

## EMERGENCY POWERS AND TERRORISM

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*The moral strength, vitality and commitment proudly enunciated in the Constitution is best tested at a time when forceful, emotionally moving arguments to ignore or trivialize its provisions seek a subordination of time honored constitutional protections.<sup>1</sup>*

*If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.<sup>2</sup>*

## I. Introduction

Does a national emergency grant unfettered power to the Executive, disrupt normal operation of tripartite government, or suspend civil liberties protections of the populace? In three cases decided in June 2004, the Supreme Court made a series of pronouncements on executive military power in time of national emergency,<sup>3</sup> with implications potentially eclipsing those from the Civil War and World War II eras. The House of Lords, in December 2004, responded to similar arguments in a remarkably similar case involving executive detention of aliens

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<sup>1</sup> *United States v. Rahmani*, 209 F. Supp. 2d 1045 (D. Cal. 2002)

<sup>2</sup> *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

<sup>3</sup> *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

suspected of terrorist links.<sup>4</sup> Five years earlier, the Supreme Court of Israel dealt with an argument for necessity as a defense to otherwise illegal interrogation techniques.<sup>5</sup>

All of these cases posit the difficulty of expecting restrained observance of individual liberty in times of crisis, particularly in time of war. There is nothing unusual or particularly threatening about heightened security and decreased mobility during time of war. But if war and civil liberties make strange bedfellows, what should be said about a “war” without a defined enemy or a defined end? The rhetorical flourish of “War on Terrorism”<sup>6</sup> has its historical roots in some loose use of language beginning with the “War on Poverty” and followed by the “War on Drugs.” Maybe the “War on Poverty” did not do much to civil rights (although some conservatives would differ strongly), but the “War on Drugs” has raised very significant concerns both for civil liberties and for the wisdom of the effort.<sup>7</sup> Now, enhanced powers of law enforcement, legislated in response to the “terrorism” threat, are being deployed in pursuit of drug dealers and other “ordinary” criminals,<sup>8</sup> and the “wars” intersect.

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<sup>4</sup> A. v. Sec’y of State for the Home Dep’t, 3 Eng. Rep. 169 (2005).

<sup>5</sup> Public Comm. Against Torture in Isr. et al. v. The State of Isr. and the Gen. Security Service, HCJ 5100/94 (1999).

<sup>6</sup> The language of “war on terrorism” is problematic for several reasons, the most obvious of which is that there is no cognizable entity with whom to be at war. See Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Law of War*, 28 YALE J. INT’L L. 325, 327-28 (2003). For the view that the distinction between war and crime is more nuanced, see Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL’Y 457 (2002).

<sup>7</sup> Judge Richard Posner takes the interesting view that this is a good time to recognize that the “war on drugs has been a big flop” and to “redirect law-enforcement resources from the investigation and apprehension of drug offenders to the investigation and apprehension of international terrorists.” Richard A. Posner, *Security Versus Civil Liberties*, ATLANTIC MONTHLY (Dec. 2001). Meanwhile, Senator Orrin Hatch has suggested conflating the two “wars” into a war on “narco-terrorism.” *Narco-Terrorism: International Drug Trafficking and Terrorism—A Dangerous Mix: Hearing Before the Senate Comm. On the Judiciary* (2003) (statement of Sen. Orrin Hatch, Chairman), available at [http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=784&Month=5&Year=2003](http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=784&Month=5&Year=2003). Senator Hatch was widely reported to have floated a draft bill entitled “Vital Interdiction of Criminal Terrorist Organizations” or VICTORY Act, but the measure never was introduced. See, e.g., Dean Scharner, *Draft Bill Seeks Broad Power in Naco-Terror Fight*, ABC NEWS, Aug. 20, 2003, <http://abcnews.go.com/US/story?id=90316&page=1>.

<sup>8</sup> David Caruso, *Critics Cite Patriot Act Abuse and Misuse—Dodson: Act Stretches Beyond Terrorism Cases*, DAILY TEXAN (Austin), Sept. 14, 2003, available at

Much has happened in United States law since 11 September 2001 (9/11), and the turmoil has produced some uncomfortable postures for the U.S. legal system. The confusion to be expected in a time of major public security threats was exacerbated when the misnamed “war on terror” was followed by two real wars in Afghanistan and Iraq. The arenas of law enforcement against terrorism and fighting on foreign soil became blended in both the public debates and in some government policy. In fact, the two efforts became physically blended when suspected terrorists captured in places such as Bosnia were imprisoned in Guantanamo along with Taliban militia members captured in Afghanistan.<sup>9</sup>

Federal judges frequently have apologized for having to enforce the constitution as they have struggled with questions involving the rights of executive detainees,<sup>10</sup> judicial review over executive demands for information,<sup>11</sup> and mens rea in criminal prosecutions.<sup>12</sup> This is a puzzling and troubling posture for a judiciary grounded in the rule of law, and it reflects a genuine difficulty in responding to emergency situations through judicial proceedings.<sup>13</sup>

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<http://www.dailytexanonline.com/media/paper410/news/2003/09/14/StateLocal/Critics.Cite.Patriot.Act.Abuse.And.Misuse-465391.shtml>. According to this story, a county prosecutor in North Carolina charged a methamphetamine manufacturer with making chemical weapons in violation of the state’s terrorism statute. *Id.* In November 2003, John Allen Muhammad (the “Beltway Sniper”) was convicted in Virginia under that state’s terrorism statute, VA. CODE ANN. § 18.2-46.4 (2004), for an “act of violence . . . committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation.” *See Muhammad v. Commonwealth*, 269 Va. 451, 486 (2005).

<sup>9</sup> It has been argued that there is a third paradigm in addition to those of war and crime. That paradigm draws from customary international law to describe a number of military actions that do not rise to the level of a state of “armed conflict.” Michael Hoffman, *Rescuing the Law of War: A Way Forward in an Era of Global Terrorism*, 35 *PARAMETERS* 18 (2005). That paradigm suffices to explain military actions outside the domestic arena, but it does not provide a source of law for dealing with civilians on home soil.

<sup>10</sup> *See Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004); *In re Guantanamo Detainee Cases*, 355 F. Supp. (D.D.C. 2005).

<sup>11</sup> *See Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

<sup>12</sup> *See United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (en banc) (Gregory, J., dissenting) (“I do not seek to give comfort to terrorist organizations, or to diminish the reality of clear and present threats posed by such groups.”).

<sup>13</sup> Virtually no academic voices can be heard in favor of the more extreme measures of the Bush administration such as executive detentions or aggressive interrogation techniques. Nevertheless, there is some support for “deferential” review by the courts.

As noted judges such as Learned Hand<sup>14</sup> and Robert Jackson<sup>15</sup> have pointed out, the judiciary is not the final bulwark against government repression. “We the People” ultimately must decide to what extent we are willing to sacrifice freedom for security.<sup>16</sup> Each generation’s emergency tends to become the fuel for the next generation’s resistance to encroachments on civil liberties, perhaps because Americans have survived each emergency and realized that extreme encroachments may not have been necessary.<sup>17</sup> As war is too important to be left to the generals,<sup>18</sup> so also are civil liberties too important to be left to the courts.<sup>19</sup> Most of the issues ultimately are not about the law so much as they are about the people, both those enforcing the law and those involved in the political process. “We the People” ultimately must decide to what extent we are willing to sacrifice freedom for security. Much of the discussion inevitably will involve political judgments. How well “We the People” respond to these challenges is up to “Us.”

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See Robert Pushaw, *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959 (2004). There has also been some support for the use of military tribunals to try cases against alleged terrorists. See Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249 (2002). The only court to address this issue found that the military tribunals as constituted did not comport with congressional mandates. *Hamdan*, 344 F. Supp. 152 (D.D.C. 2004).

<sup>14</sup> LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189-90 (Irving Dilliard ed., 3d ed. 1960).

<sup>15</sup> *Korematsu v. United States*, 323 U.S. 214, 248 (Jackson, J., dissenting).

If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

*Id.*

<sup>16</sup> This is not to say that courts shouldn’t be expected to protect minority interests against the “tyranny of the majority,” but just to recognize that the rest of us have an obligation in this regard as well.

<sup>17</sup> Jack Goldsmith & Cass Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMM. 261, 284-85 (2002).

<sup>18</sup> “War is much too serious a business to be entrusted to the military.” *Attributed to Charles Maurice de Talleyrand-Perigord*, BARTLETT’S FAMILIAR QUOTATIONS 354:9 (16th ed. 1992).

<sup>19</sup> The extreme version of this view is that the courts should stay out of the fray and that “redress must be achieved politically if it is to be effective.” George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1, 27, 65 (1984).

Much of the public controversy about the Bush administration's domestic responses to terrorism has focused on the wiretap and record-seizing powers under the Patriot Act.<sup>20</sup> The Patriot Act, however, was not really an emergency action and its existence is currently being debated in Congress.<sup>21</sup>

In contrast to the public debate, most of the post-9/11 academic discussion references emergency powers as a single general topic, sometimes using preventive detention or torture as the paradigmatic example. Generalization, however, carries only so far. This article starts with consideration of some specific claims of emergency power: domestic use of the military, preventive detentions, investigations and government secrecy, and interrogation techniques. Paying attention to the specifics will help demonstrate that there is a strong role for both the legislature and the courts even in times of crisis. Next, the article canvasses the options available for a general answer to the question of emergency powers, considering answers of "Yes," "No," and "Maybe."

Most advocates for the "No" position tend to argue that it is important for constitutional norms to remain fixed, even if officials will violate those norms without consequence during emergencies.<sup>22</sup> The "Yes" advocates tend to become advocates for "Maybe" because they conclude that there must be some method for legitimizing what would otherwise be unlawful, such as by legislative<sup>23</sup> or electoral<sup>24</sup> ratification.

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<sup>20</sup> Unifying and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act].

<sup>21</sup> The Patriot Act was passed under the impetus of public outrage and fear, but it consisted of packages of proposals that had been in the works for years. Most of the controversial measures consist of amendments to the Foreign Intelligence Surveillance Act (FISA), which has been around since 1978. See Patriot Act § 218, 115 Stat. 272 (amending 50 U.S.C. § 1804(a)(7)(B), 1823(a)(7)(B) (2000)). Other provisions amended elements of the criminal code that had been under more or less constant revision since 1992. See *id.* § 802 (amending 18 U.S.C. § 2331).

<sup>22</sup> David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1785 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1867 (2004); Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273.

<sup>23</sup> Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

<sup>24</sup> Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003). One argument for virtually plenary power is that courts should stay out of the fray and allow the executive and legislature to carry forward. George Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1 (1984).

The most attractive option, for reasons that will be spelled out at the conclusion of this article, is what might be called the “Prego” option—“It’s in there”—that emergency powers are built into some constitutional provisions and carry their own limitations. It remains true, however, that the most powerful voices in times of social-political stress will be those of a vigilant citizenry.

## II. Specific Claims of Emergency Power

Emergencies can be classified as “natural,” “technologic,” or “complex.”<sup>25</sup> Natural emergencies include hurricanes, earthquakes, and similar happenings. Technologic emergencies include destruction or immobilization of facilities or infrastructure, whether intentional or not. Complex emergencies have been described as “situations in which the capacity to sustain livelihood and life is threatened primarily by political factors, and in particular, by high levels of violence.”<sup>26</sup> Sustained terrorist attacks thus fit within the rubric of a complex emergency.

It would be a serious mistake to forget that there are centuries of experience in Anglo-American law in dealing with emergencies. Emergency power to deal with disasters of the natural or technologic variety is fully recognized in U.S. law and has been exercised on a number of occasions. In response to “complex emergencies,” Congress has explicitly authorized military involvement in domestic affairs when civilian authorities are overwhelmed.<sup>27</sup> Moreover, doctrines of necessity have developed to excuse governmental actions taken in time of complex emergencies such as wartime. The important point to remember,

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<sup>25</sup> Thomas F. Ditzler, *Malevolent Minds: The Teleology of Terrorism*, in FATHALI M. MOGHADDAM & ANTHONY J. MARSELLA, UNDERSTANDING TERRORISM 187, 188 (2004).

<sup>26</sup> *Id.* at 189 (attributing the definition to the London School of Health and Tropical Medicine).

<sup>27</sup> 10 U.S.C.S. § 332 (LEXIS 2005).

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

*Id.*

however, is that these doctrines all carry within them stated, or inferable, limitations on the scope of the emergency power.

#### A. Domestic Use of Military Power

A scenario of domestic use of military resources may help focus the issues. Imagine that someone has unleashed botulin toxin into the water supply of New York City. To make this a little more interesting, suppose that Federal Bureau of Investigation (FBI) agents believe this was not the work of a foreign group but a domestic militia out of the hills of West Virginia. There is no way of knowing what city the militia may strike next and no way that domestic police forces can patrol all the vulnerable locations of water supplies in the country. When the President calls out the military to patrol the water supplies of the nation, is there any prospect of judicial intervention? Who would be the plaintiff in a lawsuit?

Carry the scenario to the next level. *General Smith*, who is commanding the U.S. forces involved, issues orders creating a 200 meter perimeter around every access point to municipal water supplies. Military police are under orders to immediately arrest and incarcerate any unauthorized person entering the perimeter. Individuals remain in custody until officials determine why they entered the unauthorized area. *Space Cadet* wanders into the perimeter while listening to his iPod and playing a video game on his hand-held personal data device. *Ned Turner* decides to intentionally challenge this excessive display of federal power and strides purposefully up to the fence and waits to be arrested. Military police take both into custody. The following discussion does not attempt to directly answer the questions raised in this scenario, but the reader may find it useful to think about how to deal with this situation at each stage of the discussion.

##### 1. *Necessity in Takings Law*

The United States has a complete federal agency devoted to civil emergency response. The Federal Emergency Management Agency (FEMA) traces its history to the Depression and the New Deal in much

the same fashion as the accretion of federal power in many areas.<sup>28</sup> The current version of FEMA was created by executive order in 1979,<sup>29</sup> amalgamating the activities of over 100 federal agencies that were engaged in some form of “disaster relief,”<sup>30</sup> and then transferred to the Department of Homeland Security in 2002. Disaster relief encompasses coordinating disaster recovery and mitigation in conjunction with other federal agencies and state government.<sup>31</sup> The FEMA is not specifically authorized to commandeer resources from unwilling owners, but it does have authority to incur obligations for use of resources such as vehicles, food, clothing, and facilities for shelter.<sup>32</sup>

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<sup>28</sup> Congress provided relief for natural disasters by ad hoc legislation beginning as early as 1803. The FEMA describes its precursor history as follows:

By the 1930s, when the federal approach to problems became popular, the Reconstruction Finance Corporation was given authority to make disaster loans for repair and reconstruction of certain public facilities following an earthquake, and later, other types of disasters. In 1934, the Bureau of Public Roads was given authority to provide funding for highways and bridges damaged by natural disasters. The Flood Control Act, which gave the U.S. Army Corps of Engineers greater authority to implement flood control projects, was also passed. This piecemeal approach to disaster assistance was problematic and it prompted legislation that required greater cooperation between federal agencies and authorized the President to coordinate these activities.

Fed. Emergency Mgmt. Agency, FEMA History, <http://www.fema.gov/about/history.shtm> (last visited Aug. 5, 2005).

<sup>29</sup> Exec. Order No. 12,148 (1979), 44 C.F.R. § 2.3 (2005).

<sup>30</sup> *Id.*

<sup>31</sup> “In carrying out the purposes of this Act, any Federal agency is authorized to accept and utilize the services or facilities of any State or local government, or of any agency, office, or employee thereof, with the consent of such government.” 42 U.S.C.S. § 5149(a) (LEXIS 2005). “Immediately upon his declaration of a major disaster or emergency, the President shall appoint a Federal coordinating officer to operate in the affected area.” *Id.* § 5143(a). “When the President determines assistance under this Act is necessary, he shall request that the Governor of the affected State designate a State coordinating officer for the purpose of coordinating State and local disaster assistance efforts with those of the Federal Government.” *Id.* § 5143(c).

<sup>32</sup> Any federal agency involved in disaster relief is authorized “to incur obligations on behalf of the United States by contract or otherwise for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel, and communications, and for the supervision and administration of such activities. Such obligations, including obligations arising out of the temporary employment of additional personnel, may be incurred by an agency in such amount as may be made available to it by the President.” *Id.* § 5149(b)(3).

What happens if a federal agency believes that it must have something that the owner is not willing to provide? Not surprisingly, the majority of cases dealing with this phenomenon occur in the context of claims for compensation for private property that was used, damaged, or destroyed in the course of governmental response to an emergency.

In Great Britain, executive takings of private property for public use occurred in the early stages mostly as responses to emergencies. The privilege to damage or destroy private property to prevent a greater harm was recognized in early British cases so that there was no tort when the Crown dug saltpeter from the plaintiff's land to make gunpowder<sup>33</sup> or tossed articles overboard to save a ship.<sup>34</sup> The British cases seem to make the necessity a complete defense regardless of whether the property damaged was itself threatened by the emergency.<sup>35</sup>

The American version of the defense of necessity has taken a slightly different turn from the British practice. When the property itself is reasonably believed to be threatened as part of the emergency—when a house stands in the way of a fire—there is no reason to compensate the owner for its destruction.<sup>36</sup> When the property is not itself threatened by the emergency, there is a split of opinion. *The Restatement (Second) of Torts (Restatement)* takes the position that the privilege is complete so long as the actor acts reasonably.<sup>37</sup> Several commentators, however, take the position that the owner should be compensated by the public on whose behalf the property was used.<sup>38</sup>

The U.S. Supreme Court cases are inconclusive. In a number of cases involving wartime destruction of property, the Court has simply

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<sup>33</sup> King's Prerogative in Saltpetre, 12 Co. Rep. 12, 77 Eng. Rep. 1294 (1607).

<sup>34</sup> Mouse's Case, 12 Co. Rep. 63, 77 Eng. Rep. 1341 (1609).

<sup>35</sup> See Hall & Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 ILL. L. REV. 501, 525 (1907). The doctrine was sufficiently ill-defined that the Mayor of London is said to have allowed the city to burn to the ground in 1666 rather than risk a trespass action for destroying forty houses that might have prevented spread of the fire. Hall and Wigmore, however, doubt the accuracy of this claim, and say that the claim is "of no significance." *Id.* at 502 n.2.

<sup>36</sup> RESTATEMENT (SECOND) OF TORTS § 196 cmt. b (1965).

<sup>37</sup> *Id.* §§ 196, 262.

<sup>38</sup> The public in this view substitutes for the actual beneficiaries of the use to resolve the administrative problem of finding those persons who have benefited and adjudicating their collective liability. W. PROSSER & P. KEETON, TORTS 146-47 (5th ed. 1984); Hall & Wigmore, *supra* note 35, at 523-24.

dictated that citizens take the risk of property loss due to war.<sup>39</sup> The emergency is still considered sufficient justification even if the officers involved had the opportunity to make a calculated choice about the matter.<sup>40</sup> Conversely, the government has often “requisitioned” supplies and materials and acted as if compensation were required. For example, in evacuating the Philippines the Army paid for petroleum products it used but not for those destroyed to prevent their capture by the Japanese.<sup>41</sup> The basis for the distinction is probably not the benefit to the public. The products used were not subject to capture by the enemy while those destroyed were. In the case of something that is subject to capture, destruction is not any greater loss to the owner. The reason for the distinction might also be that consumables are more likely to be the subject of a bargained exchange than capital goods, although this determination would not support payment of rent for occupied premises.

