliban programs. He will serve two years in prison, and has pledged to cooperate with law enforcement authorities.[512]

PROVIDING MATERIAL SUPPORT OR RESOURCES TO A FOREIGN TERRORIST ORGANIZATION

Since September 11, 2001, federal prosecutors have charged a growing number of individuals with knowingly "providing material support or resources" to an organization the Secretary of State has designated as a "foreign terrorist organization." The material support ban was first established in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), and later amended by the USA PATRIOT Act.[506] Although the statute was used only three times before September 11, the Ninth Circuit Court of Appeals held in 2000 that two components of AEDPA's lengthy definition of material support, the provision of "training" and "personnel," were unconstitutionally vague and could criminalize a wide range of First Amendment-protected speech.[507] In amending AEDPA, however, the USA PATRIOT Act did not take out either of these terms, and instead added "expert advice or assistance" to the definition. David Cole, a professor at Georgetown Law School, has argued that the statute is now so vague "it would make it a crime for a Quaker to send a book on Gandhi's theory of nonviolence to the leader of a terrorist group."[508] Questions about the constitutionality of the statute have arisen in the cases of those charged under the amended law—resulting in conflicting decisions in federal courts.[509] The issue will likely be resolved only when cases involving the material support statute go before the U.S. Supreme Court.

The Ujaama prosecution is by no means the only national security-related case in which the executive has employed civilian criminal justice mechanisms to obtain convictions. A jury trial in Detroit of four non-citizens from Algeria and Morocco, for example, recently resulted in two defendants being

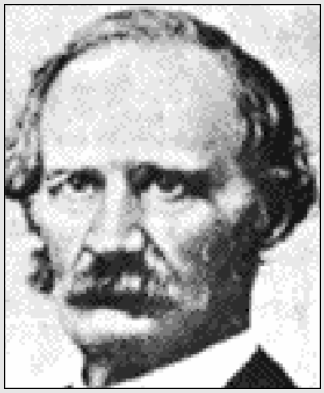
convicted of conspiracy to provide material support or resources to terrorist activities and other related charges. A third defendant was found guilty of conspiracy relating to fraud and misuse of visas, and the fourth man was acquitted of all charges. The federal prosecutor cited the case as proof that "with diligence and hard work, the FBI and Justice Department have the tools, the knowledge, the expertise and the will to stop terrorists before they inflict harm on our great nation and our allies."[513]

José Padilla

U.S. citizen José Padilla was arrested in May 2002, just two months before Ujaama's arrest, at Chicago's O'Hare Airport. After holding Padilla for a month under the same federal material witness statute, and providing him appointed criminal defense counsel, the government reversed course. On June 9, 2002, the president formally designated Padilla an "enemy combatant"[514] and ordered him transferred to a military brig in South Carolina. Attorney General John Ashcroft announced that Padilla had had contact with Al Qaeda members during his recent visit to Pakistan, and had returned to begin preparing a "dirty bomb" – a conventional explosive containing radioactive materials.[515] For more than a year, Padilla has had no contact with the outside world, including the lawyers appointed to represent him.

Padilla's appointed attorneys filed a petition for habeas corpus in federal court; the government opposed.[516] As in Hamdi's case, Justice Department lawyers argued, the designation of Padilla as an "enemy combatant" merits "great deference" by the court because the president was acting as commander-in-chief in making the determination.[517] At most, the court could conduct minimal review to confirm that the president had "some evidence" to support the designation.[518] The Justice Department also argued that the "Authorization for Use of Military Force" that Congress passed after the September 11 attacks authorized the president to make such determinations.[519]

