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***51 LIBERTY IN THE BALANCE: THE ROLE OF THE THIRD BRANCH IN A TIME OF INSECURITY**
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I. Introduction

The horrific events of September 11, 2001 shook the foundations of many of the most basic assumptions of American life. These include our confidence in relative isolation from the “trouble spots” of the world; our belief, and need to believe, that our culture is recognized on some level worldwide as an advanced and superior one; and, perhaps most fundamental, the assumption that a common instinct for self-preservation motivates and constrains even aggressive behavior.

It was not that America had never experienced terrorism, even at home and on a fairly large scale, before--in the 1990s alone New York City and Oklahoma City had experienced massive bombings characterized as terrorist acts, two American embassies in Africa had been bombed, with enormous loss of life, and at least one plot to destroy major New York City landmarks had been foiled. Rather, we were shaken, as individuals and as a nation, by the realization that the September 11th attacks were part of a long-term, sophisticated plan whose chief architect had invoked religious teaching, obligation, and duty in his followers in aid of focusing sustained hostility and destruction on the United States, and that the plan included suicide attacks. That these hostile actors apparently are not under the authority of any recognized government, nor identified with the interests of any particular state, makes it difficult for our governmental agencies to investigate their plans, places current and future preventive and enforcement efforts at the awkward *52 junction of criminal law, foreign affairs, and war, and makes us feel very insecure indeed.

Prior domestic acts of terrorism had been prosecuted as crimes. These prosecutions, which were highly successful in the sense that guilt was proven in open trials through established legal and adjudicative structures and in a manner credible at least to the West, focused on individuals identified as participants in acts prohibited by the internal laws of the United States whose guilt could be proven by competent admissible evidence. Detention was in aid of prosecution; long sentences were the ultimate outcome. Indeed, the New York trial of the embassy bombing case, in which Osama bin Laden was the named lead defendant, had concluded less than four months before the World Trade Center attacks, with guilty verdicts for all four of the defendants who were tried in that phase. [\[FN1\]](#)
[FN1]

Then came September 11th, and with it a domestic sense of insecurity--of real physical danger, and of inability to trust that all of our neighbors' values and political visions are fundamentally similar to our own--that was unprecedented in this country, at least in the second half of the 20th century.

Immediately following the September 11th attacks, the President spoke in terms of bringing the suspected perpetrators to “justice.” [\[FN2\]](#)[\[FN2\]](#) The World Trade Center, Pentagon, and Pennsylvania sites were cordoned off as “crime scenes.” [\[FN3\]](#)[\[FN3\]](#) Grand juries were empanelled to consider criminal charges in connection with the attacks. These actions suggested that the attacks would be treated, and prosecuted in federal courts, as crimes. The official statements quickly signaled a broader view of the attacks, and a broader range of reactions, as well. On September 12th, the President characterized the attacks as “more than acts of terror.” He denounced them as “acts of war.” [\[FN4\]](#)[\[FN4\]](#) The President proclaimed a national emergency and authorized the call-up of military reserve units on September 14th. [\[FN5\]](#)[\[FN5\]](#) In his radio address the following Saturday, the President announced that he and the National Security Council were engaged in planning “a comprehensive assault on terrorism.” [\[FN6\]](#)[\[FN6\]](#) By September 18th, both houses of Congress had passed, and the President had signed, a Joint Resolution finding it necessary and appropriate that the United States exercise ***53** its rights to self-defense and self-protection in response to the September 11th attacks, declaring that the President has constitutional authority “to take action to deter and prevent acts of international terrorism against the United States,” and authorizing the President “to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Congress did not declare war as such, but specifically invoked provisions of the 1973 War Powers Resolution relating to extended authorization of the introduction of U.S. armed forces into hostilities. [\[FN7\]](#)[\[FN7\]](#) We thus embarked on a “War against Terrorism”--one whose front is, to quote the President, “here in America.” [\[FN8\]](#)[\[FN8\]](#)

As is apparent from the Congressional authorization to use military force, the use of the language of “war” signifies much more than the determined focus of a nation seeking to eradicate a major domestic problem as in, for instance, the Johnson Administration's “War on Poverty.” In proclaiming war on the tactic of terrorism--and on individuals and users, and nations or organizations as facilitators thereof--the executive branch has been explicit in invoking a source of constitutional authority distinct from and broader than its authority to execute the laws of the United States. The war leadership powers of the Presidency have been claimed in aid of achieving--at home as well as outside our borders--measures of prevention, intelligence-gathering, and secrecy not normally sanctioned by the Constitution and domestic laws.

In remarks prepared for the testimony before Congress, Attorney General Ashcroft specifically referred to what he described as the President's “extraordinary and sole authority as Commander-in-Chief to lead our nation in times of war” as authority for a wide range of terrorism-related investigative and detention measures, and by way of explanation that in taking such steps the executive branch did not consider itself under obligatory Congressional oversight in relation to “those core executive powers.” [\[FN9\]](#)[\[FN9\]](#) Thus, said the Attorney General, “our fight against terrorism is not merely or primarily a criminal justice endeavor. It is a defense of our nation and its citizens.” [\[FN10\]](#)[\[FN10\]](#) A new set of priorities for federal law enforcement has been announced: “prevent[ion] ***54** first . . . prosecut[ion] second.” [\[FN11\]](#)[\[FN11\]](#)

What does this all have to do with the role of the courts--the third branch of the federal government? The courts are, of course, still open for business and continue to serve their constitutional role of adjudicating cases and controversies, testing the consistency of actions of government against the Constitution, which is our fundamental social compact. The context has changed in important respects, however, in relation to this War on Terror. Courts are now being called upon to weigh issues of individual and collective rights and liberties in relation to the war-making powers of the political branches of government and the existence, and consequences, of belligerent relationships. Courts have addressed questions relating to the designation of U.S. citizens detained in this country as enemy combatants, the statutory and constitutional implications of the use of material witness warrants in connection with grand jury investigations, access to information regarding aliens detained in this country, and whether the courts have any proper role at all in connection with challenges to U.S. detention of aliens outside the United States.

The post-September 11th era has also brought important structural changes that have shifted authority over the authorization of a broad range of domestic searches and seizures from Article III District Courts to the secret Foreign Intelligence Surveillance Court and/or executive branch entities, principally through the USA PATRIOT Act. And there continue to be criminal prosecutions, with a new overlay of national security issues and defenses based on international laws.

We will now look at the constitutional framework from which all three branches derive their powers, war-related issues that have come before the courts over the past 18 months, what the courts have said, the issues on which we can expect further word from higher courts in the near term, and some aspects of the impact of the USA PATRIOT Act.