The notion of public necessity takes on greater dimension in the opinions of the Court of Claims. This court frequently awards compensation in cases of military use or occupation of property while refusing compensation for wartime destruction of property. The difference seems to lie in the degree of urgency or compulsion from outside sources. For example, in another case from the wartime South Pacific,<sup>42</sup> owners were kept away from their land because ammunition dumps were based there, then later because some live ammunition remained in the area. When the land owners were finally allowed on their property some twenty-two years after the war ended, they received the fair market rental value of the land for the duration of their exclusion,<sup>43</sup> but obtained no compensation for the destruction of coconut trees during the invasion of the island.<sup>44</sup> It seems that military necessity existed as much with respect to the occupation as with the destruction of the coconut trees; the most likely distinction is the degree of likelihood that some third party, the enemy, would have destroyed or taken the trees or that the destruction was an inadvertent happenstance of war.

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<sup>39</sup> *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909) (destruction of factory to prevent spread of smallpox); *United States v. Pac. RR*, 120 U.S. 227 (1887) (destruction of bridges by retreating Union Army).

<sup>40</sup> *Castro v. United States*, 500 F.2d 436 (Ct. Cl. 1974); *United States v. Caltex Inc.*, 344 U.S. 149 (1952).

<sup>41</sup> *Caltex*, 344 U.S. at 151.

<sup>42</sup> *Castro*, 500 F.2d 436.

<sup>43</sup> *Id.* at 440.

<sup>44</sup> *Id.* at 443.

These cases on military necessity seem to reject the *Restatement* position that a privilege exists to destroy property for military necessity, and adopt the commentators' view of a privilege to destroy only property that is itself threatened. With respect to property that would not otherwise be lost, the public representatives have the power to take the property, but must provide compensate for its use. This is a pragmatic adjustment reflecting notions of causation and carries no hint of impropriety in executive responses to emergency conditions.

## 2. *Posse Comitatus* Limitations

Another doctrine bearing on the existence of emergency powers is the concept of *posse comitatus*, or the ability of the Executive to call on members of the community to engage in law enforcement operations.<sup>45</sup> The phrase, roughly translated as "power of the county," refers to the inherent discretion of civil authorities to call on the entire population to assist in maintaining order or apprehending criminals.<sup>46</sup>

The federal posse comitatus statute<sup>47</sup> prohibits employment of the military in civil law enforcement. Congress first adopted the statute in 1875 as part of the end of the Reconstruction Era, motivated by a desire to prevent a recurrence of military presence when civil authority had been restored at the end of the Civil War. Although the statute could be read as building a wall between military and civilian authorities, subsequent Congresses have not given it that effect. Indeed, Congress has authorized a wide array of military assistance to federal, state, or local authorities in pursuit of maintaining order or law enforcement, so long as military personnel are not directly engaged in searches or arrests.

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<sup>45</sup> See *Scott v. Vandiver*, 476 F.2d 23, 240-41 (4th Cir. 1973).

<sup>46</sup> See BLACK'S LAW DICTIONARY 1183 (7th ed. 1999).

<sup>47</sup> 18 U.S.C.S. § 1385 (LEXIS 2005).

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

*Id.* These provisions were extended to the Navy and Marines by 10 U.S.C.S. § 375, which also provides for the Secretary of Defense to promulgate regulations "to ensure that any [assistance to state and local authorities] does not include or permit direct participation . . . in a search, seizure, arrest, or other similar activity."

Courts have routinely upheld “passive” engagement of military personnel in support of civilian criminal investigations and have upheld “active” participation of military personnel in criminal enforcement when the offense concerns a military facility or activity.<sup>48</sup>

The use of federal troops,<sup>49</sup> or even presidential activation of state National Guard (NG) units,<sup>50</sup> to aid civilian authorities in response to insurrection is specifically provided by statute. Use of these forces to protect against violence or looting during the recovery period of natural disasters has never been seriously questioned. President Eisenhower used federal troops and overrode the governor’s authority with the state NG to enforce court orders dealing with school desegregation.<sup>51</sup> The principal Supreme Court precedent for use of military force in this situation unfortunately came from a federal court injunction against labor organizing activities and socialist campaigning by Eugene Debs,<sup>52</sup> but the practice of using federal military force in aid of court orders is nevertheless well-established. Attorney General Brownell advised President Eisenhower that the posse comitatus statute was not intended to limit the President’s authority to deal with mob violence or similar threats to enforcement of federal law.<sup>53</sup>

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<sup>48</sup> See, e.g., *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (military transport of air hijacker back to United States for trial); *United States v. Hartley*, 486 F. Supp. 1348 (D. Fla. 1980) (civilian DoD investigation of military supplier).

<sup>49</sup> 10 U.S.C.S. § 332.

<sup>50</sup> *Id.* § 331.

<sup>51</sup> Then-Attorney General Herbert Brownell delivered a formal opinion to President Eisenhower dealing with a range of issues regarding the desegregation of the Little Rock schools. 41 Op. Atty. Gen. 313 (1957). The federal court had issued an order requiring desegregation of Central High School, but Arkansas Governor Orval Faubus mobilized the state militia and highway patrol with orders to “place off limits to colored students those schools heretofore operated and recently set up for white students.” *Id.* at 317.

<sup>52</sup> *In re Debs*, 158 U.S. 564, 582 (1894).

The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. . . . If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

*Id.*

<sup>53</sup> Indeed, the Brownell opinion expressed “grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate.” 41 Op. Atty. Gen. 313, 331 (1957).

The most extensive analysis of the posse comitatus statute came in a series of cases arising out of the three-week occupation of Wounded Knee by members of the American Indian Movement in 1973. Various defendants were prosecuted for offenses such as trespass, assault, and interference with federal officers in the discharge of their duties.<sup>54</sup> The defendants pointed to the involvement of military units in what could have been viewed as an ordinary law enforcement operation and asserted that this involvement violated the posse comitatus statute. This defense was relevant at least to the question of whether the federal officers were “lawfully engaged in the discharge of their duties.”<sup>55</sup>

The FBI and Bureau of Indian Affairs had closed off the town to prevent additional sympathizers from joining those dissidents already on the scene.<sup>56</sup> As part of the control operation, military units assisted with advice, aerial reconnaissance, and the loan of equipment.<sup>57</sup> The district judges dealing with the defense of posse comitatus violation reached different conclusions with different standards for testing the validity of military involvement.<sup>58</sup> To Chief Judge Ubrom, the statute would be violated if military personnel influenced the decisions of the civilian officers or actively maintained and operated the equipment provided.<sup>59</sup> Chief Judge Nichol went “one step further” than Chief Judge Ubrom and held that there was no evidence justifying submission of issues to the jury regarding the nature of the military involvement.<sup>60</sup> Judge Bogue provided a more nuanced analysis by concentrating on whether military personnel were “actively engaged in law enforcement.”<sup>61</sup>

Based upon the clear intent of Congress, this Court holds that the clause “to execute the laws”, contained in 18 U.S.C. § 1385, makes unlawful the use of federal

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<sup>54</sup> See, e.g., *United States v. Red Feather*, 392 F. Supp. 916 (D. S.D. 1975); *United States v. Means*, 383 F. Supp. 368, 374-77 (D. S.D. 1974); *United States v. Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974).

<sup>55</sup> 18 U.S.C.S. § 231(c).

<sup>56</sup> *Jaramillo*, 380 F. Supp. 1375.

<sup>57</sup> *Id.* at 1377.

<sup>58</sup> *Red Feather*, 392 F. Supp. 916; *Means*, 383 F. Supp. at 374-77; *Jaramillo*, 380 F. Supp. 1375.

<sup>59</sup> *Jaramillo*, 380 F. Supp. 1375.

<sup>60</sup> *United States v. Banks*, 383 F. Supp. 368 (D. S.D. 1974).

<sup>61</sup> *Red Feather*, 392 F. Supp. at 925 (stating that the phrase “‘uses any part of the Army or the Air Force as a posse comitatus or otherwise’ means the direct active use of Army or Air Force personnel and does not mean the use of Army or Air Force equipment or materiel”).

military troops in an active role of direct law enforcement by civil law enforcement officers. Activities which constitute an active role in direct law enforcement are: arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities. Such use of federal military troops to “execute the laws”, or as the Court has defined the clause, in “an active role of direct law enforcement”, is unlawful under 18 U.S.C. § 1385. . . .<sup>62</sup>

Activities which constitute a *passive* role which might *indirectly* aid law enforcement are: mere presence of military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military personnel to deliver military materiel, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment, and to maintain such materiel or equipment; aerial photographic reconnaissance flights and other like activities.<sup>63</sup>

For Judge Van Sickle, the prior judges’ opinions were not sufficient.<sup>64</sup> He assessed the history and purposes of the statutes and concluded not only that Americans are suspicious of military involvement because military training is not designed to take into account civilian rights, but also that military specialization could be useful in unusual situations of civil disturbance.<sup>65</sup> To summarize his

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup>

[M]y concern with Judge Urbom’s analysis is that I feel his rule requires a judgment be made from too vague a standard. At the same time, my concern with Judge Bogue’s analysis is that it is too mechanical, and inevitably when the rule is applied to borderline cases, it will crumble at the edges.

United States v. McArthur, 419 F. Supp. 186, 194 (D. N.D. 1975).

<sup>65</sup> *Id.* at 193.

conclusions, Judge Van Sickle stated that “the feared use which is prohibited by the posse comitatus statute is that which is regulatory, proscriptive or compulsory in nature, and causes the citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority.”<sup>66</sup>

In this sequence of cases, the judges took varying approaches to interpreting the statute’s prohibition on the use of the military to execute the laws. Although there were constitutional concerns lurking in the background of the analyses, the courts focused on whether Congress had authorized or prohibited the use of military force in domestic disturbances. The constitutional issues are more forcefully stated in the next section.

### 3. *Martial Law*

The effect of the posse comitatus statute on the question of declaring martial law essentially is to preserve the power to make such a declaration in Congress. The military can be used to assist directly in civil law enforcement only when authorized by statute. This approach codifies, with some clarification, the results reached following the Civil War and the Reconstruction Era. Prior to that time, the Judiciary Act of 1789 had authorized federal marshals to call on the military to serve as a posse whenever it was useful for execution of the law.<sup>67</sup>

In *Texas v. White*,<sup>68</sup> the Supreme Court upheld the occupation of southern states by federal military force following the Civil War. In *Ex parte Milligan*,<sup>69</sup> the Court invalidated the trial of civilians by military tribunals in areas in which the civilian courts were open and operating. One could read the combination of these cases as permitting martial law in areas that are in a state of war, but not allowing it elsewhere. As Colonel Winthrop points out, however, this interpretation is an oversimplification.<sup>70</sup>

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<sup>66</sup> *Id.* at 194.

<sup>67</sup> WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 866-67 (2d ed. 1920).

<sup>68</sup> 74 U.S. 700 (1868).

<sup>69</sup> 71 U.S. 2 (1866).

<sup>70</sup> WINTHROP, *supra* note 67, at 799.

It is important to distinguish between military government and martial law. The former is the result of occupation of hostile territory, whether foreign or rebellious, while the latter is a condition that provides a military complement to the civil authorities on home soil because of an emergency.<sup>71</sup> Military government completely supplants civil government while martial law provides a type of self-defensive use of force commensurate with the necessity. The Supreme Court adopted this view in *Duncan v. Kahanamoku*<sup>72</sup> when it overturned a conviction by a military tribunal in Hawaii during a time of declared martial law because the civilian courts were open and operating. Thus, martial law can allow the military commander to override some of the normal operations of the civil authorities, to provide for law enforcement and maintenance of order, without supplanting the civil judicial function.

The most significant aspect of *Duncan*, however, is that it was a statutorily based, rather than constitutionally based, decision. Justice Black's opinion for the Court first pointed out what the case *did not concern*, such as enforcement of the law of war, exercise of military government in occupied lands, or preventing interference with lawful military functions.<sup>73</sup> The Court recognized the basic distinction between military government and martial law, the former having to do with enemy territory and the latter with home turf. The Court then went on to decide whether the Hawaii Organic Act authorized martial law to the point of excluding the civilian courts. "These petitioners were tried before tribunals set up under a military program which took over all government and superseded all civil laws and courts."<sup>74</sup>

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<sup>71</sup> *Id.* at 817.

<sup>72</sup> 327 U.S. 304 (1946).

<sup>73</sup> Justice Black identified a number of issues that were not implicated in the case:

Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war. We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function . . . Nor need we here consider the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war.

*Id.* at 313-14.

<sup>74</sup> *Id.* at 314.

After canvassing the history of the Hawaii Organic Act, which was admittedly a bit checkered but stabilizing in the direction of allowing military force to be used without supplanting civil authority, the Court declared:

We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of “martial law” it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase “martial law” as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.<sup>75</sup>

Justice Black may have been a bit overly enthusiastic about what “our people have always believed” or about what “responsible military and executive officers had heeded,” but his message is clearly stated—martial law does not itself close the civilian courts nor authorize diversion of civilian defendants to military tribunals.<sup>76</sup> Referring to the Court’s martial law opinion in *Sterling v. Constantin*,<sup>77</sup> Justice Black stated that “this Court ‘has knocked out the prop’ on which” earlier lower court approvals of military tribunals had been based.<sup>78</sup>

Justice Murphy was even more emphatic and did not rest his opinion on statutory grounds.

Equally obvious, as I see it, is the fact that these trials were forbidden by the Bill of Rights of the Constitution of the United States. . . . Indeed, the unconstitutionality

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<sup>75</sup> *Id.* at 324.

<sup>76</sup> *See id.*

<sup>77</sup> 287 U.S. 378 (1932).

<sup>78</sup> *Duncan*, 327 U.S. at 321 n.18 (quoting FREDERICK WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 116 (1940)).

of the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation of the action.<sup>79</sup>

Justice Murphy referred to criticism of the "so-called 'open court' rule of the *Milligan* case" and responded vigorously:

The argument thus advanced is as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts. It is a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war. It seeks to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights. It deserves repudiation.

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From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised.<sup>80</sup>

*Duncan* does not deny the possibility of using military presence to supplement or even replace some functions of civilian government in time of actual emergency. The examples cited in *Duncan* of martial law to quell civil disturbances stemming principally from labor disputes do not seem to have taken into account the posse comitatus statute.<sup>81</sup> Given the tacit approval of the use of troops in those cases, so long as crimes were tried in the civilian courts, it is not clear how the Court would deal with this statutory argument.

Some further insight might be gleaned from *Youngstown Sheet & Tube v. Sawyer*,<sup>82</sup> in which the Court struck down President Truman's attempt to seize the steel mills to avert labor strife during the Korean

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<sup>79</sup> *Id.* at 325 (Murphy, J., concurring).

<sup>80</sup> *Id.* at 329.

<sup>81</sup> *Id.* at 320-22.

<sup>82</sup> 343 U.S. 579 (1952).

War. Only the three dissenting Justices were impressed by the argument that there was a sufficient level of national emergency justifying unilateral seizure without congressional authorization.<sup>83</sup> In his classic concurrence analyzing separation of powers, Justice Jackson pointed out that the President is on strongest ground when he acts with congressional authorization, may or may not have constitutional powers when acting in congressional silence, and must have strong independent constitutional grounds when going against the will of Congress.<sup>84</sup> Under that reasoning, to justify military force to perform civil law enforcement after passage of the posse comitatus legislation, the President would have to persuade a majority of the court that a genuine emergency existed sufficient to justify departure from specific congressional direction. After the experience of *Korematsu*, *Duncan*, and *Youngstown*, it is doubtful that anything short of imminent invasion could justify unilateral action in violation of the statute.

This is not to say that Congress could not be persuaded to authorize martial law under threat of war-time conditions. That it did not do so under the extreme stress of the early stages of World War II is highly instructive. Declaring martial law does not require supplanting the normal processes of the civilian courts. Whether *Milligan* and *Duncan* express constitutional norms as well as statutory decisions may ultimately have to be addressed, but at minimum, those cases, combined with *Quirin*<sup>85</sup> reflect a disposition to require rather specific statutory authorization for military tribunals.

*Quirin* was a wartime decision, made after the existence of military trials, and involved actions that probably should not be repeated, at least not in the absence of a real war with real saboteurs. How do we know it was a real war with defendants who were agents of the enemy? In *Quirin*, the defendants admitted to that status, a fact that Justice Scalia found to be a critical distinction in *Hamdi*.<sup>86</sup> That status could also be determined by judicial review. Before we reach that stage, however, one

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<sup>83</sup> *Id.* at 679 (Vinson, C.J., dissenting) (“Even ignoring for the moment whatever confidential information the President may possess as ‘the Nation’s organ for foreign affairs,’ the uncontroverted affidavits in this record amply support the finding that ‘a work stoppage would immediately jeopardize and imperil our national defense.’”).

<sup>84</sup> *Id.* at 635-38.

<sup>85</sup> See *Ex parte Quirin*, 317 U.S. 1 (1942). How *Milligan* and *Duncan* are affected by the subsequent cases of *Quirin* and *Hamdi* is considered below.

<sup>86</sup> See *Hamdi v. Rumsfeld*, 124 S. Ct. 2670, 2643 (2004).

should really ask why ordinary civilian courts are not fully equipped to handle a trial of this type.

Justice Murphy's concurrence in *Duncan* addressed seven different arguments in favor of military courts over civilian courts in time of war and rejected each of them.<sup>87</sup> Several of the arguments he dismissed as smacking of racism, despotism, viciousness, or just petty military carping about the civil justice system. The only argument that appears to have any facial validity today is that the civilian courts are likely to take longer in reaching judgment than would a military tribunal.<sup>88</sup> If anything, the intervening half-century has brought the military judicial system closer to the civil system and made it more difficult to justify diverting cases to it. With regard to the delay argument, Justice Murphy had this to say: "Civil liberties and military expediency are often irreconcilable. . . . The swift trial and punishment which the military desires is precisely what the Bill of Rights outlaws."<sup>89</sup>

Perhaps the best way to approach the issue of martial law within the borders of the United States is with utter pragmatism. If a national emergency is so severe that the civilian courts are not able to meet and enjoin the declaration of martial law, then probably the emergency justifies the declaration. Anything short of that eventuality will give rise to a justiciable controversy of the type seen in *Youngstown*.