Against this, Padilla's appointed counsel – together with former military lawyers, retired federal judges, and a wide political range of legal experts who filed briefs as friends of the court in the case (including the Lawyers Committee) – have maintained that the government's treatment of Padilla is illegal.[520] Their arguments are several. First, all U.S. citizens are entitled to protection under the Fifth and Sixth Amendments, including the right to counsel; the right to a speedy jury trial; the right to be informed of the specific charges against them; the right to confront witnesses against them; and the right to have compulsory process to call witnesses in their favor. The Constitution identifies no "enemy combatant" exception to these basic rules. Second, federal law 18 U.S.C. § 4001(a) makes clear that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[521] Finally, while the post-September 11 "use of force" resolution was intended to authorize action against any one who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11," the government has not accused Padilla of involvement in those attacks.[522]



EX PARTE MILLIGAN

Lamdin P. Milligan, a citizen of Indiana during the Civil War, was, like José Padilla, accused of plotting against the United States. Milligan was alleged to be a leader of a secret organization, the "Sons of Liberty," that "conspire[ed] against the draft, and plott[ed] insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government."[523] Yet the U.S. Supreme Court rejected the government's effort to try Milligan by military tribunal: "It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility [*i.e.,* acts permitted to combatants under the law of war] against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties*?*"[524] On the contrary, the Court held, military trials for violations of the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[525] *Ex Parte Milligan* remains binding precedent today.

The first federal court to rule on the *Padilla* case issued a mixed opinion. Judge Michael Mukasey accepted the executive's contention that Padilla could be designated an "enemy combatant."[526] He ruled that to hold Padilla under this designation, the executive only had to provide "some evidence" that he was "engaged in a mission against the United States on behalf of an enemy with whom the United States is at war."[527] But even this highly deferential "some evidence" standard required more than the conclusory assertions the government had thus far provided. A declaration submitted by a military official could not satisfy the executive's burden unless Padilla were given the right to challenge the evidence presented, and for that, Padilla must be given access to counsel.[528] Both sides have now appealed Judge Mukasey's decision to the U.S. Court of Appeals for the Second Circuit.[529]

VOICES FROM THE DEFENSE DEPARTMENT

The objective is to produce a relationship in which the subject perceives that he is reliant on his interrogators for his basic needs and desires. Achieving that objective can take a significant amount of time . . . . ranging from months even to years.[530]

Government's Motion for Reconsideration in Part (January 9, 2003)
Padilla v. Rumsfeld

In support of its request that the court reconsider granting citizen Padilla access to an attorney, the government offered the Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, who explained the government's concern:[531]

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation… Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship… – even for a limited duration or for a specific purpose – can undo months of work and may permanently shut down the interrogation process…. Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla.[532]

Whether or not Vice Admiral Jacoby is right about its relative effectiveness, incommunicado detention violates Fifth Amendment due process protections and U.S. treaty obligations. The UN Human Rights Committee has said that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7" of the International Covenant on Civil and Political Rights, which prohibits "torture or… cruel, inhuman or degrading treatment or punishment."[533] Similarly, the Inter-American Court of Human Rights has said that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment… and a violation… of Article 5 of the [American] Convention [on Human Rights]."[534] The concern that such treatment is cruel and inhuman is grounded in experience. As one recent study of New York State prisons found, those confined in isolated units ran eight times the risk of suicide as those in unsegregated cells.[535] The Jacoby Declaration's defense of indefinite detention as an instrument of interrogation illustrates the extent of change in U.S. policy since 1999, when the U.S. State Department certified to the UN Committee Against Torture that "U.S. law does not permit 'preventive detention' solely for purposes of investigation."[536]

Zacarias Moussaoui and Ali Saleh Kahlah al-Marri

The cases of Zacarias Moussaoui and Ali Saleh Kahlah al-Marri are also broadly similar: both of these non-citizens were resident in the United States at the time of their arrests, and both were subject to criminal prosecution for alleged terrorism-related activities. But with al-Marri's civilian criminal trial less than a month away, the president designated him an "enemy combatant," putting him into indefinite incommunicado detention, and cutting him off from his lawyers, who had been vigorously defending his case. Similarly, executive officials have suggested that if they receive unfavorable procedural rulings in the Moussaoui prosecution, they will consider removing the case from federal court in Virginia to a military commission under the president's control.[537]