II. Constitutional Framework

Article I of the Constitution, in addition to vesting in the Congress all of the legislative powers granted by the Constitution in the Congress, empowers Congress to “provide for the common Defence” as well as to “define and punish . . . Offences against the Law of Nations,” “[t]o declare War . . . make Rules concerning Captures on Land and Water,” and to raise, support, and regulate the armed forces. Article I also includes an important protection of the rights of the people to challenge government detentions, providing that “[t]he Privilege of the Writ of Habeas Corpus” is not to “be suspended,” except in *55 narrowly defined circumstances. [\[FN12\]](#)[\[FN12\]](#)

Article II vests the executive power of the federal government in the President, who is made “Commander-in-Chief” of the nation’s armed forces. The Constitution also grants the President foreign affairs powers, including authority to make treaties and to appoint and receive ambassadors. [\[FN13\]](#)[\[FN13\]](#)

The judicial power of the United States is vested, under Article III, in the Supreme Court “and in such inferior Courts as the Congress may from time to time . . . establish.” Article VI provides for the supremacy of the Constitution, federal laws, and treaties. The Constitution, which is our basic social compact (the “fundamental” law, in Alexander Hamilton’s words [\[FN14\]](#)[\[FN14\]](#)), establishes the courts as the forum in which actions of the political branches are tested against the Constitution’s grants and limitations of authority in the context of specific cases and controversies.

Although no bill of rights was included in the 1789 Constitution, the first ten amendments to the Constitution had been ratified by 1791. The content and rapid ratification of this Bill of Rights reflect deep-rooted concerns about the protection of civil liberties against government intrusion.

Judges of Article III courts, unlike all other constitutional officers of the federal government, hold their offices “during good Behavior” (in colloquial parlance, for life, subject of course to impeachment). Alexander Hamilton characterized this tenure provision as “the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws.” [\[FN15\]](#)[\[FN15\]](#) Thus, the judicial branch has the structural opportunity to exercise its authority in the context, light and instruction of history, buffered by life tenure against the sometimes considerable pressures that can be generated by policy goals set by the political branches, which must react as well as guide, and against public political opinion. Because this third branch lacks direct control over enforcement mechanisms for its decisions, it must, by the integrity of its actions, maintain the trust and respect of the people and of the other branches of government to exercise its power effectively.

Let’s turn now to a few of the issues that have come before the courts in connection with the current hostilities.

III. Preventive or Investigative Detentions

One of the most controversial issues to reach the courts thus far in the context of the War on Terror is whether the Executive has authority to detain American citizens, within this country, incommunicado, after designating them *56 as enemy combatants. Two such individuals have thus far been so declared and detained. Each case has generated a number of published decisions; one has already reached a Circuit Court of Appeals three times, and the other is likely to come before another circuit soon.

As I have already noted, federal law enforcement activities in connection with this War on Terror have focused increasingly on preventative aspects of investigation and detention, seeking to refine tools for disabling suspected terrorists and their affiliates while at the same time gaining access to information regarding their suspected activities and guarding against disclosure of information that could compromise these efforts. The Attorney General has been quite explicit about this, speaking very recently of building “a culture of prevention.” [\[FN16\]](#)[\[FN16\]](#) The Secretary of Defense, under whose authority the President has placed the “enemy combatant” detainees, has been similarly candid about a lack of immediate interest in prosecution, stating of one of the detainees that “we are not interested in trying him at the moment; we are not interested in punishing him at the moment. We are interested in finding out what he knows.” [\[FN17\]](#)[\[FN17\]](#)

Needless to say, the seizure of an American citizen without probable cause to suspect that he had committed or was about to commit a crime would present serious Fourth Amendment issues in the domestic law enforcement context; holding such persons incommunicado to facilitate interrogation would raise equally serious Fifth and Sixth Amendment issues in the context of criminal proceedings. The executive branch has not, however, sought to reconcile these actions with the Bill of Rights. Instead, it has invoked in its war-making powers, as well as principles of the laws of war, as authority for such detentions, relying principally on a World War II-era Supreme Court holding that citizens who perform belligerent acts on behalf of enemies of the United States in a time of war can be detained and subjected to military prosecution to the same extent as alien combatants. [\[FN18\]](#)[\[FN18\]](#) This proposition--that by engaging in such acts a citizen loses the benefit of the American social contract and thus can be held indefinitely without charges and without counsel, indeed incommunicado, and interrogated under coercive conditions--squarely raises the question of whether courts must defer to the Executive's unilateral determination in a time of war that a person has committed such acts. A host of related questions is implicated as well, including what, if any, opportunity does the detainee have to contest the determination; on what grounds and under what standard could the detainee challenge the determination; does it matter whether *57 the conduct relied upon in making the designation took place in a combat zone or elsewhere; and is there a right to consult with anyone in making whatever challenge may be permitted?

Before discussing the recent cases, some background on the nature and significance of belligerent, or combatant, status under customary international principles of war is in order. As the Supreme Court stated in its 1942 decision in *Ex parte Quirin*, [\[FN19\]](#)[\[FN19\]](#) an opinion upon which the recent detention decisions draw heavily, “[f]rom the very beginning of its history [the Supreme] Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.” [\[FN20\]](#)[\[FN20\]](#) Under these principles, both lawful and unlawful combatants are “subject to capture and detention” and “[u]nlawful combatants are . . . in addition . . . subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.” [\[FN21\]](#)[\[FN21\]](#)

Under international conventions and the customary international law of war, the distinction between “lawful” and “unlawful” combatants is drawn based on a number of factors, including whether persons have served under an established command-and-control structure, whether uniforms or other identifying insignia are worn, whether weapons are carried openly, and whether operations are conducted in accordance with the laws and customs of war. [\[FN22\]](#)[\[FN22\]](#) The significance of the distinction relates chiefly to entitlement to POW status and whether persons can be prosecuted for hostile acts undertaken in the course of the conflict. Lawful combatants generally have immunity from such prosecution and are entitled to POW status; unlawful combatants are not entitled to such immunity and do not have to be treated as POWs. There are also differences in the degree of due process to which the two groups are entitled in connection with prosecutions. [\[FN23\]](#)[\[FN23\]](#) Both groups are, however, as the *Quirin*

Court held, subject to detention.

Ex Parte Quirin involved a challenge, during World War II, by a group of German saboteurs, to their detention by U.S. authorities for trial by a military commission on war crimes charges. All but one of the petitioners who were captured in the United States were aliens. The decision is instructive on a number of levels. Note, first, that the case reached the Supreme Court in connection with an effort to petition for habeas corpus relief. Although the *58 Court denied leave to file the petition, it did so on the merits of the application, and made it clear that even a Presidential proclamation explicitly purporting to deny the petitioner access to the courts [FN24][FN24] did not strip the courts of authority to determine, upon a habeas petition, the constitutionality of the government's actions and the applicability of the President's military commission Proclamation in the particular case. The Court declared that neither the Proclamation "nor the fact that the [petitioners] were enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." [FN25][FN25]

Chief Justice Stone, writing for the Court, also took pains to note that innocence is not a prerequisite to judicial review. "Constitutional safeguards for the protection of all who are charged with offenses," he said, "are not to be disregarded in order to inflict merited punishment on some who are guilty." [FN26][FN26] However, Chief Justice Stone stated that the wartime circumstances called for a degree of deference to the Executive:

the detention and trial of petitioners--ordered by the President in the declared exercise of his powers as Commander-in-Chief of the Army in time of war and grave public danger . . . are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted. [FN27][FN27] The Quirin Court came to no such clear conviction.