In this pragmatic vein, comparing *Korematsu*<sup>90</sup> and *Endo*<sup>91</sup> with *Milligan* and *Duncan* is particularly instructive. The majority in *Korematsu* claimed that it was not ruling on detention of anyone because it was only dealing with exclusion of a particular ethnic group from militarily sensitive areas.<sup>92</sup> In the companion case of *Endo* the Court

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<sup>87</sup> *Duncan v. Kahanamoku*, 327 U.S. 304, 329-35 (1946).

<sup>88</sup> *Id.* at 331.

<sup>89</sup> *Id.*

<sup>90</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>91</sup> *Ex parte Endo*, 323 U.S. 283 (1944).

<sup>92</sup> The Court described the issue by stating the following:

We are . . . being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law that his presence in that center would have resulted in his detention in

held that detention of a concededly loyal citizen was unauthorized by Congress or Presidential order. In scathing opinions in both cases, Justices Murphy and Roberts blistered the Court for ducking the constitutional questions of racism and failing to examine the public record for facts that would belie the military judgment to which the Court purported to give deference.<sup>93</sup> Justice Jackson provided the pragmatic notion that the Court should not even rule on *Korematsu* if it were going to give such great deference because now the Court had written into posterity its approval of an unreviewed race-based internment.<sup>94</sup>

If the War Relocation effort truly had an emergency behind it, the Supreme Court should have been able to look at the record and make that determination. If deference meant lack of review, then it would be a serious affront to the judicial authority and constitutional strictures. In some degree, however, the Court did review the findings of the military authorities. The Court noted that an invasion of the West Coast rationally could have seemed imminent—a rational commander could have thought that an unknown number of Japanese-Americans might be loyal to the Emperor and thus threaten to commit acts of sabotage or espionage, and that the numbers of persons involved would have made it difficult to do individual loyalty screenings in the limited amount of time available.<sup>95</sup> The major problem with this review was that it hardly met the concept of “strict” scrutiny. Instead, the Court conducted only a minimal scrutiny with the burden of proof on the challenger. Nevertheless, it was a review and not a capitulation under the heading of deference to executive authority.

Moreover, both *Milligan* (whether on constitutional or statutory grounds) and *Duncan* emphatically embrace the “open court” rule to

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a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others.

*Korematsu*, 323 U.S. at 221.

<sup>93</sup> *Id.* at 225 (Roberts, J.); *id.* at 239 (Murphy, J.).

<sup>94</sup> *Id.* at 245-46 (Jackson, J., dissenting).

<sup>95</sup> *See id.* (“I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor would I say that they were. But even if they were permissible military procedures, I deny that it follows that they were constitutional.”).

insist on civilian judicial processes when available. *Quirin* allowed departure from this approach in light of a number of factors: pragmatically, the military prosecution had already occurred and the political fallout of setting that conviction aside could have been enormously fearsome;<sup>96</sup> the defendants were avowed agents of an enemy nation;<sup>97</sup> as soldiers out of uniform, the defendants had violated the “law of war” in a direct fashion.<sup>98</sup> By contrast, if a future Executive attempts to supplant civilian courts with military tribunals in derogation of the principles of *Milligan* and *Duncan*, it should be hoped that the courts would stand firmly behind those cases. As Chief Justice Taney and Justice Jackson both noted, however, the courts are powerless against the “superior force” of the military and must look “to the political judgments of their contemporaries and to the moral judgments of history.”<sup>99</sup>

#### 4. *Military Assistance in Time of Insurrection*

Other than martial law as an emergency measure, some use of the military to assist civilian authorities in times of civil disturbance is also possible and its limits are found in the statutes that prevent use of the military in direct search and arrest of offenders. Although the posse comitatus statute seems to imply that the military can have no involvement in civilian law enforcement, another federal statute offers assistance to state governments in time of “insurrection.”<sup>100</sup> The “insurrection” statute amounts to a standing delegation from Congress of the power to make an exception to the posse comitatus statute when a state government requests assistance and the President finds that there is

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<sup>96</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>97</sup> *Id.* Justice Scalia is right to place emphasis on the “avowed” part of this statement because that fact removes a major element of the need for judicial review. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2670 (2004).

<sup>98</sup> *Quirin*, 317 U.S. at 31.

<sup>99</sup> *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting).

<sup>100</sup> The insurrection statute provides:

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

10 U.S.C.S. § 331 (LEXIS 2005).

a need for military force to “suppress the insurrection.”<sup>101</sup> It does not, however, appear to be a standing delegation of the power to declare martial law. That power remains implicitly within Congress unless it cannot meet.

The authority of the President under the insurrection statute has come before the Supreme Court on only two occasions, and one of those did not involve insurrection.<sup>102</sup> In *Martin v. Mott*,<sup>103</sup> a member of the New York militia refused to answer the President’s call to arms during the War of 1812. He was fined, his belongings were seized, and he brought a replevin action claiming that the President was without authority to order him into service prior to an actual invasion of the territory of the United States.<sup>104</sup> Mott first argued that a military emergency should have been shown to the court, to which the Supreme Court seemed to respond that the President’s determination was conclusive on the courts as well as on military personnel.<sup>105</sup> All of the

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<sup>101</sup> *See id.*

<sup>102</sup> *Luther v. Borden* did not involve the validity of a military call-out. With regard to Shea’s Rebellion, the Court held that it had no power to determine which of the contending parties was the legitimate government of a state. *Luther v. Borden*, 48 U.S. 1 (1849).

<sup>103</sup> 25 U.S. 19 (1827).

<sup>104</sup> *Id.*

<sup>105</sup> The Court first seemed to make the President’s decision final, but then seemed to imply that the complainant might be allowed to shoulder the burden of showing lack of emergency:

[T]he authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.

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... The argument is, that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the fact which bring the exercise within the purview of the statute. . . . When the President exercises an authority confided to him by law, the presumption that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, a fortiori, this presumption ought to be favourably applied to the chief

arguments put forth by the Court referred to the need for immediate unquestioning obedience by military personnel. Whether those same arguments would hold when a court was faced with a more doubtful situation, one in which the presence of a military threat was less clear, could yield a slightly different analysis as can be seen with *Youngstown Sheet & Tube*.

The *Prize Cases* similarly contained language seeming to grant the President unreviewable discretion to engage in acts of war.<sup>106</sup> In this case, several ships owned by foreign nationals and flagged by neutral countries had been seized by United States forces during a blockade against the Confederate states.<sup>107</sup> The owners of the ships argued that the President lacked authority to enforce a blockade against neutrals. The Court's language of deference to the President, however, was unnecessary because there was no question about the state of armed conflict between the Union and the Confederacy, and the only significant arguments in the case had to do with the status of the contending sides under international law.<sup>108</sup> Whether the President needed deference regarding the fact of armed conflict was hardly in issue.

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magistrate of the Union. It is not necessary to aver, that the act which he may rightfully do, was so done. If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury.

*Id.* at 30-33.

<sup>106</sup> The Court was quite emphatic that the presidential decision was binding on the courts:

Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The Brig Amy Warwick, 67 U.S. 635, 670 (1863).

<sup>107</sup> *Id.* at 635.

<sup>108</sup> *Id.* at 666-67.

The only twentieth century case citing the insurrection assistance statute is a federal court case dealing with property damage in the District of Columbia during the riots following the 1968 assassination of Dr. Martin Luther King.<sup>109</sup> Insurers who had paid out damage claims brought suit against the United States alleging that the government had been negligent in failing to call out the militia or use military force to suppress the riots. The district court simply pointed out the following:

[T]he decision whether to use troops or the militia (National Guard) in quelling a civil disorder is exclusively within the province of the President. The Courts also have made it clear that presidential discretion in exercising those powers granted in the Constitution and in the implementing statutes is not subject to judicial review.<sup>110</sup>

It is one thing to say that there is no constitutional duty on the part of the President to call out military force, at least not a duty enforceable by judicial damage action, but it is quite another to say that there is no judicially enforceable limit on the President's ability to call out military force when no state of insurrection justifies it. The limiting case would be one in which the President was alleged to be resorting to despotic measures to subdue the populace for whatever nefarious reasons may be motivating him or her. This is the case to which Justice Jackson's language in *Korematsu* is addressed<sup>111</sup>

Taken as a lecture in civic responsibility, Justice Jackson surely has a salient point. When his opinion is viewed as a recommended limit on the constitutional role of the courts, however, it requires more careful analysis. If it were taken to imply that courts should stay out of emergency cases, it would be highly suspect. Surely if the power of the President is limited to times of genuine emergency, then the courts must be willing to state whether such an emergency exists. To be true to the rationale of *Marbury*, recognizing an unfettered discretion in the President to use military force on the domestic arena is to say that there

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<sup>109</sup> *Monarch Ins. Co. v. Dist. of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973).

<sup>110</sup> *Id.* at 1255.

<sup>111</sup> "The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history." *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

is no constitutional *law* constraining that discretion.<sup>112</sup> Maybe there is a constitutional exhortation, but it is not a legal restraint.<sup>113</sup>

Justice Jackson made exactly this point himself, saying that the danger of deferential review is that the courts then validate executive action in the eyes of the public. “I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority.”<sup>114</sup>

Justice Jackson’s statement also carries a familiar pragmatic warning in its reference to “the physical forces of the country.”<sup>115</sup> There always exists the prospect that a court’s decree could be ignored, thus damaging its credibility (or, depending on the circumstances, the President’s credibility). Indeed, President Lincoln ignored Chief Justice Taney’s decree in *Merryman*.<sup>116</sup> On the other hand, a President might accede to even the most distasteful order. President Nixon’s lawyers hinted that he might not obey an order to deliver the tapes from his office, but within hours of the decision the President issued a statement that said “I respect and accept the court’s decision.”<sup>117</sup>

As a practical matter, certainly if there is *any level* of threatened violence to the community, the courts will accept the Executive’s decision to involve the military. The proposition preserves the rule of law and simply states an evidentiary standard that should be perfectly satisfactory for any President acting in good faith. Putting forward some evidence of a threat of violence should not be difficult in any situation that calls for military force. The presence of an emergency can be shown

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<sup>112</sup> *Marbury v. Madison*, 5 U.S. 137, 155-56 (1803).

<sup>113</sup> See generally Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HAST. CONST. L.Q. 595 (1987).

<sup>114</sup> *Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting).

<sup>115</sup> *Id.* at 248.

<sup>116</sup> See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 38 (1998); see also *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487) (holding that only Congress had the authority to suspend the writ of habeas corpus.). In this case, Merryman, a Confederate sympathizer, was suspected of sabotaging main transportation routes, which delayed Union troops, virtually cutting off the seat of government in Washington, D.C. After President Lincoln suspended habeas corpus, Soldiers broke into Merryman’s home and arrested him without a warrant upon general charges of treason and rebellion. *Id.* at 147. President Lincoln ignored Chief Justice Taney’s opinion, and Merryman remained imprisoned. REHNQUIST, *supra*, at 38-39.

<sup>117</sup> Frank Strong, *President, Congress, Judiciary: One Is More Equal than the Others*, 60 A.B.A. J. 1050 (1974).

factually with very little effort, and if the only action contemplated is calling out the military to patrol the streets, then the courts can leave that judgment to the Executive because at that point there is no clear countervailing threat to individual liberty. What if, however, the action taken by the Executive involves isolation of persons by race, or detention of alleged conspirators without a hearing? As soon as military action threatens values protected by equal protection or due process, then surely more is required of the courts.

Now return to the scenario in which military forces, following a release of botulin toxin in the New York City water supply, have established a perimeter around municipal water supplies and decreed that any person entering that perimeter will be arrested immediately and detained until it can be determined why the persons entered the unauthorized area. Suppose further that the two persons detained filed a writ of habeas corpus. For at least some period of time, the President would not even need to suspend the writ of habeas corpus to make these orders effective. A court presented with a habeas petition during the first few weeks after the initial attack would not likely thwart the defense of the entire populace by releasing persons who had violated the perimeter ban. Of course, the violation of the perimeter would need to be shown to the satisfaction of the judge as a simple matter of due process.

The point of this scenario is simply that the overblown hyperbole of unreviewable military discretion is unnecessary as a matter of law. Good faith executive-military decisions in any genuine emergency are not going to be overturned by any sensible judge. But what if the claim of emergency drags on for many months, maybe years, with no further threat of violence? How is a judge to accept a claim of emergency without being persuaded with hard evidence that a person violating the perimeter ban was actually engaged in at least a conspiracy to commit an observable crime?

Why did Chief Justice Taney not pursue the *Merryman* case? He said it was because his “power has been resisted by a force too strong for me to overcome.”<sup>118</sup> The Civil War was just beginning when Merryman was arrested—Union Soldiers were en route to Washington D.C. to defend the city from a suspected Confederate attack, and acts of sabotage, presumably committed by Merryman, virtually cut off the seat of government from its loyal states and delayed the arrival of Union troops.

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<sup>118</sup> *Id.*

During this time, there was no hope of enforcing an order to release Merryman. After the war ended, however, it was safe for the Court to issue its opinion in *Milligan*. If the government had made a return to the habeas petition in *Merryman* reciting its evidence of Merryman's involvement in blowing up railroad bridges, and asserting an intent to conduct a trial, even a military trial in an active theater of combat, then there would have been no violation. The suspension of the writ by President Lincoln was really overkill. There was no need for the suspension because most judges and the people would have willingly accepted military law enforcement in the face of a genuine emergency and the government could easily have made satisfactory returns to habeas corpus petitions after the emergency passed.<sup>119</sup>

Disputing a President's declaration of emergency might appear to require Herculean courage on the part of the judges, but the judge should realize that he will not single-handedly cause the "suicide" of the nation. Just as with Chief Justice Taney's order in *Merryman*, there is always the possibility that the President will disregard a court order, particularly one issued in the grey area between genuine emergency and lasting peace. In that instance, Justice Jackson's civics lecture has real bite. Once the court rules, if the President does not obey, the political will of the people must be the final recourse—either the legal and political culture of the United States will stand on the side of the judiciary, or the understandings of constitutional power allocations will change.

The more frightening prospect is that the President will obey, and then a disaster will occur under circumstances that make possible the argument that it is the judge's fault. This prospect is really just a strong argument that the judge must be circumspect in disputing the executive's conclusion that an emergency exists.

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<sup>119</sup> Maybe Chief Justice Taney would have still disagreed, but the President's position with the populace would have been impregnable and his position with later observers much stronger. Merryman never faced a trial, neither by military tribunal nor civilian court. He was released on bail some months after Chief Justice Taney's opinion and never brought to trial. Chief Justice Taney allegedly stalled any potential trial in the civilian courts. REHNQUIST, *supra* note 116, at 39. The implication may be that President Lincoln and his advisors accepted Chief Justice Taney's belief that Merryman could only be tried in civilian courts or it may be that they simply lost interest when more urgent matters of warfare occupied the attention of the administration.

## B. Executive Detentions

Generally speaking, the Constitution does not allow departures from peace-time norms except in times of national emergency and only to the extent required by that emergency. But the facts of what constitutes an emergency often will be in the control of the military and subject to claims of needs for secrecy. So how are the courts to review claims of military necessity and emergency? The experience thus far with military tribunals and detention is mixed.

Yaser Esam Hamdi and Jose Padilla were held in military custody for over two years before their habeas corpus cases reached the Supreme Court.<sup>120</sup> Hamdi is a U.S. citizen who was captured by military action during wartime in Afghanistan.<sup>121</sup> The government first chose not to disclose the circumstances of his capture—whether he was actively engaged in carrying arms against U.S. troops. Under pressure from the district court,<sup>122</sup> the government produced an affidavit containing very summary statements about the circumstances of his capture.<sup>123</sup> Padilla was arrested by civilian authorities when deplaning in Chicago after a trip to Pakistan, during which he allegedly made plans to detonate a “dirty bomb” in the District of Columbia.<sup>124</sup> After habeas proceedings in New York initially challenged his detention as a material witness, he was

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<sup>120</sup> Hamdi was captured in the fall of 2001 and his petition for a writ of habeas corpus was argued before the Supreme Court on 28 April 2004. *See Hamdi v. Rumsfeld*, 316 F.3d 450, 460 (4th Cir. 2003), *aff'd*, 124 S. Ct. 2633 (2004). Padilla was arrested on 8 May 2002 and his petition for a writ of habeas corpus was also argued before the Supreme Court on 28 April 2004. *Padilla v. Bush*, 233 F. Supp. 2d 564, 572-73 (S.D.N.Y. 2002), *aff'd*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004).

<sup>121</sup> *See Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).

<sup>122</sup> The district court first ordered that counsel be allowed to meet with Hamdi, but the Fourth Circuit reversed and insisted that the district court should first determine, with “deference to the political branches,” if Hamdi was indeed an illegal enemy combatant before proceeding any further. *Id.* at 283. The district court then ordered production of additional material regarding the detainee’s status. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 528-29 (E.D. Va. 2002), *rev'd* 316 F.3d 450 (4th Cir. 2003), *aff'd*, 124 S. Ct. 2633 (2004). The government petitioned for interlocutory review and the Fourth Circuit reversed and remanded, holding that Hamdi was not entitled to habeas review beyond the government’s statement of his status. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). That was the decision on which the Supreme Court then granted certiorari. 124 S. Ct. 2633.

<sup>123</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2637 (2004).

<sup>124</sup> *Padilla*, 233 F. Supp. 2d. at 572-73.

transferred to military custody in South Carolina.<sup>125</sup> In both cases, the Justice Department took the position that the government was not required to disclose to a court the basis for the detention beyond the conclusion that each was an “enemy combatant.”<sup>126</sup>

### 1. *Hamdi*

Understanding the Supreme Court holding in *Hamdi* is aided by understanding the government’s argument in the lower courts. The government first took the position that Hamdi could be held without judicial review. “Especially in a time of active conflict, a court considering a properly filed habeas action generally should accept the military’s determination that a detainee is an enemy combatant.”<sup>127</sup> Even granting the wiggle room of the word “generally,” this is at best an astonishing statement. If made by the government of any number of third-world countries over the last half century, it would bring instant rebuke from both left and right political allegiances. The United States government, apparently recognizing the enormity of the statement, immediately asserted that its position “does not nullify the writ.”<sup>128</sup>

The government suggested two checks on the military. First, a court could insist on a statement of the detainee’s status, and second, the courts would be assured of the efficacy of political checks on the executive branch.<sup>129</sup>

On the first question, whether there is judicial review authority to determine whether the detainee is an “enemy combatant,” the *Hamdi*

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<sup>125</sup> The district court ruled that the President would have authority to detain Padilla if there were “some evidence” of his being an “enemy combatant.” *Id.* at 569-70. The Second Circuit reversed, holding that absent specific congressional authorization the Non-Detention Act prohibited the President’s detention of an American citizen on American soil as an enemy combatant. *Padilla v. Rumsfeld*, 352 F.3d 695 (2nd Cir. 2003), *rev’d*, 124 S. Ct. 2711 (2004).

<sup>126</sup> *Hamdi*, 296 F.3d at 283; *Padilla*, 352 F.3d at 715-16 (The Second Circuit dealt with this argument obliquely because of its holding that the Authorization for Use of Military Force (AUMF) did not authorize detention.).