Zacarias Moussaoui

Zacarias Moussaoui is the only individual in the United States who has been charged with involvement in the September 11 attacks. The decision to prosecute Moussaoui in a civilian criminal court was in some sense surprising, as it was announced less than a month after President Bush's November 2001 Order authorizing military commissions. According to Defense Department officials, the Pentagon was not involved in the decision to bring a criminal case.[538] As Vice President Dick Cheney explained, it was the Justice Department's decision to proceed in federal court, "primarily based on an assessment of the case against Moussaoui, and that it can be handled through the normal criminal justice system without compromising sources or methods of intelligence. . . [and the view that] there's a good strong case against him."[539] Michael Chertoff, until recently the assistant attorney general in charge of the Justice Department's Criminal Division, championed the use of civilian courts, and later during the proceedings, stressed to a federal appeals court that moving the case to a military commission could disrupt intelligence and law enforcement cooperation with foreign governments.[540]

Moussaoui, though acknowledging fealty to Osama bin Laden, has maintained that he had no role in the September 11 conspiracy. His insistence on representing himself[541] and his erratic, often inflammatory behavior in court initially led some to complain about the trial's "circus-like" atmosphere.[542] But the unanticipated apprehension in Pakistan, in September 2002, of senior Al Qaeda figure Ramzi Bin al-Shibh, changed the focus of the proceedings. Bin al-Shibh had allegedly sent Moussaoui significant sums of money and was named in the Moussaoui indictment as a key participant in the September 11 plot.[543] But in interrogations conducted in an undisclosed site outside the United States, Bin al-Shibh reportedly told CIA interrogators that Moussaoui's Al Qaeda handlers had considered Moussaoui mentally unstable, and had not included him in the September 11 planning.[544]

Asserting Moussaoui's Sixth Amendment right "to have compulsory process for obtaining a witness in his favor," Moussaoui's stand-by counsel asked the court to let Moussaoui interview Bin al-Shibh. District Court Judge Leonie Brinkema found strong reason to believe that Bin al-Shibh might provide "material favorable testimony on the defendant's behalf – both as to guilt and potential punishment."[545] On January 31, 2003, the court ordered

that the defendant be permitted to take the deposition of Bin al-Shibh, to be conducted by satellite video transmission, with a time-delay mechanism to permit classified or sensitive information to be deleted in real time during the deposition.[546]

Federal prosecutors sought review of the order in the U.S. Court of Appeals for the Fourth Circuit. They maintained that "aliens seized and detained overseas as enemy combatants" – such as Bin al-Shibh – "are beyond the authority of the federal courts."[547] They urged the court to refrain from "second-guessing quintessentially military and intelligence judgments about the detention of combatants overseas,"[548] arguing that enforcing the Sixth Amendment right to confront witnesses would establish a precedent putting the military to a "Hobson's choice between risking a constitutional violation that would scuttle a criminal prosecution back home or altering the conduct of warfare on a distant battlefield to preserve evidence or produce witnesses."[549] Assistant Attorney General Chertoff, arguing for the government, warned that granting Moussaoui's request to depose Bin al-Shibh would cause "immediate and irreparable" harm to the United States by interrupting military interrogations.[550]

The court of appeals dismissed the government's appeal on June 26, 2003, finding that the legal question was not yet ripe (as the government had not yet disobeyed the lower court's order).[551] On July 14, 2003, following denial of motions for reconsideration by the court of appeals, the government formally notified the lower court that it would indeed defy its order because allowing "an admitted and unrepentant terrorist (the defendant) [to question] one of his al Qaeda confederates… would necessarily result in the unauthorized disclosure of classified information… a scenario… unacceptable to the Government."[552] The lower court must now determine what, if any, sanction should be imposed following the government's refusal. The court's options range from dismissing the case entirely, to striking some of the charges, to preventing the prosecution from seeking the death penalty.[553] As Judge Brinkema weighs the alternatives, the executive has sent mixed signals as to whether it will move the case to a military commission if it ultimately loses on the constitutional question in federal court.[554]