Starting from the fundamental proposition that none of the three branches of American government has any power that is not derived from the Constitution, [FN28][FN28] the Court examined the constitutional and statutory authority claimed in support of the detention and military trial; and, finding authority for the petitioners' detention in Articles I and II of the Constitution, as well as in congressionally-enacted Articles of War, [FN29][FN29] upheld the assertion of executive *59 branch authority for trial by military tribunal of offenses against the law of war, including charges of "relieving, harboring or corresponding with the enemy and . . . spying." [FN30][FN30] An important incident of the power to conduct war, the Court further held, is the adoption of measures by military command "to seize and subject to disciplinary measures those enemies who . . . have violated the law of war." [FN31][FN31]

Nor did the United States citizenship claimed by one of the petitioners preclude the Government from treating him as an unlawful belligerent. The Court held:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the [relevant treaty] and the law of war. [FN32][FN32]

The Court also focused on the factual predicate for the charges of unlawful belligerency on which the petitioners were being held, although not for long. It was undisputed that all of the petitioners had "received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States," and had come ashore in the United States from German submarines with explosives and wearing German military clothing which they immediately buried, changed into civilian clothing, and were to have been paid by the German government for their services. [FN33][FN33] The admitted facts, the Court held, "show[ed] that the charge [of unlawful belligerency was] not merely colorable or without foundation." [FN34][FN34] The Court did not elaborate on any standard of review or address how conflicting positions on such issues are to be weighed in a time of war.

The United States Court of Appeals for the Fourth Circuit became the first federal appellate court to speak to the

role of the courts in connection with detention of alleged unlawful enemy combatants in the context of the War Against Terror when, on July 12, 2002, it issued its second opinion arising from efforts to obtain habeas corpus relief for Yaser Esam Hamdi. [\[FN35\]](#)[\[FN35\]](#) Hamdi, who was born in Louisiana and raised in Saudi Arabia, came into the custody of *60 United States armed forces in Afghanistan in the fall of 2001 and, after his claim to United States citizenship was discovered, he was transferred to a naval brig in Norfolk, Virginia. [\[FN36\]](#)[\[FN36\]](#) The United States government has designated Hamdi as an enemy combatant and asserts that his detention is necessary for intelligence gathering efforts. [\[FN37\]](#)[\[FN37\]](#) In his petition, Hamdi claimed that his detention violated his rights as an American citizen and sought immediate cessation of interrogation and release from custody. [\[FN38\]](#)[\[FN38\]](#) Promptly upon the filing of the petition, the district court appointed counsel for Hamdi and ordered the Government to provide the appointed counsel with immediate unmonitored access to Hamdi. [\[FN39\]](#)[\[FN39\]](#) The Fourth Circuit stayed the order and all proceedings on the petition almost immediately and heard oral argument a few days later.

In its opinion, issued a little more than two weeks after oral argument, the Fourth Circuit confirmed unequivocally the availability of habeas corpus proceedings to American citizens held in the United States as enemy combatants, rejecting what it characterized as a “sweeping proposition” advanced by the Government, “namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so.” [\[FN40\]](#)[\[FN40\]](#)

The court then turned to the question of the deference due the executive branch in the conduct of military affairs, finding a mandate to show such deference in Supreme Court precedents [\[FN41\]](#)[\[FN41\]](#) and declaring that “any judicial inquiry into Hamdi’s status as an alleged enemy combatant in Afghanistan must reflect a recognition that the Government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack.” [\[FN42\]](#)[\[FN42\]](#)

Holding that the district court had not considered sufficiently seriously the Government’s position and declining to define in the first instance the standards and procedures for review of the lawfulness of the detention, the Fourth Circuit reversed the order mandating the provision of access to counsel and remanded the case to the district court for further proceedings, but not without staking out some significant parameters. First, the court settled the question of the relevant source of legal authority for the detention, limiting the inquiry on remand to the factual predicate for the Government’s claim to the right to detain Hamdi: “if Hamdi is indeed an ‘enemy combatant’ who was captured during hostilities in Afghanistan,” the court stated, “the government’s *61 present detention of him is a lawful one.” [\[FN43\]](#)[\[FN43\]](#) Second, citing separation of powers concerns, the Fourth Circuit instructed the district court that “[a]ny standard of inquiry must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation.” [\[FN44\]](#)[\[FN44\]](#) As an example of such untoward interference, the court posited that “allowing alleged combatants to call American commanders to account in federal courtrooms would stand the war-making powers of Articles I and II on their heads.” [\[FN45\]](#)[\[FN45\]](#)

The Fourth Circuit did not articulate or review any general mechanism for determining disputed factual issues in the context of enemy combatant designations. On remand, the Government offered a two-page declaration purporting to document the fact of, and factual basis for, Hamdi’s designation as an enemy combatant, including “that Hamdi was seized in Afghanistan by allied military forces during the course of the sanctioned military campaign.” [\[FN46\]](#)[\[FN46\]](#) The district court, although stating that it “did not ‘have any doubts [Hamdi] had a firearm [or] any doubts he went to Afghanistan to be with the Taliban,’” raised questions about virtually every aspect of the declaration and ordered the Government to turn over a broad range of underlying information as well as the names of interrogators and statements of Hamdi and Northern Alliance members. [\[FN47\]](#)[\[FN47\]](#) On the third appeal, which quickly followed, the Fourth Circuit held that there were no disputed material fact issues warranting further investigation. The material facts, in the Fourth Circuit’s view, were that Hamdi was detained “during a combat operation undertaken in a foreign country” and that the executive branch had determined that he “was allied with enemy forces.” [\[FN48\]](#)[\[FN48\]](#) Under these circumstances, the court observed, the enemy combatant determination “bears the closest imaginable connection to the President’s constitutional responsibilities during the actual conduct of hostilities.” [\[FN49\]](#)[\[FN49\]](#)

Based on the proposition that “the standard of review of enemy combatant detentions must be a deferential one when the detainee was captured abroad in a zone of combat operations,” [\[FN50\]](#)[\[FN50\]](#) the court held that Hamdi was not entitled to challenge the factual assertions in the Government's affidavit. Because there were, in its view, no relevant factual disputes to weigh, the Hamdi court found it unnecessary to decide what standard should apply where the facts underlying the executive's assertion of authority to detain a petitioner are at issue. [\[FN51\]](#)[\[FN51\]](#)