<sup>127</sup> Brief of Respondents-Appellants at 31, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895), *available at* <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums61902gbrf.pdf> [hereinafter Brief for Respondents-Appellants].

<sup>128</sup> *Id.* at 32.

<sup>129</sup> *Id.* at 33.

brief in the Fourth Circuit attempted reassurance by stating the following:

[A]lthough a court should accept the military's determination that an individual is an enemy combatant, a court may evaluate the legal consequences of that determination. For example, a court might evaluate whether the military's determination that an individual is an enemy combatant is sufficient as a matter of law to justify his detention even if the combatant has a claim to American citizenship. In doing so, however, a court may not second guess the military's determination that the detainee is an enemy combatant, and therefore no evidentiary proceedings concerning such determination are necessary.<sup>130</sup>

Thus, the government took the position that its status determination would be "sufficient as a matter of law to justify his detention."<sup>131</sup> If a court were to decide as the government wished, then the combatant determination effectively isolates the detainee from any judicial oversight whatsoever. The Supreme Court never hesitated in either *Quirin* or *Eisentrager*<sup>132</sup> to assert its authority to determine whether the determination of the prisoner's status was reasonable. Anything less would undercut the entire structure upon which this nation's jurisprudence is built.<sup>133</sup>

The Supreme Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."<sup>134</sup> That statement hardly ends the matter, however, because then the government must decide what its next step should be.

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<sup>130</sup> *Id.* at 32.

<sup>131</sup> *Id.*

<sup>132</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>133</sup> At the outset, Chief Justice Marshall's explication of judicial-executive relations in *Marbury v. Madison* described areas in which the Executive would have unfettered discretion as being those of purely political choices. *Marbury v. Madison*, 5 U.S. 137 (1803). All other areas, in which there is law to control executive discretion as if affects individuals, would be subject to judicial review. "[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id.* at 166.

<sup>134</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004).

The government can either turn to proof of combatant status in the habeas proceeding or to another avenue, such as trial for specific criminal conduct. Pursuing the first course requires asking what sort of evidence would be required for the United States to justify holding a citizen without trial. If the government sought to show that Hamdi was bearing arms against the United States, the Supreme Court's due process demands would allow Hamdi an opportunity to rebut the government's evidence. Because bearing arms against the United States by a citizen violates any number of statutes,<sup>135</sup> it is difficult to see why the government's evidence and Hamdi's rebuttal should not take place in a full-blown trial, either in the civilian criminal justice system (such as John Walker Lindh) or in the military criminal justice system. In the latter instance, a person captured bearing arms in the "theater of operations" would rather clearly be subject to the jurisdiction of a military commission.<sup>136</sup>

The government made two arguments against the need for a trial. The first argument—regarding the desirability of detention for interrogation—a plurality of the Supreme Court answered with the flat statement that "indefinite detention for interrogation is not authorized."<sup>137</sup> The government next argued that combatants could be held to prevent their rejoining the enemy.<sup>138</sup> The plurality's partial agreement with this argument stated their "understanding" that Congress had authorized military detention without trial only for:

[T]he duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.<sup>139</sup> But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals

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<sup>135</sup> See, e.g., 18 U.S.C. §§ 2381, 2383, 2390 (2000).

<sup>136</sup> Brief for Respondents-Appellants, *supra* note 127, at 30.

<sup>137</sup> *Hamdi*, 124 S. Ct. at 2641.

<sup>138</sup> *Id.* at 2638.

<sup>139</sup> The question of what happens when a resistance fighter confronts a military occupation force will be considered later in this article.

legitimately determined to be Taliban combatants who “engaged in an armed conflict against the United States.”<sup>140</sup>

By contrast, Justice Scalia said that there was nothing in Anglo-American law since the Magna Carta to authorize executive detention of a citizen without trial.<sup>141</sup> He distinguished *Quirin* on the ground that “in *Quirin* it was uncontested that the petitioners were members of enemy forces,”<sup>142</sup> to which the plurality responded that Hamdi was picked up on a foreign battlefield and the proof of enemy status would be forthcoming in the hearing envisioned on remand.<sup>143</sup> With all due respect, this dialogue between Justices Scalia and O’Connor misses the point that Hamdi was being held *without trial* and would continue being held even after the hearing contemplated by the plurality. In *Quirin*, the individual was at least granted a military tribunal because of his status as a member of “enemy forces.”<sup>144</sup> Justice Scalia surely has the better of the argument that indefinite detention without trial is alien to our constitutional underpinnings.<sup>145</sup>

The plurality’s position carried the day only because Justice Souter, joined by Justice Ginsburg, would have preferred to reach a similar position to Justice Scalia on statutory rather than constitutional grounds, but relented to vote with the plurality because otherwise there would have been no resolution of the case.<sup>146</sup> It would have been an extremely odd situation for eight Justices to reject the lower court’s acceptance of the government’s position and yet leave the Court unable to reverse the lower court for failure to agree on a disposition.

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<sup>140</sup> *Hamdi*, 124 S. Ct. at 2641-42.

<sup>141</sup> *Id.* at 2661 (Scalia, J., dissenting).

<sup>142</sup> *Id.* at 2670.

<sup>143</sup> *Id.* at 2643.

<sup>144</sup> *Ex parte Quirin*, 317 U.S. 1, 45 (1942).

<sup>145</sup> The plurality at this point also accuses Justice Scalia of creating a “perverse incentive” to hold citizens abroad rather than bringing them back to the United States, because Scalia would deny U.S. courts jurisdiction to issue habeas corpus to persons held abroad. *Hamdi*, 124 S. Ct. at 2643. But this ignores the one critical feature of citizenship that remains in the modern world—a citizen cannot be held in exile. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) (“No one shall be subject to arbitrary arrest, detention, or exile.”) The right of a citizen to enter his country of nationality would be the only apparent reason why Hamdi was brought to Virginia and then South Carolina.

<sup>146</sup> *Id.* at 2660 (Souter, J., concurring).

The government also made an argument to the Fourth Circuit for executive discretion based on original intent, an argument that flowed from the Fourth Circuit's own earlier opinion involving the "don't ask, don't tell" policy on homosexuality in the military.<sup>147</sup> Coupling two different statements from the Federalist Papers, the Fourth Circuit had asserted that "the Founders failed to provide the federal judiciary with a check over the military powers of Congress and the President."<sup>148</sup> The government asserted that this represented a "hands-off approach taken by the courts in reviewing military decisions or operations."<sup>149</sup> The first statement from the Federalist Papers is that, with regard to military affairs, "if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger [by the minority], and [the community] will have an opportunity of taking measures to guard against it."<sup>150</sup> This quote comes from a passage by Hamilton providing assurances that Congress will have control of the military by virtue of its inability "to vest in the executive department permanent funds for the support of an army" and by action of the "party in opposition."<sup>151</sup> When the Executive claims authority to hide information

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<sup>147</sup> Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996).

<sup>148</sup> *Id.* at 924. It is not apparent how many members of the Fourth Circuit shared this view. Nine judges voted to uphold the "don't ask, don't tell" policy. *Id.* at 918. The statement about the judicial role appears in Chief Judge Wilkinson's opinion for the Court. *See generally id.* at 923-25. Judge Luttig, however, concurred in an opinion also joined by five other judges, so it is not clear the extent to which six of the nine votes embraced the statements regarding judicial deference.

<sup>149</sup> Brief for Respondents-Appellants, *supra* note 127, at 33

<sup>150</sup> THE FEDERALIST NO. 26, 188-89 (Alexander Hamilton) (Jacob E. Cooke ed., 1984). The language chosen by the government is italicized:

The provision for the support of a military force will always be a favorable topic for declamation. As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition and *if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it.* Independent of parties in the national legislature itself, as often as the period of discussion arrived, the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.

*Id.* (emphasis added).

<sup>151</sup> *Id.* at 164-71.

from the other branches and the public, as in *Hamdi*, it is difficult to place much reliance on the power of the Loyal Opposition.

The second quote, Hamilton's statement that the judiciary would have "no influence over either sword or purse," related to assurances that the judiciary would not be able to rule by fiat.<sup>152</sup> It does not serve as a mandate for unfettered executive power any more than a mandate for unfettered judicial power.

Using these quotes to support plenary military authority is far from fair to the authors of the Federalist Papers, who could hardly have been arguing in favor of rule by military fiat. They had just fought a war against a runaway monarch, had drafted a constitution full of checks on executive power, and were consistently reminding the public of the need to be vigilant against the abuses of a standing army.

The Fourth Circuit responded to these arguments by straddling both sides of the fence, an uncomfortable if not downright painful position. After reciting the reasons for judicial deference to executive military decisions and praising American reliance on the Bill of Rights and habeas corpus, the court held that Hamdi could be detained because he had been captured bearing arms against the United States in an active combat zone.<sup>153</sup> "We shall, in fact, go no further in this case than the specific context before us—that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces."<sup>154</sup>

The Fourth Circuit seemed to hold that a court must accept the factual determinations of the military without judicial review,<sup>155</sup> but it

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<sup>152</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>153</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

<sup>154</sup> *Id.* at 465.

<sup>155</sup> The court overstated the situation by speculating about the degree of factual inquiry that could be required to determine whether Hamdi was engaged in levying war against the United States, but he was not on trial for that offense.

The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be

backed off the most extreme implications of this position by gratefully accepting the government's "voluntary" submission of some factual information.<sup>156</sup> A fair reading of the Fourth Circuit's opinion is that the judiciary must defer to the military and that the military must defer to the judiciary, which shows the extraordinarily difficult position in which the court found itself.

The Supreme Court rejected the arguments for unreviewed discretion by a vote of 8-1.<sup>157</sup> In neither military law nor civilian law is there any justification for indefinite detention of an American citizen once he is removed from the theater of operations.<sup>158</sup> Accepting the government's

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diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.

*Id.* at 471.

<sup>156</sup> The court claimed some authority to review the "basic facts" justifying detention.

This deferential posture, however, only comes into play after we ascertain that the challenged decision is one legitimately made pursuant to the war powers. It does not preclude us from determining in the first instance whether the factual assertions set forth by the government would, if accurate, provide a legally valid basis for Hamdi's detention under that power. Otherwise, we would be deferring to a decision made without any inquiry into whether such deference is due. For these reasons, it is appropriate, upon a citizen's presentation of a habeas petition alleging that he is being unlawfully detained by his own government, to ask that the government provide the legal authority upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority. Indeed, in this case, the government has voluntarily submitted—and urged us to review—an affidavit from Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, describing what the government contends were the circumstances leading to Hamdi's designation as an enemy combatant under Article II's war power.

*Id.* at 472.

<sup>157</sup> The Hamdi votes were: O'Connor (4), Souter (2), and Scalia (2). The Scalia (and Stevens) opinion was labeled a dissent because they would have required that Hamdi be released or prosecuted. Justices Souter (with Ginsburg) argued that there was no authority for his detention but joined the plurality to avoid stalemating the Court.

<sup>158</sup> The Fourth Circuit saw the problems of conducting a trial as being insurmountable in light of an ongoing war effort. *Id.* at 471. But this argument is simply unpersuasive in light of modern communications and transportation, especially a year after the military

position in *Hamdi*, that civilian courts may not inquire into the bases of classifying a person as an enemy combatant, would have constituted a radical change in the American way of doing government business. As Justice Souter stated, “[w]hether insisting on the careful scrutiny of emergency claims or on a vigorous reading of § 4001(a), we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons’ insistence, confined executive power by ‘the law of the land.’”<sup>159</sup>

In one sense, *Hamdi* is an example of an easy case with the potential for making bad law. If Hamdi had been detained in a militarily occupied zone, then he would have been subject to the law either of the occupied state or the occupying forces.<sup>160</sup> Once brought to the United States, however, he was rather obviously entitled to whatever due process entailed under the circumstances. The harder questions are those that were lurking in Justice O’Connor’s statement that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [regarding detention for the duration of the conflict] may unravel.”<sup>161</sup> This is the quintessential example of how the combining of the misnamed “war on terror” with the circumstances of a real war brought confusion into the handling of persons who were alleged to have acted against the peace and security of the United States.<sup>162</sup>

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operation has reached the majority of its objectives and now consists of something closer to occupation than active engagement.

<sup>159</sup> *Hamdi*, 124 S. Ct. 2633, 2659 (2004).

<sup>160</sup> See U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF WAR para. 362 (15 July 1956).

Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory. The necessity for such government arises from the failure or inability of the legitimate government to exercise its functions on account of the military occupation, or the undesirability of allowing it to do so.

*Id.*

<sup>161</sup> *Hamdi*, 124 S. Ct. at 2641.

<sup>162</sup> See Hoffman, *supra* note 9. Hoffman argues for application of customary international law to nonstate actors who violently attack the interests of the state. *Id.* at 27. This approach can work to some extent with foreign nationals overseas but does not provide a source of law by which to deal with domestic situations. Hoffman’s own examples involve situations in which the perpetrators of acts on U.S. soil were handed over to civilian authorities. *E.g., id.* at 30.

## 2. *Padilla*

Unfortunately, the Court stopped short of the logical implications of its *Hamdi* position when it turned to the case of Jose Padilla. Padilla, a U.S. citizen, was arrested on U.S. soil.<sup>163</sup> He was carrying no weapons, having just stepped off a secure airplane, but was allegedly hoping to carry out an attack on U.S. soil at an undisclosed date in the future.<sup>164</sup> The government first held him as a “material witness” before a grand jury in New York, but later transferred him to military custody in South Carolina as an “enemy combatant.”<sup>165</sup> A habeas corpus petition in New York was met with claims by the United States that isolation of Padilla was necessary “to bring psychological pressure to bear on him for interrogation.”<sup>166</sup>

On the merits, following *Hamdi*, the *Padilla* habeas petition seemed an even easier case. Padilla presented the added dimension of an arrest on U.S. soil for alleged activities not connected to an enemy nation. Even if one assumed that this made Padilla similar enough to defendant Haupt in the *Quirin* case so that military jurisdiction would arguably be proper, there was nothing to indicate that Padilla should not be given a military commission hearing, such as the hearing that Haupt received, or at least a *Hamdi*-style review in the civil courts.

But the Court ducked the implications of its holding in *Hamdi* by holding that Padilla’s petition should have been filed in South Carolina rather than in New York because he had been transferred to a South Carolina facility two days before the filing.<sup>167</sup> In a routine case, this might be an appropriate result. But this was no ordinary case. As Justice Stevens pointed out in dissent,<sup>168</sup> Padilla was already represented by counsel when he was held in New York pursuant to a material witness warrant.<sup>169</sup> When the New York court ruled that his status under that

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<sup>163</sup> *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004).

<sup>164</sup> *See id.* at 2715, 2716 n.2.

<sup>165</sup> *See id.* at 2715-16.

<sup>166</sup> *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003) (The government contended that “[o]nly 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.”). This argument probably flies in the face of much of due process law, but that issue need not be explored now in light of how the case developed.

<sup>167</sup> *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

<sup>168</sup> *Id.* at 2732-33.

<sup>169</sup> *Id.* at 2730 (Stevens, J., dissenting).

warrant gave him rights to meet with counsel, the Attorney General transferred him to the Secretary of Defense, who designated Padilla an unlawful combatant and authorized his transfer from New York to South Carolina.<sup>170</sup> Padilla's New York counsel filed the habeas corpus petition promptly on his behalf in New York.<sup>171</sup> If the petition had been filed in New York before his transfer to South Carolina, then the New York court could have retained jurisdiction.<sup>172</sup> Requiring the case to be refiled in South Carolina seemed at the time a mere formality because a judge in either New York or South Carolina could conduct the sort of due process review required by *Hamdi*.

Padilla's lawyers filed in South Carolina against Padilla's immediate custodian and moved for summary judgment on the habeas petition.<sup>173</sup> The district court determined that the Authorization for Use of Military Force Joint Resolution, Pub. L. 107-40, 115 Stat. 224 (AUMF), as a general statement of authority, did not exempt detention of citizens on home soil from operation of the Non-detention Act, a very specific statement of Congress on the matter at hand.<sup>174</sup> The court went on to point out that there was a plethora of criminal statutes under which Padilla might be charged and that due process required either charging or releasing him.<sup>175</sup> The Fourth Circuit, however, disagreed.<sup>176</sup> Referring to the plurality opinion in *Hamdi* as the "controlling opinion," the court of appeals held that the AUMF authorized military detention of an "enemy combatant" for the duration of hostilities in Afghanistan.<sup>177</sup>

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<sup>170</sup> *Id.* at 2715-16.

<sup>171</sup> *Id.* at 2711, 2716.

<sup>172</sup> *See id.*

<sup>173</sup> *See Padilla v. Hanft*, 2005 U.S. Dist. LEXIS 2921 \*29 (D.S.C. 2005), *rev'd Padilla v. Hanft*, 2005 U.S. App. LEXIS 19465 (4th Cir. S.C., 2005).

<sup>174</sup> "[W]hereas it may be a necessary and appropriate use of force to detain a United States citizen who is captured on the battlefield, this Court cannot find, in narrow circumstances presented in this case, that the same is true when a United States citizen is arrested in a civilian setting such as an United States airport." *Padilla v. Hanft*, 2005 U.S. Dist. LEXIS 2921 \*29 (D.S.C. 2005).

<sup>175</sup> *See id.* at \*40.

<sup>176</sup> *Padilla v. Hanft*, 2005 U.S. App. LEXIS 19465 (4th Cir. 2005).

<sup>177</sup>

Under *Hamdi*, the power to detain that is authorized under the AUMF is not a power to detain indefinitely. Detention is limited to the duration of the hostilities as to which the detention is authorized. 124 S. Ct. at 2641-42. Because the United States remains engaged in the conflict with al Qaeda in Afghanistan, Padilla's detention has not exceeded in duration that authorized by the AUMF.

Although the lead opinion in *Hamdi* was a mere plurality, Justice Thomas agreed with the interpretation of the AUMF, and the Fourth Circuit essentially followed a majority of the Supreme Court.<sup>178</sup> On this issue, the district court's position is persuasive but goes against five votes at the Supreme Court.

At this point, one would expect the next question to be whether military detention without a hearing violated due process. That did not happen, however, because according to the Fourth Circuit, Padilla's counsel had agreed to the statement of facts presented by the government in the course of the summary judgment proceedings.<sup>179</sup> Given such a stipulation, there was no further need for a *Hamdi*-style due process determination, and the only issues related to whether the AUMF covered U.S. citizens arrested on U.S. soil, a distinction that the Fourth Circuit declined to make.<sup>180</sup>

The contrast of the opinions of the District Court in South Carolina and the Fourth Circuit are very enlightening on the question of what constitutes emergency power and how far it extends. The district court emphasized that the AUMF was passed in urgency as a wartime measure and did not address detentions whereas the Non-detention Act was a deliberate statement specifically addressed to detentions.<sup>181</sup> The district court could have added that the Non-detention Act was prompted by the very type of situation presented (*i.e.*, the Japanese internment of World War II). Unfortunately for the district judge's position, the Supreme Court in *Hamdi* had read the AUMF as if it incorporated a long-standing tradition of military detention power in wartime, and the Fourth Circuit incorporated that tradition to the *Padilla* situation by analogy to *Quirin*.<sup>182</sup>

This sequence of opinions shows very clearly the dangers in responding to emergency situations without being clear that it is an emergency that is prompting departure from normal operations. The

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*Id.* at \*17 n.3.