Ali Saleh Kahlah al-Marri

Ali Saleh Kahlah al-Marri, a Qatari engineering student, arrived in the United States on September 10, 2001, and was first arrested as a material witness in December 2001. Prosecutors believed al-Marri had visited an Al Qaeda training camp in Afghanistan, met with Osama bin Laden, and returned to Illinois intending, prosecutors claimed, to help "settle" Al Qaeda agents.[555] Al-Marri was eventually indicted in federal district court in Illinois on seven terrorism-related charges involving credit card fraud, lying to the FBI, and related counts.[556] The Qatari government retained a U.S. lawyer for al-Marri, and his criminal trial was set for July 21, 2003. With the assistance of counsel, al-Marri planned to argue that the charge of lying to the FBI was based on a misunderstanding.[557] Al-Marri also sought to suppress "key evidence" based on the federal officers' failure to advise him of his right both to remain silent and to secure the assistance of counsel, and based on officers' warrantless search of al-Marri's apartment.[558] On June 20, the court ordered a hearing on the motion to suppress, scheduling it for July 2, 2003.[559]

On June 23, 2003, Defense Department officials took custody of al-Marri and transferred him from his Peoria County Jail cell to the Naval Consolidated Brig in Charleston, South Carolina. The same morning, prosecutors sought and obtained an order from the district court dismissing the charges with prejudice, based on the president's determination that the defendant is an "enemy combatant."[560] Although al-Marri had been held in "solitary confinement" in the Peoria jail,[561] the president determined that al-Marri "represents a continuing, present, and grave danger to the national security of the United States."[562]

Administration officials attributed the sudden decision to pull al-Marri out of the criminal justice system "to recent credible information,"[563] and insisted they were "confident" that they would have prevailed on the criminal charges.

THE THREAT OF INDEFINITE MILITARY DETENTION

> *The defendants believed that if they didn't plead guilty, they'd end up in a black hole forever. [There is] little difference between beating someone over the head and making a threat like that.* [564]
>
> **Neal R. Sonnett**,
> Chairman of the American Bar Association
> Task Force on Treatment of Enemy Combatants

In September 2002, six Arab-American U.S. citizens were arrested in Lackawanna, New York, and charged with conspiracy to provide material support and resources to a terrorist organization, mainly by training in an Al Qaeda camp in Afghanistan in the summer of 2001.[565] While the FBI celebrated the apprehension of "the key players in western New York… [of an] an Al Qaeda-trained cell,"[566] local community leaders saw them more as "knuckleheads [who] betrayed our trust."[567] In April 2003, the *Wall Street Journal* reported "indications that the government's case wasn't as strong as officials in Washington had characterized it after the arrests," and the U.S. attorney "confirmed the government ha[d] found no evidence the defendants were involved in any violent plot."[568] During the next five months, each of the six pled guilty to lesser charges and promised cooperation with ongoing investigations. The six were sentenced to prison terms ranging from six to nine years.[569]

That the Lackawanna defendants reached plea agreements with prosecutors was in itself unremarkable. Of greater concern, however, were reports that federal officials used threats of "enemy combatant" designation to induce the settlements. Lackawanna defense lawyer Patrick J. Brown explained the significance of the pleas: "We had to worry about the defendants being whisked out of the courtroom and declared enemy combatants if the case started going well for us…. So we just ran up the white flag and folded."[570] Another Lackawanna defense attorney remarked: "As often is the case with federal plea negotiations, the government has some pretty potent weapons in its arsenal, but in this case those weapons were the prosecutors' version of nuclear warheads."[571] Indeed, by the time of the plea negotiations, the implications of the "enemy combatant" designation had been extensively reported in the press. The Lackawanna defendants knew that hundreds of detainees languished at Guantánamo, unable to challenge their indefinite detentions, and that José Padilla and Yaser Hamdi were being held under similar conditions. Though Justice Department officials have strongly denied using the