***62** In reaching the conclusion that there was neither a factual nor a legal basis [\[FN52\]](#)[\[FN52\]](#) for granting Hamdi habeas corpus relief on the merits of his petition, the court struggled at length with questions of separation of powers, the war-making powers and protective duties of the executive; the concept of war-making as the exercise of a collective “right to self-determination and self-governance,” and the obligation of the courts to “defend the ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’” [\[FN53\]](#)[\[FN53\]](#) Indeed, the court reiterated its earlier holding that judicial review via habeas proceedings must be available, stating that a petition by “an American citizen challenging his summary detention for reasons of state necessity” falls “squarely within the Great Writ's purview.” [\[FN54\]](#)[\[FN54\]](#)

The Fourth Circuit disclaimed, however, any effort to make “any broad or categorical holdings on enemy combatant declarations” and, as we have seen, confined its holding that no evidentiary proceeding was appropriate to the situation before it (namely, where there was no dispute that the American citizen was captured abroad, in a war zone during a combat operation, and in that connection was determined to be an enemy combatant). [\[FN55\]](#)[\[FN55\]](#) In that context, the practical and political prospects of inappropriate judicial intrusion on the particulars of military decision-making in the field weighed heavily in favor of deference to the Executive with respect to the court's determination of the proper approach to fact issues in the habeas proceeding. [\[FN56\]](#)[\[FN56\]](#) Distancing itself from another case then pending in the Southern District of New York, the Hamdi court stated that it had “no occasion . . . to address the designation of an American citizen captured on American soil or the role that counsel might play in such a proceeding.” [\[FN57\]](#)[\[FN57\]](#)

***63** In this second case, *Padilla v. Rumsfeld*, the court and the Government [\[FN58\]](#)[\[FN58\]](#) have confronted both of these issues. Following the commencement of grand jury proceedings relating to the September 11th events, a number of individuals were arrested and detained on material witness warrants. [\[FN59\]](#)[\[FN59\]](#) Jose Padilla, a United States citizen, was one of them. He was arrested in Chicago on May 8, 2002, by Justice Department law enforcement personnel. The court appointed an attorney for him [\[FN60\]](#)[\[FN60\]](#) and Padilla, through his attorney, moved to vacate the material witness warrant. On June 9, 2002, prior to a decision on that motion, the Government withdrew the grand jury subpoena and, after the warrant had been vacated, disclosed that “the President had designated Padilla an enemy combatant” in an order issued that same day. The Defense Department thereupon took custody of Padilla and transferred him to South Carolina, where he has been held incommunicado in a Naval brig ever since. [\[FN61\]](#)[\[FN61\]](#) As summarized by the district court, the June 9th order set forth:

the President's conclusion that Padilla is an enemy combatant, and . . . the basis for that conclusion, including that Padilla: is “closely associated with Al Qaeda,” engaged in “hostile and war-like acts” including “preparation for acts of international terrorism” directed at this country, possesses information that would be helpful in preventing Al Qaeda attacks, and represents “a continuing, present and grave danger to the national security of the United States.” [\[FN62\]](#)[\[FN62\]](#)

The court-appointed lawyer filed a petition for habeas corpus as “next friend” to Padilla, on June 11, 2002. The government moved to dismiss the petition. [\[FN63\]](#)[\[FN63\]](#) Rejecting the motion to the extent it argued that the attorney lacked “next friend” standing, the court found in its December 4, 2002 decision on the motion that the relationship formed in connection with the material witness proceedings was sufficiently significant to support standing. [\[FN64\]](#)[\[FN64\]](#) Turning to the question of the legal authority for Padilla's military detention, the court first rejected Padilla's argument that his detention was unauthorized because the war ***64** with Afghanistan was undeclared, holding that “a formal declaration of war is not necessary in order for the executive to exercise its constitutional authority to prosecute an armed conflict--particularly when, as on September 11th, the United States is

attacked” and that the September 18, 2001, Joint Resolution of Congress authorized military action in any event, “engag[ing] the President’s full powers as Commander-in-Chief.” [\[FN65\]](#)[\[FN65\]](#)

The laws of war being thus implicated, the court reviewed the factual underpinnings and legal significance of distinctions between lawful and unlawful combatants, finding that the executive has power to detain both types of combatants and framing what it characterized as “the central issue presented in th[e] case: whether the President has the authority to designate as an unlawful combatant an American citizen, captured on American soil, and to detain him without trial.” [\[FN66\]](#)[\[FN66\]](#) Citing the “logic” of *Ex Parte Quirin*’s holding that unlawful combatants, like lawful ones, are “subject to capture and detention,” [\[FN67\]](#)[\[FN67\]](#) the district court found the detention of Padilla, without charges or immediate plans for presentation of any to a military tribunal or otherwise, to be within the scope of the executive branch’s power as construed by the Supreme Court in *Quirin*. The court explained that it interpreted *Quirin*

to mean that as between detention alone, and a trial by a military tribunal with exposure to the [death] penalty . . . or, at the least, exposure to a sentence of imprisonment intended to punish and deter, the [Supreme] Court regarded detention alone, with the sole aim of preventing the detainee from rejoining hostile forces . . . as certainly the lesser of the consequences an unlawful combatant could face. If . . . the Court in fact regarded detention alone as a lesser consequence than the one it was considering--trial by military tribunal--and it approved even that greater consequence, then [Padilla’s] case is a fortiori from *Quirin* as regards the lawfulness of detention under the law of war. [\[FN68\]](#)[\[FN68\]](#)

This view of proportionality and *Quirin*’s breadth provides, with the Joint Resolution, the principal basis for the Padilla court’s conclusion that the President has Constitutional and Congressionally-granted authority to order indefinite detention of an unlawful combatant. [\[FN69\]](#)[\[FN69\]](#)

***65** Having determined that the constitutional war-making authority, and congressional action pursuant thereto, provided a legal basis for the detention, the court held that a right to present facts contradictory to any proffered in opposition to the petition is inherent in the statutory habeas provisions. [\[FN70\]](#)[\[FN70\]](#) The court’s corollary holdings that an appointment of counsel is necessary and appropriate under the circumstances of Padilla’s detention, [\[FN71\]](#)[\[FN71\]](#) and that Padilla has a right to consult with his appointed counsel in aid of his petition, have triggered strenuous objections by the Government.