<sup>178</sup> See generally *id.*

<sup>179</sup> *Id.* at \*8 n.1. From the district court's opinion, however, it appears that the stipulation covered only the circumstances of his arrest, not the contentions of the government that he was engaged in a mission for a terrorist organization. See *Padilla*, 2005 U.S. Dist. LEXIS 2921, at \*5-7.

<sup>180</sup> See *Padilla*, 2005 U.S. App. LEXIS 19465, at \*17-30.

<sup>181</sup> See *Padilla*, 2005 U.S. Dist. LEXIS 2921, at \*29-30.

<sup>182</sup> See *Padilla*, 2005 U.S. App. LEXIS 19465, at \*15-16.

Fourth Circuit, arguably taking a lead from the *Hamdi* plurality, wrote as if it were perfectly normal for the military to detain U.S. citizens arrested on U.S. soil for actions to be taken within the United States.<sup>183</sup> This rhetoric is almost plausible if one reads the plurality in *Hamdi* and the majority in *Quirin* as if those situations reflected long-standing traditions. Long-standing traditions, yes, but those are traditions drawn from the battlefield as the district judge in *Padilla* emphasized.<sup>184</sup> Extending the battlefield to U.S. soil is an enormous stretch.

Now, instead of Jose Padilla, let us hypothesize the arrest of a U.S. citizen alleged to be acting as an agent of the Iraqi government in a zone of combat during time of armed conflict. In this context, the government arguments make complete sense. There is an identified enemy nation, an identified battlefield, and the prospect of a cessation of hostilities that would carry “repatriation.” In that situation, the U.S. citizen would not be merely “repatriated” at the conclusion of hostilities but could be tried for any number of offenses.

Next, take the same scenario without U.S. citizenship, so that the detainee is an Iraqi soldier arrested on U.S. soil before the close of hostilities. Pursuant to the law of war, he would be punishable by processes complying with international law or could be detained until the close of hostilities.<sup>185</sup> Similarly, a civilian who takes up arms unlawfully in a state of “armed conflict” may be charged and tried pursuant to the same laws<sup>186</sup> with opportunity for a “determination by a competent tribunal”<sup>187</sup> Battlefield abuse and executions of both combatants and civilians certainly occur, but they are violations of international law and conventions. To round out the picture with insurgencies, the Geneva Conventions also provide for detaining persons in occupied or contested territory when they present a reasonable security threat to an active military force.<sup>188</sup> If the military holds such persons “in country,” there is

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<sup>183</sup> See, e.g., *id.* at 11-15.

<sup>184</sup> See *Padilla*, 2005 U.S. Dist. LEXIS 2921, at \*29.

<sup>185</sup> See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 84, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

<sup>186</sup> See, e.g., Geneva Convention Relative to the Treatment of Civilian Persons in Time of War art. 5, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

<sup>187</sup> Geneva Convention III, *supra* note 185, art. 5.

<sup>188</sup> See *id.* Even Protocol I to the Geneva Conventions, to which the United States is not a party, recognizes the ability of an active armed force to detain persons for security reasons. Protocol Additional to the Geneva Conventions of 12 August 1949, and

no need for judicial review. If it subjects such a person to military trial for violation of the law of war, then *Quirin* and *Eisentrager* are ample precedent. What happened with Padilla, however, is none of these situations.

There are several bases on which to distinguish Jose Padilla from those who went before him. Unlike Hamdi, Padilla was not arrested on the battlefield by military units. Unlike Haupt in *Quirin*, Padilla did not concede that he was acting as an agent of a foreign government or even an insurgent entity. Like Milligan, he was arrested on domestic soil at a time when the civilian courts were open and operating even though there was a war going on. All of this shows that some judges and courts facilely accepted principles from wartime as if they applied universally rather than recognizing that the powers of the Executive in wartime are designed for that occasion and no others. As Justice Souter paraphrased from Justice Jackson, the “President is not Commander in Chief of the country, only of the military.”<sup>189</sup> For the sake of both the military and civilian processes, it is important to keep the two separate so that both limitations and extra-normal powers inherent in the military operation are congruent. In other words, it is wise to remember that “it’s in there.”

*Padilla* shows very clearly that it is up to Congress to clarify the intent of “We the People” as to what is included in the scope of emergency authorizations. Without that clarity, there is a great temptation on the part of the unelected judiciary to accede to assertions that Executive power includes the unusual, an exercise of the “it’s in there” position that reverses the normal operation of the presumption.

### 3. *Guantanamo Detainees*

Several habeas corpus and related petitions challenging detentions at Guantanamo Bay were presented to federal courts in the District of Columbia<sup>190</sup> (DC) and the Ninth Circuit<sup>191</sup> on behalf of nationals of nations other than Afghanistan,<sup>192</sup> and each essentially challenged the

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Relating to the Protection of Victims of International Armed Conflicts arts. 46 & 75, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

<sup>189</sup> Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2659 (2004).

<sup>190</sup> See, e.g., Khaled al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

<sup>191</sup> See, e.g., Ghorebi v. Bush, 352 F.3d 1278 (9th Cir. 2003).

<sup>192</sup> The named individuals on whose behalf relief was sought in the District of Columbia included twelve Kuwaitis, two Australians, and two Britons. See generally *id.*, *Khaled al*

authority of the United States to hold the detainees without due process. The DC Circuit held that habeas corpus is not available to aliens held outside the “sovereign territory” of the United States for the simple reason that those persons have no constitutional rights under U.S. law.<sup>193</sup> The Ninth Circuit disagreed, however, holding that Guantanamo is subject to U.S. control and jurisdiction, and that the rights of the detainees would need to be determined after consideration of the government’s response to the habeas petitions.<sup>194</sup> The Ninth Circuit expressed astonishment at what it considered the government’s “extreme position.”<sup>195</sup>

Under the heading of *Rasul v. Bush*,<sup>196</sup> the Supreme Court essentially agreed with the Ninth Circuit. Although these detainees were being held outside the United States, they were under federal custody.<sup>197</sup> Thus the “immediate custodian” rule would not apply, the Secretary of Defense

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*Odah*, 321 F.3d 1134. The individuals claimed to have been in Afghanistan for various personal or humanitarian reasons, to have been kidnapped by locals, and to have ended up in the hands of U.S. military forces without having taken up arms against the United States. See generally *Khaled al Odah*, 321 F.3d 1134. The Ninth Circuit did not indicate the nationality of Gherebi.

<sup>193</sup> *Id.* at 1141.

<sup>194</sup> *Gherebi*, 352 F.3d at 1284.

<sup>195</sup> *Id.* at 1300.

[U]nder the government’s theory, it is free to imprison Gherebi indefinitely along with hundreds of other citizens of foreign countries, friendly nations among them, and to do with Gherebi and these detainees as it will, when it pleases, without any compliance with any rule of law of any kind, without permitting him to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged. Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantanamo, the U.S. government has never before asserted such a grave and startling proposition. Accordingly, we view Guantanamo as unique not only because the United States’ territorial relationship with the Base is without parallel today, but also because it is the first time that the government has announced such an extraordinary set of principles - a position so extreme that it raises the gravest concerns under both American and international law.

*Id.* at 1299-00.

<sup>196</sup> 124 S. Ct. 2686 (2004).

<sup>197</sup> *Id.* at 2695.

would be an adequate defendant, and the D.C. district court could exercise jurisdiction. The Supreme Court went about as far as the Ninth Circuit in expressing an opinion on the merits of the petitions, but in a slightly different direction. In a mere footnote, Justice Stevens stated the following for the Court:

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.”<sup>198</sup>

Unfortunately, the Court did not elaborate on what the Constitution, laws, or treaties might require in this situation. Without any indication of what law might apply, it is difficult to know whether the habeas petitions stated a claim on which relief could be granted.<sup>199</sup> That leaves wide-open questions of what law to apply to the Guantanamo detainees, which the next section addresses.

#### 4. *Finding the Law Applicable to Military Detainees*

The Supreme Court left open some very important questions to be resolved on remand in the three 2004 cases. What law should the “neutral decision maker” apply to determine if a citizen such as Hamdi or Padilla can be held indefinitely without trial? What law applies to the

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<sup>198</sup> *Id.* at 2698 n.15.

<sup>199</sup> Although 28 U.S.C. § 2243 continues to contemplate immediate issuance of the writ or an order to show cause why the writ should not be issued, at which point the writ requires a “return” in which the custodian would set out the circumstances justifying detention, the courts routinely treat the petition and answer as if they were an ordinary civil case. If the pleadings do not call for a hearing for factual determinations, then the entire matter can be treated as if the defendant had filed a motion to dismiss or motion for summary judgment. If the writ issues, it usually takes the form of an order to release the prisoner or conduct a new trial. Although this procedure has become widespread, it carries only an inferential approval by the Supreme Court. *See Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 498 (1974).

claims of the Guantanamo detainees that they are in “custody in violation of the Constitution or laws or treaties of the United States?”

The lower courts did not deal with the first of these questions in Hamdi’s case because he was released in a negotiated arrangement by which he was remitted to Egypt with assurances of future behavior that amounted to a set of parole conditions.<sup>200</sup> Padilla’s application for habeas corpus produced a holding by the district court—that Padilla is being held in violation of federal statutes<sup>201</sup>—which is still pending on appeal.

The Guantanamo cases, however, have produced an interesting division of opinion. Justice Stevens did not explore the “merits” of the Guantanamo detentions. “In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States.”<sup>202</sup> Justice Scalia said essentially that there is no law that protects these persons, making a distinction between citizens and noncitizens,<sup>203</sup> much as he did in *Hamdi*. On remand in these cases, or in ruling on any future habeas corpus petitions, what law will apply to determine whether a detainee in U.S. military custody is being held “in violation of the Constitution or laws” of the United States? Each of the possibilities presents some difficulties.

*Constitutional rights*—It is not clear that an alien held in federal custody outside the United States would have constitutional rights other than perhaps some rights regarding conditions of confinement, or perhaps the due process right to a determination of status similar to that accorded to *Hamdi*. In one of the cases reviewed in *Rasul*, the D.C. Circuit stated:

We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional

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<sup>200</sup> Yaser Esam Hamdi v. Donald Rumsfeld, Settlement Agreement, Sept. 17, 2004, <http://news.findlaw.com/hdocs/docs/hamdi/91704stlagmnt.html>.

<sup>201</sup> Padilla v. Hanft, 2005 U.S. Dist. LEXIS 2921 (D. S.C. 2005), *cert. denied*, 2005 U.S. LEXIS 4813 (2005). The district court held that the Authorization for Use of Military Force, which justified military action in Afghanistan and which was read by the Supreme Court plurality to authorize initial detention of Hamdi, did not apply in the case of Padilla, who was arrested by civilian authorities in the United States. Thus, his detention by military authority was in violation of the Non-Detention Act, 18 U.S.C.S. § 4001(a) (LEXIS 2005).

<sup>202</sup> Rasul v. Bush, 124 S. Ct. 2686, 2698 (2004).

<sup>203</sup> *Id.* at 2702, 2706.

protections are not. This much is at the heart of *Eisentrager*. If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty.<sup>204</sup>

*Statutory rights*—An alien seeking admission to the United States may have claims to statutory rights under the immigration laws, but the only statute generally protecting against incarceration is the anti-detention statute considered in *Hamdi*, which almost certainly applies only within the United States. Other statutes protecting the interests of the Guantanamo detainees would be those that protect generally against such behavior as torture or murder, none of which on its face grants any claim of release from incarceration.

*Treaty rights*—There is a significant question about whether the Geneva Conventions are self-executing in the sense that they create rights on behalf of individuals as opposed to institutional claims subject to diplomatic solutions. The government argued in the lower courts that the Conventions created diplomatic remedies and not individual remedies.

*Customary international law*—There is a strong argument that both treaties and customary international law entitle a person to freedom from “arbitrary” detention, which implies some level of judicial review over the propriety of detention or at least a regularized administrative proceeding.<sup>205</sup>

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<sup>204</sup> *Al Odah v. United States*, 355 U.S. App. D.C. 189 (D.C. Cir. 2003).

<sup>205</sup> Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503 (2003). The most directly applicable statement of law would be the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, art. 9, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]: “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.” It is easily arguable that this provision codifies existing customary international law in the context of foreign nationals. Customary international law may place terrorists in a paradigm somewhere between war and crime, but that does not remove the requirement of nonarbitrariness. See Hoffman, *supra* note 9. Presumably, even this third paradigm would still carry an obligation of finding through some neutral process that an individual in fact is a security threat to the interests of a military force in the field or has committed an offense warranting detention.

Following *Rasul*, and in response to the government's motion to consolidate the various applications for habeas corpus, the case management committee of the D.C. district court left it open to federal judges hearing these cases whether they wished to transfer their cases to Judge Green for plenary or partial consideration of the issues.<sup>206</sup> Judge Leon chose to retain his own cases and issued a ruling that there was no law protecting any cognizable interests of the Guantanamo detainees.<sup>207</sup> In his view, due process did not attach to aliens detained outside the United States (relying on *Eisentrager*), the Geneva Conventions were not self-executing, and no other source of international law created rights of individuals to be free of detention under these circumstances.<sup>208</sup>

Judge Green issued her ruling less than two weeks later, holding that the detainees did have rights to due process, that the review panels set up to review their status after *Rasul* did not satisfy due process standards, and that the Taliban detainees had rights under the Geneva Conventions to be repatriated at the end of hostilities in the absence of individualized prosecutions for war crimes.<sup>209</sup> On this last point, Judge Robertson earlier had ruled that the military commissions established to conduct trials of alleged war crimes did not satisfy Congressional standards because they lacked notice to the defendant of all the evidence against him and did not provide for effective assistance of counsel.<sup>210</sup>

Of the six federal courts that heard the military detention cases prior to the Supreme Court, not one accepted the government's insistence on an unreviewable discretion to classify persons as "enemy combatants" and thus avoid judicial review. The Supreme Court seemed to hold that no person, even an alien alleged to have taken up arms against the United States, could be held without at minimum an opportunity to rebut the government's evidence against him.<sup>211</sup> In the follow-up cases, however, Judge Leon in the D.C. district court has held that there is no law to apply in the case of the alien captured and held offshore<sup>212</sup> while Judge Green has held that due process mandates the minimum opportunity of

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<sup>206</sup> *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D. D.C. 2005).

<sup>207</sup> *Khalid v. Bush*, 355 F. Supp. 2d 311 (D. D.C. 2005).

<sup>208</sup> *Id.* at 322-29.

<sup>209</sup> *In re Guantanamo*, 355 F. Supp. 2d 443.

<sup>210</sup> *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D. D.C. 2004).

<sup>211</sup> *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

<sup>212</sup> *Khalid*, 355 F. Supp. 2d 311.

rebuttal.<sup>213</sup> This issue will ultimately be resolved by the D.C. Circuit, if not the Supreme Court.

By way of comparison, the British House of Lords dealt with a similar situation in a similar fashion. In *A. v. Home Secretary*, the House of Lords was presented with a petition on behalf of several aliens who were being detained under statutory authorization because they were suspected of ties to terrorist organizations and were unwilling to be deported to their country of origin.<sup>214</sup> Parliament had responded to a request from the government to allow certification of a person as a terrorist based on “links to an international terrorist organization,” which in turn required that “he supports or assists it.”<sup>215</sup> Once certified, an alien who could not be deported could be detained indefinitely. This mechanism was challenged as being in violation of European Convention on Human Rights (ECHR), Article 5, which protects “liberty and security of person” except in circumstances such as detention “with a view to deportation.”<sup>216</sup> Because the plaintiffs could not be deported against their will, they argued that the detention was not undertaken with a view to deportation.

The government argued that Article 5 was subject to the “derogation” principle of Article 15, which allows departure from ECHR requirements in “time of war or other public emergency threatening the life of the nation . . . to the extent strictly required by the exigencies of the situation.”<sup>217</sup>

All but one of the Lords speaking to the appeals would have followed the lead of Lord Bingham and held that there was no sufficient explanation for why aliens should be treated differently from anyone else for this purpose- the alien was no more likely to be a threat to the public peace and security than a citizen and the government had not chosen to imprison citizens under the same conditions.<sup>218</sup> To Lord Bingham, the presence of an emergency and a threat of future terrorist action was a political question reserved to the Parliament and government, but the choice of means was a legal question. Lord Hoffmann also noted that the failure to imprison suspected terrorist citizens was relevant, but that it

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<sup>213</sup> *In re Guantanamo*, 355 F. Supp. 2d 443.

<sup>214</sup> 3 All E.R. 169 (2005).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* para. 68.

<sup>218</sup> *Id.* para. 43.

related to the question of whether there was an emergency that “threatened the life of the nation.”<sup>219</sup> Only one member of the panel was willing to accord full deference to the judgment of the political branches.

The ECHR is a paradigm of the “it’s in there” principle. Article 15 specifically permits derogation of most provisions when the life of the nation is on the line.<sup>220</sup> No derogation is allowed, however, from the prohibitions on intentional deprivation of life (except in lawful execution of warfare), torture, slavery, or punishment by *ex post facto* legislation. Two points deserve emphasis. First, it is possible to set out in advance the provisions from which no derogation will be allowed because the document specifies the rights of each person—there are no unenumerated or general principles of liberty. Because the catalog of rights is limited and written, it is possible to identify in advance which ones are not to be derogated in an emergency. Second, under the reasoning of Lord Hoffmann, the presence of a threat to the “life of the nation” is amenable to judicial review. This is a critical step in determining whether the provision is a part of the law to be interpreted by a court operating under the mandate of *Marbury v. Madison*. Without that step, the provision could be “in there,” but not part of the rule of law in the sense that *Marbury* speaks of law that is binding on the judiciary.

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<sup>219</sup> A. v. Sec’y of State for the Home Dep’t, 3 Eng. Rep. 169 (2005).

There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said: “Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governours.”

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

*Id.* ¶ 95-96.

<sup>220</sup> European Convention on Human Rights (ECHR), 213 U.N.T.S. 221, available at <http://www.hri.org/docs/ECHR50.html> [hereinafter European Convention] (last visited Sept. 26, 2005).