"enemy combatant" tactic in Lackawanna, defense lawyers have stuck to their claim.[572] And the *New York Times* has reported that one "senior F.B.I. official" explained that "the [al-]Marri decision held clear implications for other terrorism suspects. 'If I were in their shoes, I'd take a message from this,' the official said."[573]

CITIZEN DERWISH

Though not among those indicted with the Lackawanna defendants, Kamal Derwish, another U.S. citizen, was named as a co-conspirator in the case. Indeed, investigators believed him to be the leader of the Lackawanna "Al Qaeda cell."[574] On November 3, 2002, approximately six weeks after the arrests, Derwish was killed in Yemen by a CIA-fired missile. He was one of five automobile passengers accompanying Yemeni Al Qaeda operative Qaed Salim Sinan al-Harethi, the intended target of the U.S. strike. Although the CIA was apparently unaware of Derwish's presence in the automobile, U.S. officials made clear their view that they would have been fully within their rights to target him intentionally. National Security Advisor Condoleezza Rice explained: "[N]o constitutional questions are raised here. There are authorities that the president can give to officials…. He's well within the balance of accepted practice and the letter of his constitutional authority."[575] A secret "finding" signed by the president after September 11 had authorized CIA covert attacks on Al Qaeda "anywhere in the world." Officials have explained that "[t]he authority makes no exception for Americans, so permission to strike them is understood."[576] Taken together, these assertions imply that the president's claimed authority to designate as an "enemy combatant" any individual, including a U.S. citizen within the United States, includes authority to carry out extrajudicial executions, within or outside the United States, of suspects so designated.

At least one additional case has been reported where the threat of "enemy combatant" status has been used to enhance prosecutors' negotiating position in plea discussions. Authorities believe that Iyman Faris, a Columbus, Ohio truck driver and U.S. citizen, was involved in plots to derail passenger trains and blow up the Brooklyn Bridge.[577] Reportedly tipped off by evidence seized with Al Qaeda operations planner Khalid Shaikh Mohammed,[578] the FBI observed Faris for a period and then, in March 2003, recruited him to inform on his accomplices.[579] On April 17, 2003, Faris reached a plea agreement with prosecutors, and on May 1, 2003, in a federal district court in Virginia, Faris pled guilty to providing material support to Al Qaeda and a related conspiracy charge.[580] He could face a sentence of up to 20 years. Though little detail has been made public about the case, federal officials told the *Washington Post* that Faris "cooperated with the FBI because he sought to avoid being declared an enemy combatant."[581] It appears that Faris was unrepresented by legal counsel until after the substance of the plea agreement was concluded.[582]

RECOMMENDATIONS

1. The administration should provide U.S. citizens José Padilla and Yaser Hamdi immediate access to legal counsel. These individuals, and all those arrested in the United States and designated by the president as "enemy combatants," should be afforded the constitutional protections due to defendants facing criminal prosecution in the United States.

2. The Justice Department should prohibit federal prosecutors from using, explicitly or implicitly, the threat of indefinite detention or military commission trials as leverage in criminal plea bargaining or in criminal prosecutions.

3. The U.S. government should carry out its obligations under the Third Geneva Convention and U.S. military regulations with regard to all those detained by the United States at Guantánamo Bay, Cuba and other such detention camps around the world. In particular, the administration should provide these detainees with an individualized hearing in which their status as civilians or prisoners of war may be determined. Detainees outside the United States as to whom a competent tribunal has found grounds for suspecting violations of the law of war should, without delay, be brought to trial by court martial under the U.S. Uniform Code of Military Justice. Those determined not to have participated directly in armed conflict should be released immediately or, if appropriate, criminally charged.

4. President Bush should rescind his November 13, 2001 Military Order establishing military commissions, and the procedural regulations issued there-under.

5. The administration should affirm that U.S. law does not permit indefinite detention solely for purposes of investigation, and that suggestions to the contrary in the Declaration of Vice Admiral Lowell E. Jacoby (USN) do not reflect administration policy.