The Government had argued that permitting Padilla (who has been held incommunicado) to have access to counsel would undermine the intelligence-gathering goal of the detention by interfering with psychological techniques employed in his interrogation, and with the preventative goals of detention as well; as Al Qaeda operatives are, the Government asserted, trained to pass information through unwitting third-party intermediaries such as lawyers. [\[FN72\]](#)[\[FN72\]](#) Although the court held that neither argument was sufficient to justify preclusion of the consultation with counsel, the court made clear that it would eliminate or minimize any untoward impact on interrogation by placing certain limitations on the right of consultation. The court found the Government’s third-party intermediary theory conjectural and overbroad--to quote the court, “by the government’s logic, no indicted member of Al Qaeda facing trial in an Article III court should be allowed to consult with counsel--a result barred by the Sixth Amendment,” but nonetheless authorized monitoring of the contact to guard against the improper transmission of information through lawyers. [\[FN73\]](#)[\[FN73\]](#) In weighing the Government’s security concerns against the impact of denial of consultation on the efficacy of the habeas remedy, the court found that “Padilla’s statutorily granted right to present facts in connection with this ***66** petition will be destroyed utterly if he is not allowed to consult with counsel.” [\[FN74\]](#)[\[FN74\]](#)

With respect to the standard and scope of review, the court focused on deference to the executive branch, observing that such deference properly extends both “to military designations of individuals as enemy combatants in times of active hostilities . . . [and] to their detention after capture on the field of battle.” [\[FN75\]](#)[\[FN75\]](#) The court stated unequivocally that review of judgments by the political branches in the exercise of Article I and II war powers is outside the jurisdiction of Article III courts. [\[FN76\]](#)[\[FN76\]](#) Because “[t]he commission of a judge,” the court

continued, “does not run to deciding de novo whether Padilla is associated with Al Qaeda and whether he therefore should be detained as an unlawful combatant,” the court’s inquiry would be limited to a determination, based on an examination of whether there is “some evidence to support [the President’s] conclusion that Padilla was . . . engaged in a mission against the United States on behalf of an enemy with whom the United States is at war,” so as to determine whether “the controlling political authority” was “in fact exercising a power vouchsafed to him by the Constitution and the laws” in detaining Padilla as an unlawful combatant. [\[FN77\]](#)[\[FN77\]](#)

The Government, rather than agreeing to conditions for the court-ordered consultation with counsel, sought reconsideration of the order, proffering a declaration by the Director of the Defense Intelligence Agency (“DIA”) elaborating upon the executive branch’s concerns regarding the impact of consultation on the interrogation techniques being used on Padilla. [\[FN78\]](#)[\[FN78\]](#) The court granted the motion for reconsideration, and finding the DIA Director’s declaration speculative and insufficiently specific as to the status of Padilla’s interrogation or the actual effects of interruptions on other interrogations, [\[FN79\]](#)[\[FN79\]](#) the court adhered to its original decision, offering further details of the standard of review it contemplated. The “some evidence” standard, the court explained, will take into account information proffered by the petitioner “to assure that the *67 executive has not arbitrarily deprived a person of liberty.” [\[FN80\]](#)[\[FN80\]](#) Padilla is to be permitted to present evidence that “undermines the reliability” of the Government’s factual assertions supporting the enemy combatant declaration and will also be entitled to present evidence conflicting with the Government’s factual assertions and “to have that evidence considered alongside” the declaration proffered by the Government. The specifics of the evaluation, the court noted, “will have to abide whatever submission Padilla may choose to make.” [\[FN81\]](#)[\[FN81\]](#) Second Circuit rulings on the district court’s core determinations in Padilla are more likely to be seen in the near future than any factual proffer by Padilla. On April 9, 2003, the district court certified a number of issues for interlocutory review, including whether the President has authority to “designate an American citizen captured within the United States and . . . detain him for the duration of armed conflict with Al Qaeda,” and the appropriate standard for review of such designations. [\[FN82\]](#)[\[FN82\]](#)

Although the Hamdi and Padilla cases are, as far as anyone outside the executive branch knows, at this point singular, I have addressed them at length because they frame well the tension between ordinary civil liberties and Presidential war powers that is likely to persist in an ongoing War on Terror waged, at least in part, here in the United States. I would like to turn now to a few of the other significant civil rights and national security issues that have thus far come before the federal courts in connection with the War on Terror, and the related criminal prosecutions that have been brought in domestic Article III courts since September 11th.

IV. Alien Detainees Outside of the United States

There have thus far been two circuit court opinions addressing challenges to the detention of non-citizens at Guantanamo Bay, Cuba. Those persons, numbering in excess of six hundred, [\[FN83\]](#)[\[FN83\]](#) were principally captured in connection with the fighting against Al Qaeda and Taliban forces in Afghanistan. In *Coalition of Clergy, Lawyers and Professors v. Bush*, [\[FN84\]](#)[\[FN84\]](#) the Ninth Circuit rejected an effort by the eponymous Coalition to pursue habeas corpus relief for the detainees in a “next friend” capacity, holding that the Coalition lacked standing because it had “failed to demonstrate any relationship with the detainees, generally or individually.” [\[FN85\]](#)[\[FN85\]](#) In light of that holding, the Ninth Circuit declined to address the question of whether United States courts have *68 jurisdiction of habeas petitions brought by or on behalf of aliens held outside the territorial jurisdiction of the United States and vacated what it characterized as the district court’s “far-reaching ruling that there is no United States court that may entertain any of the habeas claims of any of the detainees.” [\[FN86\]](#)[\[FN86\]](#)

The United States Court of Appeals for the D.C. Circuit addressed the latter question on March 11, 2003 in its opinion in *Al Odah v. United States*, [\[FN87\]](#)[\[FN87\]](#) holding, in a group of cases brought by relatives of aliens held at Guantanamo Bay, that the courts of the United States lack jurisdiction of claims by detainees alleging violations of the Constitution, treaties and/or federal law. The D.C. Circuit found that Guantanamo Bay is not within the territorial sovereignty of the United States (being a rental from Cuba that is merely under the control of the United

States) and determined, based on its reading of the Supreme Court's 1950 holding in *Johnson v. Eisentrager* [FN88] [FN88] that the “privilege of litigation” does not extend “to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign,’” that the Guantanamo detainees similarly lack the ability to challenge their confinement in U.S. courts, whether or not they have actually engaged in hostilities against the United States. [FN89][FN89]

V. Material Witness Detentions

As mentioned previously, the Government has also used material witness warrants as a tool for detaining persons in connection with the War on Terror. These material witness detainees are not themselves accused of crimes, but have been held without bail for purposes of securing their testimony in connection with grand jury investigations. Two judges, both in the Southern District of New York, have reached, in lengthy, reasoned opinions, diametrically conflicting conclusions as to whether the governing federal statute, [FN90][FN90] which refers to detention in connection with a “criminal proceeding,” permits the detention of material witnesses in connection with grand jury proceedings rather than solely in connection with criminal trials.