In the United States cases, Judge Leon's ruling is particularly troubling because it could be taken to imply that there is no law restraining U.S. agents acting overseas, but that is not quite the case. In oral argument before the Ninth Circuit, the government conceded that its "no law" position would mean that U.S. agents could summarily execute prisoners at Guantanamo without recourse.<sup>221</sup> At most, that position could refer to there being nothing in U.S. domestic constitutional law to restrain violence overseas and no application of the "law of war" in the absence of "armed conflict." But ordinary rules against murder and assault would apply to military actors by virtue of the Uniform Code of Military Justice (UCMJ), and they would lack combat immunity in the absence of armed conflict.<sup>222</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) speaks to treatment of prisoners and it is enforced against U.S. actors overseas by statute.<sup>223</sup> In the view of the International Criminal Tribunals, customary international law includes criminal sanctions for crimes against humanity.<sup>224</sup> The International Covenant on Civil and Political Rights (ICCPR) protects against "arbitrary" loss of liberty and mistreatment of prisoners.<sup>225</sup> There are rules, even if their enforcement leaves open many questions of allocation of power.

At this point, it would make sense to return to Justice O'Connor's suggestion that "If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [of the rules regarding detention] may unravel."<sup>226</sup> Some of the political commentary in this arena would make it seem that there is a gap in the law of war that leaves the United States unable to respond to clandestine attacks on civilian populations. But the law of war is far from the only source of law capable of dealing with terrorism. Various international covenants<sup>227</sup> and numerous domestic

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<sup>221</sup> *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003).

<sup>222</sup> 10 U.S.C.S. §§ 918, 928 (LEXIS 2005). See *United States v. Calley*, 48 C.M.R. 19 (1973).

<sup>223</sup> 18 U.S.C.S. § 2340A (LEXIS 2005); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113.

<sup>224</sup> *Prosecutor v. Tadic*, ICTY (Trial Chamber May 7, 1997); (Appeal Chamber July 15, 1999).

<sup>225</sup> See *supra* note 205, at art. 9.

<sup>226</sup> *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

<sup>227</sup> See United Nations, Office on Drugs and Crime, Convention Against Terrorism, [http://www.unodc.org/unodc/terrorism\\_conventions.html](http://www.unodc.org/unodc/terrorism_conventions.html) (last visited Aug. 8, 2005).

statutes with extraterritorial reach<sup>228</sup> provide many opportunities for application of law to the threat. Cooperative arrangements with other countries may resolve most of the problems attendant on transnational criminal investigations, but lack of that cooperation is hardly cause for abandoning adherence to the rule of law.

Despite political statements asserting that terrorism is a “new kind of threat,” historians point out that terrorism has been around since the beginning of recorded history.<sup>229</sup> The international law of war has no difficulty with security detention of insurgents or clandestine resistance fighters by occupation forces.<sup>230</sup> This is a far cry, however, from

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<sup>228</sup> Jeff Breinholt, *Seeking Synchronicity: Thoughts on the Role of Domestic Law Enforcement in Counterterrorism*, \_\_ AM. U. INT’L L. REV. \_\_ (forthcoming 2005).

<sup>229</sup> See CALEB CARR, *THE LESSONS OF TERROR* (2002).

<sup>230</sup> *Field Manual 27-10* provides this following information concerning the Geneva Convention for the Protection of Civilian Persons in Time of Armed Conflict:

248. Derogations

a. Domestic and Occupied Territory.

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case such persons shall nevertheless be treated with humanity, and in ease of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be. (GC, art. 5.) (See also par. 73.)

b. Other Area. Where, in territories other than those mentioned in a above, a Party to the conflict is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person is similarly not entitled to claim such rights and privileges under GC as would, if exercised in favor of such individual person, be prejudicial to the security of such State.

capturing a suspected terrorist on foreign soil outside the context of armed conflict and holding that person without trial. In that instance, the capturing parties may well have violated the law of the country on whose soil the capture took place<sup>231</sup> as well as customary international law.<sup>232</sup> To emphasize, there are rules restraining governmental action under all circumstances. These rules do not hamstring law enforcement, they just make it difficult in some situations and require diplomacy as well as force.

For purposes of this article, the central point with respect to treatment of prisoners in time of emergency is that most of the rules addressing treatment of prisoners were crafted specifically with emergencies in mind. Thus, the international law regarding torture cannot be derogated in time of emergency because it was designed precisely to deal with emergency situations. With regard to nonjudicial detentions of a state's own citizens, international law may allow for derogation in time of emergency, but prisoners taken in conflict with other nations are subject to the rules of the Geneva Conventions, whatever those may be in specific circumstances. Thus, the Executive claim of unreviewable discretion vastly overstates the proposition. As Justices Scalia and Stevens said, there simply is no room for nonjudicial domestic military detention in U.S. law.<sup>233</sup> It is frankly unfortunate that Justice Scalia did not apply this basic proposition to aliens and left the Supreme Court's rulings in a state of suspended flux for the time being. To the extent that "armed conflict" constitutes "emergency," there is no dearth of rules and no need for undefined exceptions. In the language of our preferred alternative, "It's in there."

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c. Acts Punishable. The foregoing provisions impliedly recognize the power of a Party to the conflict to impose the death penalty and lesser punishments on spies, saboteurs, and other persons not entitled to be treated as prisoners of war, except to the extent that that power has been limited or taken away by Article 68, GC (par. 438).

FM 27-10, *supra* note 160, para. 438.

<sup>231</sup> Italy issued an arrest warrant for thirteen alleged CIA agents who allegedly captured an alleged terrorist in Milan and transported him to Egypt in exercise of what has come to be known as "extraordinary rendition." *Italy Seek Americans over Abduction*, CNN.COM, June 24, 2005, <http://www.cnn.com/2005/WORLD/Europe/06/24/italy.arrest/index.html>.

<sup>232</sup> This action could be considered a violation of the host state's sovereignty as well as a violation of the rules against arbitrary detention of the individual.

<sup>233</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2660 (2004).

### C. Government Claims for Secrecy

One feature of intelligence gathering is that it most often works by assembling massive amounts of information, each piece of which may be seemingly innocent, until a malevolent pattern emerges. Modern high-tech artwork offers analogies that might be helpful in understanding the process. It is possible to take hundreds or thousands of utterly innocent pictures, reduce them to miniature scale, and reassemble them into a pattern that produces an image totally unrelated to the component pictures. In this instance, the critical information exists only as a pattern produced by assembling all the innocent images, no one of which would be suspicious on its own. Conversely, there are pictures, usually in children's books, that ask you to find a character buried in an elaborate drawing. In this instance, all the irrelevant information is masking the one piece of critical information.

This general problem is what the government refers to as the "mosaic" phenomenon. In court proceedings involving both the closing of "sensitive" deportation hearings<sup>234</sup> and the government's refusal to release the names of persons detained for questioning,<sup>235</sup> the government produced affidavits from high-level law enforcement officials detailing concerns over releasing information.<sup>236</sup> Some level of secrecy has

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<sup>234</sup> See *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (rejecting claim for secrecy); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (accepting claim for secrecy).

<sup>235</sup> See *Ctr. for Nat'l Sec. Studies v. United States DOJ*, 331 F.3d 918 (2003).

<sup>236</sup> The two affidavits were provided by James Reynolds of the Justice Department and Dale Watson of the FBI. The Sixth Circuit excerpted this much of the Reynolds affidavit:

1. Disclosing the names of 'special interest' detainees . . . could lead to public identification of individuals associated with them, other investigative sources, and potential witnesses . . . and terrorist organizations . . . could subject them to intimidation or harm.
2. Divulging the detainees' identities may deter them from cooperating [and] terrorist organizations with whom they have connection may refuse to deal further with them, thereby eliminating valuable sources of information for the government and impairing its ability to infiltrate terrorist organizations.
3. Releasing the names of the detainees . . . would reveal the direction and progress of the investigation. Official verification that a member [of a terrorist organization] has been detained and therefore can no longer carry out the plans of his terrorist organization may enable the organization to find a substitute who can achieve its goals.

always been part of law enforcement, but the aura of secrecy is heightened substantially when government action shifts more toward prevention of future terrorist activity from prosecution of past activity.<sup>237</sup>

*Center for National Security Studies v. U.S. Department of Justice*<sup>238</sup> involved a Freedom of Information Act (FOIA) request for information about three categories of persons: those questioned and detained for immigration violations, those detained on criminal charges, and those held on material witness warrants. The government produced the Reynolds affidavit and argued that each bit of information could be part of a mosaic that would yield a bigger picture when combined with other bits. “[W]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.”<sup>239</sup> To the majority of the court of appeals, the experts’ opinion of the mosaic danger should be given such deference as almost to amount to unreviewable discretion: “the judiciary is in an extremely poor position to second-guess the executive’s judgment in this area of national security.”<sup>240</sup> By contrast, the dissent read the FOIA exception of “could reasonably be expected to interfere” with government operations to mean that a mere possibility of harm was not enough to justify intrusion on the public right to know.<sup>241</sup> The dissent also pointed out that the government attempted to exempt broad categories of information from disclosure without identifying the potential harm from specific information.

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4. Public release of names, and place and date of arrest . . . could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence.

5. The closure directive is justified by the need to avoid stigmatizing ‘special interest’ detainees, who may ultimately be found to have no connection to terrorism.

*Ashcroft*, 303 F.3d at 705-06.

<sup>237</sup> The question of government action against the interests of an individual or organization by the use of secret evidence is beyond the scope of this article. Suffice to say that the courts are currently struggling with the due process ramifications of nondisclosure in criminal or punitive proceedings. *See, e.g.*, *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004) (attempting to prosecute without providing access to witnesses in custody); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 357 U.S. App. D.C. 35, 333 F.3d 156 (D.C. Cir. 2003) (upholding designation of organization as supporting terrorism and blocking its funds without disclosure of all evidence).

<sup>238</sup> *Ctr. for Nat’l Sec. Studies*, 331 F.3d 918.

<sup>239</sup> *CIA v. Sims*, 471 U.S. 159, 178 (1985).

<sup>240</sup> *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 928.

<sup>241</sup> *Id.* at 937 (Tatel, J., dissenting).

This last point, whether the government is required to identify specific reasons for nondisclosure rather than maintaining secrecy over categories of information, came to the fore with regard to the closure of deportation proceedings to the press and public. In the wake of 9/11, during the “round-up” of young men from Arab countries, the Department of Justice initiated “removal” proceedings against hundreds of aliens who had allegedly overstayed their visas. For those who were considered individuals of “special interest,” a departmental directive ordered that all proceedings be closed and that no information on their cases could be given to anyone but an attorney or other formal representative. When newspapers and Michigan Congressman Conyers filed suit to gain access to one of these proceedings, the Sixth Circuit recognized that aliens are not entitled to the protections of much of the Bill of Rights but insisted that this realization made the role of the press even more important rather than less.<sup>242</sup> Responding to the Reynolds affidavit, the Court stated its willingness to defer to the executive judgment that it had a compelling interest in secrecy but insisted that that interest did not extend to all of a hearing in the absence of “particularized findings” about the need to close certain portions of a hearing. “While the risk of ‘mosaic intelligence’ may exist, we do not believe speculation should form the basis for such a drastic restriction of the public’s First Amendment rights.”<sup>243</sup> In a virtually identical setting, the Third Circuit disagreed with the Sixth Circuit and held that the mosaic scenario fully justified a determination that a hearing should be closed to the public.

These cases demonstrate the interaction of the political branches with the anti-democratic character of judicial review. In the FOIA, Congress provided for an emergency exception when information “could reasonably be expected to interfere” with government needs.<sup>244</sup> The judges of the D.C. circuit disagreed on whether this meant a mere possibility or a likelihood. In the deportation cases, the Third and Sixth Circuits disagreed over whether a hearing could be closed without a particularized finding of harm from public disclosure. Both claims of the need for secrecy, however, were subjected to some level of judicial scrutiny of the government’s justifications for secrecy.

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<sup>242</sup> “When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment ‘did not trust any government to separate the true from the false for us.’ They protected the people against secret government.” *Detriot Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

<sup>243</sup> *Id.* at 709.

<sup>244</sup> 5 U.S.C.S. § 552 (b)(7)(A) (LEXIS 2005).

“It’s in there” means that the review itself can take account of the bases for concern about national security, but that does not mean an absence of all review. With respect to the mosaic argument itself, it is perfectly understandable that the courts would give an extreme level of deference because even requiring the government to do the “particularized” showing demanded by the Sixth Circuit or by Judge Tatel, could reveal information that would be useful to a terrorist organization. Moreover, if the mosaic argument presents a compelling state interest, as the Sixth Circuit acknowledged, then how would the government advocates themselves know which piece of information would be critical to the watching terrorist organization? The difficulty of these decisions does not exempt them from judicial review entirely, but merely informs the degree to which the courts should be willing to hold a factual showing to be inadequate.

#### D. Racial and Ethnic Profiling

The choice of subjects to detain and question as part of the response to 9/11 has been argued to be a virulent form of ethnic profiling, although defended by the government both as an emergency response and as having been based on “country of origin” rather than ethnicity.<sup>245</sup> Racial and ethnic profiling as part of an emergency response could be a ground of invalidation for a practice otherwise lawful, but in another sense it can also represent a claim for additional power or a claim for an exception to otherwise applicable rules in an emergency. In other words, preventive detention may be doubly problematic if it is based on ethnicity—or the ethnic application could be part of an argument for the power as an exception to otherwise prohibited behavior because the particular ethnic group is claimed to be the source of an identified threat (*Korematsu* revisited).

It should be apparent that the more intrusive on individual freedom a measure is, then the stronger the emergency justification must be. Returning to the scenario above describing an armed perimeter around a city’s water supply, what if the perimeter was set at one place for most of

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<sup>245</sup> See David A. Harris, *New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, 2004 UTAH L. REV. 913; Liam Braber, *Korematsu’s Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451 (2002).

the population, but was more restrictive for members of specific ethnic groups?

Racial and ethnic profiling has been the target of intense scrutiny in legal academic writing for the past couple of decades<sup>246</sup> and has prompted both significant court decisions<sup>247</sup> and administrative changes.<sup>248</sup> As the Department of Justice points out in its “Guidance Regarding the Use of Race in Federal Law Enforcement” (“Guidelines”), profiling carries costs to the individuals targeted and to the national commitment to equality.

The Supreme Court, however, has advised caution in the manner of litigating claims of racial or ethnic profiling. Before a defendant can even obtain discovery to examine prosecutorial decisions for evidence of racial bias, “to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present ‘clear evidence to the contrary.’”<sup>249</sup> This creates the dilemma that the defendant must have clear evidence of bias before being able to obtain evidence of bias—the defendant must have strong extrinsic evidence before obtaining access to the prosecution’s own records. The reasons for this cautious approach are that diversion of resources (mainly time of supervisory personnel and lawyers) into litigation over prosecutorial motives can itself have socially undesirable consequences.<sup>250</sup>

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<sup>246</sup> See, e.g., DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 149 (1998); David Cole, *Race, Policing, and the Future of the Criminal Law*, 26 HUM. RTS. at 3 (1999) (“Legitimacy is one of the law’s most powerful tools, and when the law forfeits legitimacy, its only alternative is to rely on brute force. . . . It is not surprising that virtually all the riots we have experienced in this country since World War II have been sparked by racially charged police-citizen encounters.”).

<sup>247</sup> See, e.g., *Marshall v. Columbia Lea Reg’l Hosp.*, 345 F.3d 1157 (10th Cir. 2003); *Price v. Kramer*, 200 F.3d 1237 (2d Cir. 2000); *Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000); *Nat’l Cong. of Puerto Rican Rights v. City of New York*, 191 F.R.D. 52 (S.D.N.Y. 1999).

<sup>248</sup> See U.S. Department of Justice, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (2003), [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.htm](http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm) [hereinafter *Guidance*].

<sup>249</sup> *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

<sup>250</sup> See *United States v. Wayte*, 470 U.S. 598, 607 (1985) (“Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the government’s enforcement policy.”).

In a recent case in which the Tenth Circuit reversed a grant of summary judgment for the police in a damage action based on a traffic stop, the court suggested that importunate judicial oversight could induce police “to direct their law enforcement efforts in race-conscious ways by focusing law enforcement on neighborhoods with relatively few low-income, minority persons.”<sup>251</sup> That case is instructive, however, for the type of extrinsic evidence that may be available. The police officer making the stop and search had been fired from a previous position with another police department for “an extensive pattern of misconduct and violation of citizens’ constitutional rights.”<sup>252</sup> The problem with most claims of discriminatory application of the law is that the discrimination cannot be shown until the pattern has become apparent, potentially leaving the first victims’ harms unredressed. Thus, selective-prosecution and biased-stop cases will have prospective impact but often little compensatory effect. This is one strong reason for the emphasis in racial profiling on administrative solutions through guidelines and training.

The Department of Justice Guidelines proclaim that they extend protection in ordinary law enforcement activities beyond what is required by the laws and the Constitution.<sup>253</sup> With regard to terrorism-related investigations, however, the Guidelines leave open the possibility of considering race or ethnicity,<sup>254</sup> at least when specific information makes it relevant to a crime of “national security.”<sup>255</sup> The Guidelines’

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<sup>251</sup> *Id.* at 1167.

<sup>252</sup> *Id.* at 1162.

<sup>253</sup> Guidance, *supra* note 248, at introduction.

<sup>254</sup>

In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation’s borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.

*Id.* sec. II.

<sup>255</sup>

The Constitution prohibits consideration of race or ethnicity in law enforcement decisions in all but the most exceptional instances. Given the incalculably high stakes involved in [terrorism] investigations, however, Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution.

limitations simply pose the question of the extent to which the laws or the Constitution prohibit racial or ethnic profiling under exigent circumstances. In the examples provided, the Department of Justice asserts that information that persons of a particular ethnic or national group are plotting a terrorist incident will justify intensifying scrutiny of members of that group.<sup>256</sup>

The Guidelines present two problems: first, what level of threat justifies treatment of a threat as a matter of “national security,” and second, what level of intrusion into individual autonomy is warranted in a given circumstance. On the first point, the Guidelines treat threats of “devastating harm” as if they were all terrorist threats.<sup>257</sup> The concept “devastating harm” is used in the Guidelines as a justification rather than a description and could be spelled out a bit more clearly (*e.g.*, threats involving use of certain kinds of weapons or explosives, or threats contemplating great bodily harm to more than one person). The problem with that approach is that it seems to place a premium on creative employment of new weaponry or conversely to discount the loss of a single life. At the other side of the connection, the examples used in the Guidelines identify varying levels of intrusion into the lives of individuals. In one example, where heightened scrutiny is merely deployment of increased investigatory resources and presumably unknown to any member of the public, it could be a relatively mild imposition on the ideal of equality. But in another example, heightened screening of individuals at an airport, it has a direct and immediate impact on the individuals and the perceptions of every member of that group.

Taking both of these problems in tandem, however, may suggest a solution. If nothing else, the Guidelines should state that the level of threat affects the level of intrusion permitted. In this formulation, level of threat would have to include the degree of specificity of identified

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*Id.*

<sup>256</sup> *See id.*

<sup>257</sup>

Since the terrorist attacks on September 11, 2001, the President has emphasized that federal law enforcement personnel must use every legitimate tool to prevent future attacks, protect our Nation’s borders, and deter those who would cause devastating harm to our Nation and its people through the use of biological or chemical weapons, other weapons of mass destruction, suicide hijackings, or any other means.