Judge Scheindlin's May 13, 2002 opinion in *United States v. Awadallah* [FN91][FN91] holds that the language and context of the material witness statute make it clear that the statute was only intended to authorize the detention of material witnesses to ensure their appearance at trial. [FN92][FN92] Any other construction of the statute would, the court observed, raise serious Fourth Amendment issues and *69 thus would violate a cardinal rule of statutory construction. [FN93][FN93]

Chief Judge Mukasey, also of the United States District Court for the Southern District of New York, reached the opposite conclusion in his July 11, 2002 decision in a proceeding captioned *In Application for Material Witness Warrant*. [FN94][FN94] This later decision's reasoning focuses prominently on a 1971 Ninth Circuit statement that grand jury proceedings constitute “criminal proceedings” within the meaning of a predecessor statute. The *Awadallah* decision had dismissed the Ninth Circuit statement as dicta and “wrong.” [FN95][FN95] In contrast, Judge Mukasey found that a reference to the statement (which he construed as a holding rather than dicta) in a conference committee report to the current version of the material witness statute was direct evidence of congressional “awareness [of], and thus of . . . [its] intent” not to disturb the Ninth Circuit's interpretation of the term “criminal proceeding.” [FN96][FN96] The later decision criticized at length the statutory and constitutional reasoning of *Awadallah*, holding that the material witness statute does apply to grand jury proceedings and comports with the Fourth Amendment, and thus denied a motion to quash the warrant in question. [FN97][FN97]

The Government appealed the decision in *Awadallah*. The appeal was argued before the Second Circuit on April 10, 2003.

VI. INS Detention of Aliens

The detention of aliens in the U.S. by the Immigration and Naturalization Service (INS) is another preventative technique employed extensively in the War on Terror. According to the Attorney General, such detainees, whose number exceeds five hundred as of late November, 2001, [FN98][FN98] were permitted to make “phone calls to family or attorneys” and could “make their identity public, if they wish[ed] to.” The Justice Department declined, however, to “share valuable intelligence information with our enemies,” and thus refused to release identifying information regarding the persons in custody. [FN99][FN99] On September 21, 2001, the Chief Immigration Judge of the INS issued a blanket *70 directive mandating that all deportation hearings for persons the Attorney General has determined “might have connections to or knowledge of the September 11, 2001 terrorist attacks” be closed to the public and press, including family members and friends. Access to the record of the proceedings is also strictly limited by the directive, including even “confirming or denying whether such a case is on the docket or scheduled for a hearing.” [FN100][FN100] This directive triggered First Amendment lawsuits by media organizations, which

in turn generated two conflicting Circuit Courts of Appeals decisions.

In a case filed by the Detroit Free Press, Congressman John Conyers, and an INS detainee, among others, the Sixth Circuit held that the INS directive impermissibly infringes on the public's right of access to deportation hearings. [FN101][FN101] Introducing its analysis with the observation that the plenary power granted to the political branches of government over immigration means that “neither the Bill of Rights nor the Judiciary can second-guess government's choices” with respect to the deportation of non-citizens, the court asserted that “[t]he only safeguard on this extraordinary power is the public, deputizing the press as guardians of their liberty.” [FN102][FN102] Rejecting the Government's argument that the plenary immigration power mandated judicial deference to the executive branch in all immigration-related matters, the court held that “the Constitution meaningfully limits non-substantive immigration laws and does not require special deference to the Government” in such matters, [FN103][FN103] finding that “the Supreme Court has repeatedly allowed for meaningful judicial review of non-substantive immigration laws where constitutional rights are involved.” [FN104][FN104] The court then applied the two-part “experience and logic” test articulated by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*, [FN105][FN105] finding a First Amendment right of public access to deportation hearings. [FN106][FN106] Acknowledging that the Government has a compelling interest in preventing terrorism and deferring to its judgment that information revealed during deportation hearings could impede “the ongoing anti-terrorism investigation,” [FN107][FN107] the Sixth Circuit nonetheless found that the INS blanket directive was overly broad and upheld a preliminary injunction against the closure of future proceedings in the alien plaintiff's deportation *71 case. [FN108][FN108]

Writing two months later in *North Jersey Media Group, Inc. v. Ashcroft*, [FN109][FN109] the Third Circuit rejected the Sixth Circuit's application of the *Richmond Newspapers* test, finding insufficient historical precedent for open deportation proceedings to support a finding in favor of a First Amendment right of access on the “experience” prong of the test. [FN110][FN110] The *North Jersey Media* court also differed with the Sixth Circuit on the “logic” prong of the test, finding it “doubtful that openness promotes the public good” where national security matters are at stake, [FN111][FN111] and noting the Government's factual assertions that case-by-case closure [FN112][FN112] would be unworkable because closure applications would themselves reveal sensitive information, and that individual judges are insufficiently expert in national security matters to be entrusted with “the decision whether an isolated fact is sensitive enough to warrant closure,” [FN113][FN113] the court found itself “hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive enterprise.” [FN114][FN114] Holding on this basis that the press and public possess no First Amendment right of access under the *Richmond Newspapers* test, a divided panel of the Third Circuit reversed the district court's grant of a nationwide injunction prohibiting enforcement of the blanket closure order. [FN115][FN115] A petition for a writ of certiorari is pending as of April, 2003.

VII. Secret Federal Court Proceedings

A newspaper account suggests that at least one federal appellate court has acceded to Government requests for terrorist investigation-related secrecy by holding a closed hearing and expunging its public records of all information identifying a civil case filed by an Algerian who was detained in what the newspaper termed the “post-Sept. 11 nationwide dragnet.” [FN116][FN116] The same article reported that a United States Attorney's Office had filed a sealed motion to seal and expunge from public view the files relating to a habeas petition brought by a Palestinian man to stop a deportation based on a finding that the man was a terrorist. [FN117][FN117]

*72 VIII. Criminal Prosecutions in Civilian Courts

Notwithstanding the Government's avowed focus on prevention and the investigative sensitivity issues that have been brought before the courts, many terrorism-related civilian prosecutions have been commenced in the federal courts since September 11th. Attorney General Ashcroft reported to Congress in early March 2003 that 211 such charges have been brought, with 108 convictions or guilty pleas entered up to that point. [FN118][FN118]

Among the highest-profile prosecutions was that of John Walker Lindh, the “American Taliban.” Before the case was resolved with a plea of guilty to some of the charges, the Virginia district court ruled on Lindh's attempt to invoke a “lawful combatant” defense to the charges of conspiracy to murder Americans. The court rejected the defense as precluded by the President's February 2, 2002 declaration that the Taliban militia were unlawful combatants, holding that the declaration warranted deference as a reasonable interpretation and application of the Geneva Convention Relative to the Treatment of Prisoners of War, that Lindh had failed to carry his burden of demonstrating the contrary, and that, even without deferring to the Presidential declaration, the Taliban failed to meet the Geneva Convention's lawful combatant criteria. [\[FN119\]](#)[\[FN119\]](#) The question of the availability of this defense, including issues regarding the distinction between lawful and unlawful combatants, may well return to the federal courts if members of the Iraqi armed forces or the irregular “Saddam Fedayeen” are prosecuted in connection with their activities in the current war in Iraq.

Another high-profile prosecution, that of Zacarias Moussaoui, whom the Government has characterized as the “20th” September 11th hijacker, is currently on hold as the court and the parties struggle with information classification issues. In a recent sealed ruling, the trial judge ordered that Moussaoui be provided access to an Al Qaeda leader currently detained by the U.S. Government, in aid of gaining factual information relevant to Moussaoui's defense. The progress of the case toward trial was stayed pending the Government's appeal of this ruling to the Fourth Circuit. Within the past week, several news organizations filed an application with the district court, seeking access to the voluminous material that has been sealed in the case at the Government's request. The New York Times reported on Saturday, April 5th, that the judge, in directing the government to respond to the news organizations' application, stated that she was “disturbed by the extent to which the United States' intelligence officials have classified the pleadings, orders and memorandum opinions in this case” and that she was “skeptical that the government could prosecute the case ‘under the shroud of secrecy under which *73 it seeks to proceed.’” [\[FN120\]](#)[\[FN120\]](#)

The first such prosecution to go to trial, in which four men are accused of document fraud and conspiring to provide material support to terrorists, is currently in its third week of testimony in Detroit. [\[FN121\]](#)[\[FN121\]](#)

IX. USA PATRIOT Act

The USA PATRIOT Act [\[FN122\]](#)[\[FN122\]](#) (PATRIOT Act), which was signed into law on October 26, 2001, expands significantly the federal government's surveillance, detention, and investigative powers, particularly within the United States and with respect to immigrants. Linking expanded investigative and surveillance authority with foreign intelligence and national security concerns, a number of the PATRIOT Act's provisions reduce, eliminate, or bypass requirements to demonstrate Fourth Amendment probable cause for searches or to meet the even more stringent requirements applicable to criminal investigative wiretaps and other electronic surveillance. Several of these provisions shift control over authorization of surveillance and physical evidence seizures from domestic Article III courts to the secret Foreign Intelligence Surveillance Court and even, in some cases, to the law enforcement authorities themselves. The law also expands these authorities' abilities to carry out intrusions in secret.

Through liberalized information-sharing provisions, information obtained in connection with foreign intelligence-related investigations, including such information obtained in the United States regarding American citizens and residents, can be shared with domestic law enforcement authorities and vice-versa. Grand jury secrecy provisions are relaxed to permit grand jury information relating to foreign affairs or national security concerns to be shared with intelligence, immigration, protective, defense, and law enforcement authorities as well. [\[FN123\]](#)[\[FN123\]](#) The PATRIOT Act also draws on the authority of the political branches over immigration, adding a number of provisions directed at non-citizens present in the United States, including expanded detention authority and provisions rendering inadmissible to the United States persons designated by U.S. authorities as having engaged in terrorist-related activity or having supported organizations designated by U.S. authorities as terrorist ones.

Perhaps the most significant mechanism employed in the PATRIOT Act for expanding the reach of foreign intelligence-based investigative and surveillance authority involves the insertion of the word “significant” into key provisions of ^{*74} the Foreign Intelligence Surveillance Act of 1978 [\[FN124\]](#)[\[FN124\]](#) (FISA). Prior to the PATRIOT Act, authorities could invoke FISA's broad, secret surveillance and physical search provisions only for “the purpose” of obtaining foreign intelligence information. [\[FN125\]](#)[\[FN125\]](#) The PATRIOT Act makes the FISA authorizations available as long as obtaining foreign intelligence information is “a significant purpose” [\[FN126\]](#)[\[FN126\]](#) of the activity, thus permitting utilization of the secret, less demanding FISA approval process in connection with domestic criminal law enforcement activities ordinarily requiring district court authorization. FISA requires the secret Foreign Intelligence Surveillance Court (FISA Court) to issue surveillance and physical search authorizations upon the ex parte submission of certain information and certifications by the executive branch and the FISA Court's finding of probable cause to believe that the target of the application is a “foreign power” (a term that is defined to include groups engaged or preparing to engage in international terrorism, as well as foreign-based political organizations [\[FN127\]](#)[\[FN127\]](#)) or agent of a foreign power and that the place or facility to be monitored or searched is used, possessed, or owned by that foreign power or agent. [\[FN128\]](#)[\[FN128\]](#) Probable cause to believe that criminal activity has been or is being committed is not required. [\[FN129\]](#)[\[FN129\]](#) Coupled with the new provisions for the use of such information in “consultation” with federal law enforcement officers in efforts “to investigate or protect against,” among other things, “grave hostile acts,” terrorism, and clandestine intelligence activities by “foreign powers” [\[FN130\]](#)[\[FN130\]](#) and their agents, this expansion of FISA monitoring and search authority also expands the access of criminal law enforcement authorities to private information regarding persons in the United States, without obtaining a warrant based upon a showing of probable cause as to the commission of a crime.

^{*75} The PATRIOT Act also effects a significant expansion of federal law enforcement access to pen register and trap and trace information, now including e-mail, under the FISA. The amendments broaden the grounds for authorization of such orders to include investigations “to protect against international terrorism or clandestine intelligence activities.” [\[FN131\]](#)[\[FN131\]](#) They also extend law enforcement officers' access via such orders to e-mail, by amending the definitions of “pen register” and “trap and trace devices” to include the capture of “routing, addressing, or signaling information” in connection with Internet communications. [\[FN132\]](#)[\[FN132\]](#) Although the amendments specifically exclude the “contents” of communications from the definitions, more than one commentator has expressed concerns about the practical ability of law enforcement officials to separate the substantive content of e-mail from addressing information, and about the capture, as part of addressing information, of subject lines and Internet site addresses that reveal content. [\[FN133\]](#)[\[FN133\]](#)

Pen register and trap and trace orders under FISA must be issued by the FISA Court upon a Government attorney's certification that “the information likely to be obtained is foreign intelligence information [regarding aliens] . . . or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities.” [\[FN134\]](#)[\[FN134\]](#) E-mail is also brought into the scope of pen register and trap and trace orders obtained through district courts in connection with criminal investigations. District courts are required to issue such orders upon a certification that the information likely to be obtained is relevant to an ongoing criminal investigation. [\[FN135\]](#)[\[FN135\]](#)

The PATRIOT Act also adds an expanded so-called “sneak and peak” provision relating to notice of the execution of warrants for evidence of criminal offenses. The new subsection of the federal criminal code permits a court, upon a finding of “reasonable cause to believe that providing immediate notification of the execution of the warrant may” seriously jeopardize an investigation or unduly delay a trial, to delay any required notice of execution of the warrant for a “reasonable period” and thereafter extend such period, apparently indefinitely, “for good cause shown.” [\[FN136\]](#)[\[FN136\]](#) This provision is not specifically foreign intelligence or terrorism related.