*Id.*

ethnic connection to the threat. In other words, just as it is not prohibited profiling for the description of a specific suspect in a specific crime to include ethnic identifiers, it may not be prohibited profiling for the identification of a threat to include the specific ethnic group that is implicated in the plot. This is a position, however, that can be justified only by highly specific information about the threat and a clear correlation between the threat and an ethnic group with specific identifying characteristics. If it were to become a blank check for detention of all members of a given ethnic group, then the exigency has swallowed the norm.

One of the few examples on which almost all critics can agree that racial actions are warranted is prison officials' segregation of inmates by race to quell a race riot.<sup>258</sup> In its most recent pronouncement on the use of race under exigent circumstances, the Supreme Court, however, held that a state prison practice must be subjected to strict scrutiny rather than a mere rationality review.<sup>259</sup> California had an informal policy of segregating new or transferred prisoners by race for up to sixty days to determine whether the prisoner was at risk from gang violence or likely to be a member of a gang. The lower courts had upheld the policy giving deference to the prison officials, but the Supreme Court reversed and remanded for review to determine whether the policy was narrowly tailored to serve a compelling state interest.<sup>260</sup> In their dissent, Justices Thomas and Scalia asserted that the desire to save lives should prevail over the desire to preserve dignity and avoid racial stereotyping.<sup>261</sup>

Recall Justice Jackson's comment in *Korematsu* with which this article began, but look now at the full context of his comments. Speaking of the prior case of *Hirabayashi*,<sup>262</sup> in which the Court had already upheld the curfew order, Justice Jackson pointed out that the following:

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<sup>258</sup> Justice Scalia, in opposing most affirmative action plans, has stated that "only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens.'" *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring).

<sup>259</sup> *Johnson v. California*, 125 S. Ct. 1141 (2005).

<sup>260</sup> *Id.* at 1144-46.

<sup>261</sup> *See id.* at 1157.

<sup>262</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1944).

[I]n spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. . . . Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.<sup>263</sup>

Next follows his language about reliance on the courts to curb the military:

I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.<sup>264</sup>

For racial profiling in exigent circumstances to be justifiable, two conditions must be met: the statement of the limitations must be built into the rule itself, and the actor must be aware that he or she is acting at risk of being wrong. Just as with exigent circumstances for searches without a warrant or the defense of necessity in a criminal prosecution, if the actor perceives the circumstances differently from a person acting with some degree of hindsight, then the law of exigency provides no relief.

#### E. The Torture Debacle

The interrogation of prisoners starkly poses the problem of emergency powers. In the famous “ticking bomb” hypothetical, the

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<sup>263</sup> *Korematsu v. United States*, 323 U.S. 214, 247 (1944).

<sup>264</sup> *Id.* at 248.

question is presented of whether it should be legal to torture the person who knows the location of the bomb. As a result of the display of abuse by U.S. prison guards and interrogators, the U.S. public must now face the question of the extent to which it wants to hold military or civilian public officials accountable for violations of both domestic and international law.<sup>265</sup>

Abu Ghraib presents the precise slippery slope problem that was forecast. What began as marginal levels of improper interrogation for those who might have had some knowledge of terrorist organizations expanded outward until it became policy at rather high levels.<sup>266</sup> Memoranda from the Pentagon and Justice Department during 2002 and 2003 discuss the degree to which interrogation techniques can be accelerated in a climate of emergency,<sup>267</sup> during which it became increasingly acceptable in the field to treat prisoners in ways that had no justification under either domestic or international law.<sup>268</sup>

The most visible memorandum is one from the Justice Department to White House Counsel—the Bybee Memorandum<sup>269</sup>—which attempted to

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<sup>265</sup> Under military tradition, the chain of command through the Secretary of Defense and even the President could be held responsible if policy positions prompted abuse. One close observer quotes a “senior Pentagon consultant” as saying that the President and Secretary of Defense “created the conditions that allowed transgressions to occur.” SEYMOUR HERSH, *THE CHAIN OF COMMAND* 71 (2004). Another states that “knowledge about ‘interrogation techniques’ leads to knowledge about the official doctrine that allowed these techniques, doctrine leads to policy, and policy leads to power.” MARK DANNER, *TORTURE AND TRUTH* 42 (2005).

<sup>266</sup> HERSH, *supra* note 265, at 71.

<sup>267</sup> See KAREN GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (2005) (providing an extensive collection of the documents); WashingtonPost.com, *Bush Administration Documents on Interrogation*, (June 23, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html> (providing an online catalogue of the memoranda addressed to methods of interrogation).

<sup>268</sup> See Major General Antonio M. Taguba, Army Regulation 15-6 Report of Investigation on the 800th Military Police Brigade, *available at* <http://www.agonist.org/annex/taguba.htm> (last visited Aug. 16, 2005). General Taguba’s report in March 2004 found “That between October and December 2003, at the Abu Ghraib Confinement Facility, numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force.” *Id.* at 15.

<sup>269</sup> Memorandum, Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002),

legitimize aggressive interrogation techniques at two levels. At the first level, the memorandum argued that many interrogation techniques would not constitute torture under the Convention against Torture or its implementing statutes.<sup>270</sup> The memorandum, however, did not explain that the Convention also requires steps to prevent “cruel, inhuman or degrading treatment.”<sup>271</sup> At the second level, the Memorandum argued that even torture could be excused because military actions in wartime are not subject to the requirements of law or because “necessity or self-defense” could justify what would otherwise be illegal conduct.<sup>272</sup> The Bush Administration first attempted to distance itself from the memorandum by stating that no decisions were ever made to implement its conclusions,<sup>273</sup> and finally withdrew the Memorandum in late 2004.<sup>274</sup>

This article does not deal with the first level of argument, the degree to which certain techniques could be valid,<sup>275</sup> other than to point out that

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available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> [hereinafter Bybee Memorandum].

<sup>270</sup> See *id.*

<sup>271</sup> The ICCPR also prohibits “cruel, inhuman, or degrading treatment.” ICCPR, *supra* note 205, art. 7.

<sup>272</sup> See Bybee Memorandum, *supra* note 269. “The memos read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison.” Anthony Lewis, *Making Torture Legal*, 51 N.Y. REV. OF BOOKS 12, at 4 (2004).

<sup>273</sup> *Memo on Torture Draws Focus to Bush*, WASH. POST, June 9, 2004, at A03.

White House Counsel Alberto R. Gonzales said in a May 21 interview with The Washington Post: “Anytime a discussion came up about interrogations with the president, . . . the directive was, ‘Make sure it is lawful. Make sure it meets all of our obligations under the Constitution, U.S. federal statutes and applicable treaties.’”

*Id.*

<sup>274</sup> Memorandum, Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to James B. Comey, Deputy Attorney General, subject: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/dagmemo.pdf> (last visited July 15, 2005).

<sup>275</sup> The Bybee Memorandum, *supra* note 269, describes aggressive versions of some of the interrogation techniques later authorized by the Secretary of Defense that were previously labeled by the ECHR as constituting not torture, but “cruel, inhuman or degrading treatment.” Republic of Ireland v. United Kingdom, 2 EHRR 25 (ser. A) (1979-80). The “five techniques” considered included “wall standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink.” *Id.* The United States is a signatory to the ICCPR, which condemns both torture and “cruel, inhuman, or degrading treatment or punishment” and whose language, which is the same as the ECHR, was interpreted by the ECHR in the *Ireland* case. The Bybee memorandum emphasized that both the Executive and Congress had endorsed an

Pentagon lawyers were careful to label some techniques as skirting on “inhumane” treatment and that care should be taken in their application.<sup>276</sup> Nor does the article attempt to assess claims that political forces contributed to a climate in which abuses were tolerated.<sup>277</sup> The focus here is on the justifications for emergency departures from normal operations.

In that regard, the Bybee Memorandum makes the rather unexceptional point that the Constitution vests the President with the Commander in Chief power and that the Supreme Court has recognized that the Executive has a “unity in purpose and energy in action” that makes it better suited to conduct the strategy and tactics of warfare.<sup>278</sup> The military has the obligation to capture, detain, and interrogate enemy combatants and, some might argue, criminals such as terrorists, to obtain valuable information to prevent further harm. The Bybee Memorandum, however, then goes on to say:

Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President. . . . Just as statutes that order the President to

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“understanding” when ratifying the Convention that “torture” was an “extreme form of cruel, inhuman or degrading treatment” and further stating that “cruel, inhuman or degrading treatment” would be considered limited to those acts that would be unconstitutional under the U.S. Eighth Amendment. The Convention states that Parties “undertake to prevent” the lesser category of “cruel, inhuman or degrading.” So far, the Bybee memorandum is on solid ground in distinguishing between torture and other acts, the first category to be criminalized and the other to be prevented by other means. But the Bybee memorandum fails to point out that “cruel, inhuman or degrading treatment” would violate not only the Eighth Amendment, but also the obligation under the Convention to “prevent” those acts. In other words, the United States has obligated itself as a matter of law to prevent an array of actions in addition to those that are criminalized under the Torture Statute.

<sup>276</sup> WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM (2003), reprinted in DANNER, *supra* note 265, at 187; Memorandum, Donald Rumsfeld, Secretary of Defense, to Commander, US Southern Command, subject: Counter-Resistance Techniques in the War on Terrorism, tab A (Apr. 16, 2003), reprinted in DANNER, *supra* note 265, at 199.

<sup>277</sup> “Given the known facts, the notion that the photographed outrages at Abu Ghraib were just the actions of a few sick men and women, as President Bush has repeatedly argued, is beyond belief.” Lewis, *supra* note 272.

<sup>278</sup> Bybee Memorandum, *supra* note 269. For this proposition, the memorandum cites a number of cases with dicta to the effect that the President is better suited than Congress to conduct military operations. The memorandum does not cite cases such as *Youngstown* or *Milligan* that place restraints on the Presidential powers.

conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.<sup>279</sup>

Under this argument, would the Uniform Code of Military Justice be unconstitutional? Is it unconstitutional for Congress to ratify treaties prohibiting war crimes and cruel, inhuman, or degrading treatment of prisoners? Was it even unconstitutional for Congress to authorize and set goals for the invasion of Iraq? If the Bybee Memorandum had suggested any limits on its sweeping statement of Presidential autonomy, then it might be possible to address it seriously. As it stands, however, it is impossible to imagine what the limits might be and thus impossible to describe these conclusions as warranted.

The Bybee memorandum concludes by proffering potential defenses of necessity or “defense of others” that could be raised in criminal prosecutions under the torture statutes. The Bybee Memorandum recognizes the argument that the defense of necessity is not available with regard to any offense in which the legislative body has already made the decision that there shall be no defense.<sup>280</sup> The Torture Convention contains the provision that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>281</sup> The Bybee Memorandum responds to this by pointing out that this provision was not enacted into the U.S. Code, so because “Congress omitted CAT’s effort to bar a necessity or wartime defense, we read Section 2340 as permitting the defense.”<sup>282</sup> It is just as plausible to believe that Congress did not enact this section because it was already part of the framework of the statute. Moreover, just because a defense might be allowed under domestic law does not make that defense available in any setting other than domestic courts.<sup>283</sup> The Bybee

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<sup>279</sup> *Id.*

<sup>280</sup> *See id.*

<sup>281</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2.2, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113.

<sup>282</sup> Bybee Memorandum, *supra* note 269.

<sup>283</sup> United States courts typically take the view that Congress’s statutory law stands on a higher footing than a treaty where the two conflict. Although some treaties are self-executing, most will require some legislative action to put their provisions into effect as

Memorandum subjects a U.S. interrogator to prosecution by another signatory nation, or possibly by any nation under the doctrine of universal jurisdiction,<sup>284</sup> in which the necessity or wartime defense clearly would be unavailable. This seems irresponsible lawyering at best.

The Israeli Supreme Court dealt with similar arguments in its most recent decision on these issues.<sup>285</sup> The Court rather matter-of-factly recognized that any interrogation while in custody occasions some level of discomfort and loss of dignity, but that a “reasonable” interrogation would not countenance brutality.<sup>286</sup> Thus, a number of practices producing extreme discomfort or excessive sleep deprivation would not be allowed by either Israeli or international law. With regard to the defense of necessity, the Court merely stated that the defense would have to be proved to the satisfaction of a decision maker in a given criminal prosecution of the interrogator.<sup>287</sup> The Court did not hold out any hope of defining in advance the precise measures that could be taken under a given claim of emergency.

The Bybee Memorandum and the Israeli handling of the necessity defense at first glance appear to present a strong case against the “it’s in there” position because they both defer the question to the future. There is a slight difference, however, in that the Israeli Court believed that it would not be possible to set out guidelines for the use of force because

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domestic law. When Congress does act, it can decide to modify the terms of international law.

Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law. ‘Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency.

United States v. Yunis, 288 U.S. App. D.C. 129; 924 F.2d 1086 (DC Cir. 1991) (quoting Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988)).

<sup>284</sup> See generally *Ex parte Pinochet Ugarte* (No. 3), [2000] 1 AC 147, [1999] 2 All ER 97 (House of Lords 1999).

<sup>285</sup> Public Comm. Against Torture in Isr. et al. v. The State of Isr. and the Gen. Security Service, HCJ 5100/94 (1999).

<sup>286</sup> *Id.* para. 22-23.

<sup>287</sup> *Id.* para. 36.

the defense was one to be established after the fact by reference to the specific circumstances confronting the interrogator. The Bybee Memorandum pointed out that availability of the defense would be affected by the imminence of the threatened harm and by its severity. These two propositions at least acknowledge that there is a body of law to which one could refer in assessing a claim of necessity. The subtle difference is not over whether the limits are “in there,” but over “how much is in there.” In both instances, the claim of necessity is left to the future evaluator to determine whether otherwise unlawful conduct should be excused.

The Dershowitz proposal<sup>288</sup> for a torture warrant at least provides for judicial review of each claim of necessity, but it has not been enacted and would be impossible to get through the international bodies. The counter view that is more likely to prevail is that it is better to state and hold to the legal principle that torture is criminal conduct, while recognizing the inevitable place of discretion in the functions of prosecutor, judge, and jury. Discretion necessarily will dispense a rough sort of justice without promoting the idea of a legal excuse. With regard to those interrogations that are taking place in “undisclosed locations” around the world, some degree of “see no evil, hear no evil” also is inevitable in this arena. That U.S. citizens can tolerate a generalized knowledge of the existence of illegal behavior, however, does not mean that they wish persons should condone it. To this extent, then, the “it’s in there” position can co-exist with the “illegal with prosecutorial discretion” position.

Some arguments have been made for an “extra-legal subject to ratification” position, which would allow decision-makers to depart from the law subject to being wrong or right depending on how matters turn out. Even in that position, however, there is nothing to suggest that the policy makers ought to be immune from the consequences of clandestine authorization of illegal conduct. Moreover, even when their conduct is disclosed, they are subject to the ultimate type of prosecutorial discretion, namely the response of the voters at the next election.

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<sup>288</sup> ALAN DERSHOWITZ, WHY TERRORISM WORKS 140 (2002).

## II. The General Question: Do Emergency Powers Exist?

### A. The Available Answers

The essential issue in a discussion of emergency powers is whether departures from legal norms should be countenanced in the name of public safety. Of the three possible answers (yes, no, and maybe), it is difficult to find pure “yes” or pure “no” advocates. The “Yes” answers are mostly in the form of arguing that emergencies justify extra-legal measures to a certain extent. The “No” answers sometimes insist on rigid adherence to norms under all circumstances, but more often they reflect the knowledge that the courts will adjust those norms to fit the circumstances. The “Maybe” answers have prompted at least two proposals for ratification by supermajorities of what would otherwise be invalid actions.

Observers differ sharply over what can be learned from prior experience with national emergencies. Professor Oren Gross asserts emphatically that emergency powers suspend civil liberties, whether we like it or not:

Experience shows that when grave national crises are upon us, democratic nations tend to race to the bottom as far as the protection of human rights and civil liberties, indeed of basic and fundamental legal principles, is concerned. Emergencies suspend, or at least redefine, de facto, if not de jure, much of our cherished freedoms and rights.<sup>289</sup>

Although he ends up in the “Maybe” camp, Gross’ view of the history is that an “emergency” departure from norms constitutes a “slippery slope” on which the emergency becomes the norm, and in the meantime the response threatens the very democratic values for which the State intends to stand.<sup>290</sup> Prior to 9/11, Justice William Brennan had acknowledged that the Ship of State may right itself as the crisis eases, but asserted that the ship would tend to founder again in the next crisis.<sup>291</sup>

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<sup>289</sup> Gross, *supra* note 24, at 1019.

<sup>290</sup> *Id.* at 1046-52.

<sup>291</sup> William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 *Isr. Y.B. HUM. RTS.* 11 (1988).

Professor Mark Tushnet, by contrast, emphasizes the “social learning” of history, in which not only does protection for civil liberties regenerate as the crisis eases, but the message for future generations is that a previously validated action was a very bad idea.<sup>292</sup> In the process, the United States should learn to be skeptical of claims of the need for extraordinary powers.

The Supreme Court’s own view of emergencies has varied. The Court stated in response to an apparently fraudulent effort on the part of the Governor of Texas to declare martial law to limit production from oil wells, “It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.”<sup>293</sup> In American experience, only a small handful of emergency actions have been upheld, and those mostly as authorized by established law in wartime. Lincoln’s blockade of Southern ports was upheld as an ordinary incident of civil war in the *Prize Cases*,<sup>294</sup> the World War II expulsion of Japanese from the West Coast was upheld in *Korematsu*,<sup>295</sup> and the use of military tribunals for saboteurs in the service of a foreign enemy was upheld in

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<sup>292</sup> Tushnet, *supra* note 22, at 295 (“We ratchet down our reaction to what we perceive to be a threat each time we observe what we think in retrospect were exaggerated reactions to threats.”).

<sup>293</sup> The Court presaged many of the issues of the current situation in a few short statements:

What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken or destroyed to prevent it from falling into the hands of the enemy or may be impressed into the public service and the officer may show the necessity in defending an action for trespass. “But we are clearly of opinion,” said the Court speaking through Chief Justice Taney, “that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.”

*Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (quoting *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1852)).

<sup>294</sup> *The Brig Amy Warwick, The Schooner Crenshaw, The Barque Hiawatha, The Schooner Brilliance*, 67 U.S. 635, 670 (1863).

<sup>295</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

*Quirin*,<sup>296</sup> which was more an application of traditional military law in wartime than an exercise of emergency power. By contrast, executive actions were struck down in major cases such as *Milligan*,<sup>297</sup> *Youngstown*,<sup>298</sup> and *In re Endo*<sup>299</sup> (attempting to limit the impact of *Korematsu*).

### 1. Variations on “No”

To start with the “No” camp, Professor David Cole argues that basic morality as well as constitutional doctrine demand recognition that times of crisis present the strongest argument for adherence to protection of the individual.<sup>300</sup> Variations on the “No” answer, however, are so encompassing that they may be the norm. The two most prominent are the “discretionary enforcement” approach and the notion that “it’s in there.”

Discretionary enforcement posits that although no special rules should be recognized in the law, discretionary decisions not to prosecute or not to convict a perpetrator who acted in the best interests of the community should be permissible. In this approach, the behavior still remains illegal although sanctions are not applied in all settings.<sup>301</sup> Professor Mark Tushnet argues that “it is better to have emergency powers exercised in an extraconstitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalized away as consistent with the Constitution and thereby normalized.”<sup>302</sup>

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<sup>296</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>297</sup> *Ex parte Milligan*, 71 U.S. 2 (1866).

<sup>298</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).

<sup>299</sup> *Ex parte Endo*, 323 U.S. 283 (1944).

<sup>300</sup> Cole, *supra* note 22, at 1785.

<sup>301</sup> In response to Professor Ackerman’s version of the “Maybe” answer, Professors Tribe and Gudridge argue that steadfastness is a virtue, but they provide no specific guidance on how the courts and legislature should respond to genuine emergencies declared by the executive. Tribe & Gudridge, *supra* note 22, at 1867. In praising Justice Jackson’s dissent in *Korematsu*, Tribe and Gudridge come close to advocating the turning of a blind eye to some excesses of the moment. Professor Gross’s argument for ratification of otherwise illegal conduct leads to insisting that conduct be considered illegal no matter what the circumstances while still acknowledging that some circumstances will lead to a lack of enforcement. Oren Gross, *Are Torture Warrants Warranted?*, 88 MINN. L. REV. 1481, 1486-87 (2004).

<sup>302</sup> Tushnet, *supra* note 22, at 306.

The “it’s in there” approach is closely related and may be the most widely-held view of emergency powers. A rule limiting power could be stated with exceptions for extreme circumstances, or at least allow for the inference of exceptions. As an alternative, a rule granting power could be stated as being applicable only in the exceptional case. For example, rules of search and seizure under the fourth amendment carry the built-in allowance for exigent circumstances when seizure of an item is necessary for public safety.<sup>303</sup>

In the “it’s in there” camp, Chief Justice Rehnquist has written:

It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government’s claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.<sup>304</sup>

Almost all observers recognize that the necessity for action in a manifest emergency will permit exercise of granted powers in unusual ways that may threaten individual liberties. A rigorous adherent to the demands of individual rights, however, will strike the balance with greater weight to the language of rights than to the language of power.<sup>305</sup>

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<sup>303</sup> As a practical matter, it really should not matter whether the rule requiring a warrant is limited to non-exigent situations or whether exigent circumstances are considered an exception to the normal rule. *But see* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991). Professor Schauer points out that a law prohibiting Nazi propaganda could be pictured as either an exception to usual laws protecting free expression or as a limitation built into the law of free expression. *Id.* at 887. He then argues that the proper way to view the matter is context-specific. *Id.* at 892. In contemporary Germany, Nazi propaganda could be defined out of the operation of the law protecting free expression without raising significant concerns because expression simply should not include Nazi propaganda. In the United States, that approach does not carry the same contextualized justification; meanwhile, any proposal to create an exception to free expression so as to disallow certain content leads to fears of a “slippery slope” on which there are no sensible stopping points. *Id.* at 888. In this sense, an exception may be a bit more dangerous than a built-in limitation.

<sup>304</sup> REHNQUIST, *supra* note 116, at 224-25.

<sup>305</sup> Justice Douglas’ opinion in *Endo* is worth particular note:

Broad powers frequently granted to the President or other executive officers by Congress so that they may deal with the exigencies of

## 2. *Difficulties with “Yes”*

It is difficult to find an outright adherent to the “Yes” answer because almost everyone recognizes the need for controls at some point. Cicero’s *Silent enim leges inter arma* translates roughly as “Law stands mute in the midst of arms.”<sup>306</sup> Only in preliminary arguments before the lower courts in cases such as *Hamdi* and *Padilla* has the government argued for unfettered discretion on the part of the President to take such actions as imprisonment of citizens without trial, and these arguments were quickly abandoned in the face of obvious judicial hostility.<sup>307</sup>

Outright recognition of emergency powers without checks should be rejected at least with regard to any rules that have already contemplated the presence of emergencies in the formulation of the rule. An unabashed Realpolitik approach could lead to the utterly outlandish statement that the President of the United States could authorize violations of domestic and international law and that Congress and the courts would be constitutionally disenfranchised from applying legal norms to the President while acting as Commander in Chief. There is really no “slippery slope” problem here; there is only the question of whether the king is above the law, a question that was answered hundreds of years ago and should not be rethought in the nuclear age. To the extent that exigent circumstances require action for the public good, then every adherent to the Rule of Law will take either the absolutist

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wartime problems have been sustained. And the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully. At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government.

This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. . . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

*Ex parte Endo*, 323 U.S. 283, 299-300 (1944).

<sup>306</sup> Marcus Tullius Cicero, *Pro Milone*, quoted and translated in BARTLETT’S FAMILIAR QUOTATIONS 87 n.6 (16th ed. 1992); see REHNQUIST, *supra* note 116, at 218.

<sup>307</sup> See Wayne McCormack, *Military Detention and the Judiciary: Al Qaeda, the KKK, and Supra-State Law*, 5 S.D. INT’L L.J. 7, 58-63 (2004).

approach that the behavior is illegal (with room for prosecutorial discretion) or the it's-in-there approach to say that the limits of power have already been stated (either contained within the statement of the rule or as exceptions).

### 3. Proposals for “Maybe”

The two leading proposals for general initiatives in this area are put forth by Professors Gross and Bruce Ackerman. In some sense, they are variations on the theme of “it’s in there” but they propose additional articulation of how built-in controls should be structured. Gross suggests that extra-legal action could be validated if it were subsequently ratified by an informed public.<sup>308</sup> The argument is that, like Tushnet’s actor with knowledge of risk, the governmental actor is at risk if the action is not ratified. Ackerman suggests an added dimension that he calls a “supermajoritarian escalator” in which the longer a given action is to continue, the larger the supermajority required for ratification must be (e.g., executive alone for two weeks, fifty-one percent majority for two months, sixty percent for the next two months, seventy percent for the next month, etc.).<sup>309</sup> He goes on to suggest that this requirement could be implemented by a “framework statute” spelling out the level of majority needed for given periods of time.<sup>310</sup>

Professor Alan Dershowitz has received a lot of publicity for his advocacy of a third “Maybe” answer, judicially authorized torture in the “ticking bomb” scenario.<sup>311</sup> The hypothetical is that a person in custody admits to knowing where a bomb is planted, claims that it will explode in the next two hours, but refuses to divulge where it is located. The interrogator, Dershowitz argues, should be able to apply for a judicial torture warrant to force the information from the suspect,<sup>312</sup> a variation of the “it’s in there” approach. Gross argues that this approach will lead to a “slippery slope” in which the legality of torture under a warrant will lead to torture without warrants in situations that are thought to present “exigent circumstances” with no time to go before a judge, and then a climate of officially sanctioned torture will have been created. Gross’s

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<sup>308</sup> Gross, *supra* note 24, at 1123-24.

<sup>309</sup> Ackerman, *supra* note 23, at 1047.

<sup>310</sup> *Id.* at 1089.

<sup>311</sup> DERSHOWITZ, *supra* note 288. See, e.g., Dershowitz: *Torture Could be Justified*, CNN.COM, March 4, 2003, <http://edition.cnn.com/2003/LAW/03/03/cnna.Dershowitz/>.

<sup>312</sup> DERSHOWITZ, *supra* note 288, at 141.

general position is to countenance “extra-legal” behavior if the actor could persuade the public after the fact that the action was justified, but in dealing with torture specifically he has adhered to the absolutist approach with discretion for non-enforcement.<sup>313</sup>

Dershowitz insists that torture will occur whatever legal approach the United States takes and that it would be better controlled by judicial authority than by *post hoc* evaluation.<sup>314</sup> By contrast, journalist Mark Bowden, in a very thorough review of interrogation techniques that forecast the Abu Ghraib debacle, argues that because torture will occur regardless of the legal posture, it is better to say that torture is criminal under all circumstances, but that prosecutorial discretion can appropriately allow some offenses to go unpunished.<sup>315</sup>

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<sup>313</sup> Gross argues for assumption of the risk of illegality coupled with prosecutorial discretion:

The officials must assume the risks involved in acting extralegally. Rather than recognize *ex ante* the possibility of a lawful override of the general prohibition on torture, as suggested by the presumptive approach, official disobedience focuses on the absolute nature of the ban while accepting the possibility that an official who deviates from the rule may escape sanctions in exceptional circumstances.

Gross, *supra* note 301, at 1522.

<sup>314</sup> DERSHOWITZ, *supra* note 288.

<sup>315</sup> Bowden argued for prosecutorial discretion as the ultimate check:

Candor and consistency are not always public virtues. Torture is a crime against humanity, but coercion is an issue that is rightly handled with a wink, or even a touch of hypocrisy; it should be banned but also quietly practiced. Those who protest coercive methods will exaggerate their horrors, which is good: it generates a useful climate of fear. It is wise of the President to reiterate U.S. support for international agreements banning torture, and it is wise for American interrogators to employ whatever coercive methods work. It is also smart not to discuss the matter with anyone.

If interrogators step over the line from coercion to outright torture, they should be held personally responsible. But no interrogator is ever going to be prosecuted for keeping Khalid Sheikh Mohammed awake, cold, alone, and uncomfortable. Nor should he be.

Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51. Bowden was writing before the revelations following Abu Ghraib and stated that “The Bush Administration has adopted exactly the right posture on the matter.” That statement

Dershowitz, Gross, and Bowden all agree that the slippery slope is something to be avoided, but they differ over how best to avoid it. The most probable reality is that no approach will avoid it entirely. But the prospect of illegal behavior does not mean that we throw up our hands. All of criminal law is based on the realization that illegal conduct will occur. American responses to emergencies similarly should be premised on the realization that officials often will do what they think necessary in an emergency situation. The criminal law deals with this phenomenon by creating only minimal exceptions for duress and the excuse of necessity. In dealing with the actions of those low in the chain of command, criminal and military law typically exclude the defense of superior orders to the extent that the defendant should have known that an order was illegal.

#### B. Separation of Powers, Civil Liberties and the Public

Having set out the possibilities, now we should turn to the competing considerations in selecting a preferred alternative. There are a number of considerations to inform Americans on whether emergency powers in fact will exist or whether they should. Some of these considerations relate to structural issues within government, some relate to understandings of individual rights, and most cut across both spheres.

Constitutional norms that relate to separation of powers often overlap those that relate to individual liberties. Whether the Executive is encroaching on the powers that the Legislature would normally exercise may be a slightly different question from whether either or both is exceeding limits that are explicitly crafted for protection of the individual. For example, in ordinary times private property is not subject to use restrictions except as established by law subject to the due process clause.<sup>316</sup> Absent an emergency or threat to public safety, the Executive could not unilaterally declare a private facility closed to the public without legislative action, and even with legislative action individual rights to use and access of the facility are likely to prevail.<sup>317</sup> During an

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would have to be reconsidered in light of what has since surfaced about the willingness of some within the administration to skirt the rules of law.

<sup>316</sup> *E.g.*, *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304 (1987).

<sup>317</sup> Denying an owner "all beneficial use" of a property will in most circumstances constitute a "taking" that would require compensation. *See Dolan v. City of Tigard*, 512

emergency, however, law enforcement might declare a certain facility off limits for the purpose of clearing away dangerous conditions.<sup>318</sup> The Executive in this situation has not encroached on legislative powers if the existing organic law allows unilateral executive action to meet emergencies. With regard to individual rights, the executive action would be tested by the doctrine of necessity to determine whether it was legal and, even if legal, the “takings” doctrine might require compensation for a lawful taking.<sup>319</sup> The question of emergency powers is much more complex than a simple yes or no question.

The titles, if not the substance, of some treatments of these issues suggest that responses to crises need not always be constitutional. But that is quite simply not possible. At the outer limits of valid governmental action, the Constitution stands as an impermeable barrier. The question is not whether the Constitution applies but where the barrier will be located under given circumstances. Short of that, however, a world of options exist and they need not all be treated as equally valid. To say that something is within constitutional powers is not to say that it is a good idea.<sup>320</sup> Several Justice Department responses to critics of the Patriot Act have pointed out that particular techniques have been upheld by the courts as being constitutional.<sup>321</sup> This “constitutional therefore valid” argument says only that a particular practice has not been found to be beyond the pale, not that it is a good idea. It is unresponsive to the political concern of whether a practice has encroached on liberty to a point that the populace finds unacceptable.

The Constitution can be interpreted easily to authorize emergency mobilization of resources by the President in extreme situations. It is very difficult to dispute the propriety of Justice Jackson’s analysis in *Youngstown* that there are areas of executive discretion in which the President’s powers standing alone will be sufficient, at least when

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U.S. 374, 384-85 (1994); *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003, 1019 (1992).

<sup>318</sup> See *Dolan*, 512 U.S. at 385.

<sup>319</sup> See text accompanying notes 54-62 *supra*.

<sup>320</sup> See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 203 (1961).

<sup>321</sup> The Justice Department launched a separate website in 2005 to defend the Patriot Act. U.S. Department of Justice, *The USA PATRIOT Act: Myth v. Reality*, [http://www.lifeandliberty.gov/subs/add\\_myths.htm](http://www.lifeandliberty.gov/subs/add_myths.htm) (last visited July 15, 2005) (showing that some tools allowed in the Patriot Act have been used in other settings such as pursuit of drug cases).

Congress has been silent on the subject.<sup>322</sup> Certainly one of those is to preserve the nation from attack, and even the War Powers Resolution recognizes this responsibility.<sup>323</sup> Because this responsibility is within constitutional limits, there is no need for extra-constitutional measures to carry it out. (“It’s in there.”)

Justice Robert Jackson wrote more about these issues than most Supreme Court Justices, perhaps not surprising given his experience with the Nuremberg Tribunal prosecutions. In a slightly obscure “fighting words” case, Justice Jackson, recently returned from the Nuremberg trials, characterized the clash between communists and radical conservatives in that day as a crisis similar to the early stages of the Nazi rise to power. In his view, government needed to intervene early in incitement cases to avoid a slide toward fascism. “There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”<sup>324</sup>

In Justice Jackson’s framework, however, there are two areas in which Congress has addressed the particular exercise of power in question. One is when Congress has explicitly rejected a claimed power. In this instance, Justice Jackson’s approach says that the President’s power must be found within Article II or implied from the nature of the executive.<sup>325</sup> Of course, once past that hurdle of lack-of-power, the President would still face a challenge from the direction of individual liberty.<sup>326</sup> The obverse situation occurs when Congress has authorized the action. In this instance, both Congress and the President still must face the challenge of individual liberty.<sup>327</sup> Either way, the challenge of

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<sup>322</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>323</sup> 50 U.S.C.S. § 1542(c) (LEXIS 2005).

<sup>324</sup> *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). Justice Goldberg borrowed Justice Jackson’s phrase in another case during the Cold War: “[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-60 (1963) (Goldberg, J., dissenting).

<sup>325</sup> *Youngstown*, 343 U.S. at 637-38.

<sup>326</sup> For example, Justice Douglas in *Youngstown*, implied that the executive could never exercise unilateral seizure power because only the legislature has the authority to pay compensation for the taking. *Id.* at 887.

<sup>327</sup> See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2643 (2004) (“Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status.”).

claims of individual liberty do not go away because of the emergency. They may change and morph to meet the times, but they do not disappear just because there is authority for the action.

It is true that the pressures to modify the demands of liberty in time of emergency will be very strong. The Constitution makes many of the demands of liberty contextual by using phrases such as “due” process, or “unreasonable” searches and seizures. Virtually all Supreme Court expressions of liberty in the past half-century have been contextualized by asking whether governmental justifications for an action serve a compelling or important governmental interest. Surely, a genuine emergency will present a strong case for a compelling governmental interest, such as in the example of racial segregation to quell a prison race riot.<sup>328</sup>

Because emergencies generate strong demands for “erosion” of civil liberties, there is a rhetorical gap to bridge so that we can speak a common language. Take the familiar example of not being allowed to publish ship sailing times during time of war.<sup>329</sup> Assuming the validity of the proscription so that my expectations of free expression are diminished, does that mean that my first amendment liberties have been curtailed or does it mean that my first amendment liberties are different depending on the context? Based on the analysis here, the preferred alternative should be the “it’s in there” approach, which avoids saying that government is allowed to do something unconstitutional. It requires that we seek a way to read the constitutional language, history, and structure in light of the emergency involved. Again, it must be remembered that a contextualized statement that an action is not unconstitutional is hardly a ringing endorsement of its wisdom or even validity as a matter of statutory authorization. That conclusion simply refers the matter back to the political process in which “We the People” must decide what “We” choose to allow.

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<sup>328</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., dissenting).

<sup>329</sup> *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

### III. Conclusion

The counter-terrorism measures of the Bush administration have produced a great deal of dialogue in the popular press and even to some extent in the courts about the existence and scope of emergency powers.

In the 2004 detainee cases, the Supreme Court firmly rejected the argument that an emergency provided unrestrained executive or military authority to imprison anyone without a hearing, not even aliens who might have carried arms against the United States. In that instance, the limits were built into the Constitution in the form of the due process clause. But the due process clause, the Court reminded us, is addressed to whatever process is due under the specific circumstances. It is difficult to quarrel with the proposition that the limits on executive authority are built into the due process clause itself.

Emergency powers surely exist in some parts of the constitutional framework. They are not to be found in authority to violate the law but in the very statement of the law itself. When a set of laws is designed specifically to restrain governmental power, then courts are capable of making those limits clear in specific situations. When the limits are to be inferred from the interstices of constitutional provisions, as in the clash of military authority and due process, it is again the traditional role of the judiciary to say what the law is.

As an extreme example, the Bybee Memorandum argued that the President could authorize actions that would otherwise violate statutory or international law either because of the Commander-in-Chief power or because of defenses such as necessity. The reaction to these propositions has been overwhelmingly negative. The whole point of statutes and treaties setting out the rules of law to govern use of force and conduct of war are to prevent claims of necessity or emergency from overriding the dictates of law. Limits on executive power are not just built in, they are the very substance of the rules.

Finally, the public debates now occurring over extension or modification of the Patriot Act have reaffirmed the central role of the electorate in American civil liberties. As Justice Jackson said, if the electorate hands over unrestrained power, then it is at least likely that the courts would be powerless to prevent tyranny. That is not to say that courts should throw up their hands and tolerate whatever is not voted down. The electorate and the courts both have roles to play in this

continuing dynamic. But the courts and the built-in constitutional limits on executive authority cannot be the sole source of protection for civil liberties in time of emergency. In those situations in which the Constitution itself does not set limits against what government is doing, the electorate must exercise independent review of governmental action and make its voice heard.