In addition, the PATRIOT Act gives the FBI the ability to obtain a broad ^{*76} range of records from businesses and other entities, apparently including libraries, book stores, and doctor's offices, without showing probable cause; the FISA Court is required to issue an order directing the production of all “tangible things (including books,

records, papers, documents and other items)” upon an application specifying that “the records concerned are sought for an authorized investigation . . . to obtain foreign intelligence information [concerning persons other than U.S. citizens or permanent residents] . . . or to protect against international terrorism or clandestine intelligence activities.” [\[FN137\]](#)[\[FN137\]](#) Furthermore, orders directing the disclosure to federal law enforcement of educational records and statistics are required to be issued by courts of competent jurisdiction upon the ex parte certification of the Attorney General or a high-ranking designee that there are “specific and articulable facts giving reason to believe that the education records are likely to contain information” that is “relevant to an authorized investigation or prosecution of” any of a large number of terrorism-related and violent crimes or “an act of international or domestic terrorism.” [\[FN138\]](#)[\[FN138\]](#) The FBI can obtain financial institution and identifying information relating to consumers directly from consumer reporting agencies upon a certification that the “information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities.” [\[FN139\]](#)[\[FN139\]](#)

The “Enhanced Immigration Provisions” of Title IV of the PATRIOT Act amend the Immigration and Nationality Act to render inadmissible and deportable persons who have engaged in any of a broadly-defined range of terrorist activities, including persons who are “representatives” of “foreign terrorist organizations” as designated by the Secretary of State, or of “political, social or other similar group[s] whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities,” as well as such individuals' spouses and children. [\[FN140\]](#)[\[FN140\]](#) Announcements in the Federal Register show that more than forty organizations have been so designated. [\[FN141\]](#)[\[FN141\]](#) The PATRIOT Act also mandates the detention of aliens certified by the Attorney General or the Deputy Attorney General as persons whom he has reasonable grounds to believe have engaged in such terrorism-related activities or “in any other activity that endangers the national security of the United States.” [\[FN142\]](#)[\[FN142\]](#) Such persons can be detained for up to seven days without charges or the *77 commencement of removal proceedings. Such a person who has not been removed within six months can continue to be held indefinitely, for renewable six-month periods, if the person's release “will threaten the national security of the United States or the safety of the community or any person.” [\[FN143\]](#)[\[FN143\]](#) The amendments make a specific, limited provision for the availability of judicial review of such detentions. Such review is available only by petition for habeas corpus, and appellate review is placed exclusively in the United States Court of Appeals for the D.C. Circuit (and the Supreme Court thereafter), no matter where the petition originates. [\[FN144\]](#)[\[FN144\]](#)

X. Conclusion

The many issues that have already come before the courts, and the careful, often conflicting ways in which they have been addressed, show that, even in wartime, the third branch has an essential and ongoing role as an element of the Founders' tripartite governmental design of co-equal branches with distinct functions, complementing and at times restraining each others' exercise of Constitutionally-granted powers through appropriate checks and balances. The Constitution remains supreme, and it remains “emphatically the province and duty of the judicial department to say what the law is.” [\[FN145\]](#)[\[FN145\]](#) The Constitution grants unique powers to the political branches with respect to the conduct of war and foreign policy; the courts continue to have the responsibility to determine, in the context of particular cases of which they have jurisdiction, whether particular actions taken are within the scope of those powers and other relevant Constitutional limits as a legal and factual matter. The courts also have the clear and ongoing responsibility of providing for fair and impartial proceedings in criminal cases, dealing with information classification issues in a manner consistent with the defendants' rights and the public good.

The wartime context does, as the decisions I have reviewed recognize, transform the threshold questions in many cases involving civil liberties. Rather than testing the actions of government against the Bill of Rights in the first instance, the question when military or foreign affairs powers are invoked is whether and to what extent the authority exercised derives from Articles I and II of the Constitution and, if so, whether that authority has properly been exercised. Deference is called for within interpretive realms committed to the executive branch; the third branch has among its responsibilities the judicious discernment of the boundaries of those realms. Liberty thus

remains where the Founders placed it--in the balance, in the scales of justice.

[FN^a1]. This Article is based on a speech that Professor Koplow delivered on February 13, 2003, as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the Suffolk University Law Review to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture's Series serves as a tribute to Judge Donahue's accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture in the series is designed to address contemporary legal issues and expose the Suffolk University community to outstanding authorities in various fields of law.

[FN^d1]. United States District Judge, Southern District of New York. This article documents the lecture as delivered at Suffolk University Law School on April 10, 2003. A number of the judicial decisions discussed here have been appealed or otherwise reviewed since that time. Because the litigation is ongoing, any attempt to update the discussion or citations would itself become dated quickly. Accordingly, the article speaks as of April, 2003.

[FN1]. Attorney General John Ashcroft Press Conference, at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_18.htm (Oct. 18, 2001) (reporting imposition of life sentences).

[FN2]. President George W. Bush, Statement by the President in his Address to the Nation, at <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html> (Sept. 11, 2001).

[FN3]. Attorney General John Ashcroft, Remarks of Attorney General Ashcroft, Media Briefing, at <http://www.usdoj.gov/ag/speeches/2001/0912pressconference.htm> (Sept. 12, 2001).

[FN4]. President George W. Bush, Remarks by the President in Photo Opportunity with the National Security Team, at <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.htm> (Sept. 12, 2001).

[FN5]. Proclamation No. 7463, [66 Fed. Reg. 48199](#), available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-4.html> (Sept. 14, 2001).

[FN6]. President George W. Bush, Radio Address of the President to the Nation, at <http://www.whitehouse.gov/news/releases/2001/09/20010915.html> (Sept. 15, 2001).

[FN7]. Authorization For Use of Military Force, [Pub. L. No. 107-40](#), 115 Stat. 224 (codified as amended in scattered sections of 50 U.S.C.).

[FN8]. President George W. Bush, Remarks by the President at the Signing of H.R. 5005 the Homeland Security Act of 2002, at <http://www.whitehouse.gov/news/releases/2002/11/20021125-6.html> (Nov. 25, 2002).

[FN9]. Attorney General John Ashcroft, Testimony before the Senate Committee on the Judiciary, at <http://www.usdoj.gov/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.h> (Dec. 6, 2001).

[FN10]. Attorney General John Ashcroft, Testimony before the House Committee on the Judiciary, at http://www.usdoj.gov/ag/testimony/2001/agcrisisremarks9_24.htm (Sept. 24, 2001).

[FN11]. Attorney General John Ashcroft, Testimony before the Senate Committee on the Judiciary, at <http://www.usdoj.gov/ag/testimony/2001/0925AttorneyGeneralJohnAshcroftTestimony> (Sept. 25, 2001).

[FN12]. U.S. Const. art. I, §§ 8, 9.

[FN13]. *Id.* at art. II, §§ 2, 3.

[FN14]. *The Federalist* No. 78, at 746 (Alexander Hamilton) (Rossiter ed., 1999).

[FN15]. *Id.* at 433.

[FN16]. Prepared Remarks of Attorney General John Ashcroft, Senate Judiciary Committee Hearing: “The Terrorist Threat: Working Together to Protect America,” at <http://www.usdoj.gov/ag/testimony/2003/030403senatejudiciaryhearing.htm> (Mar. 4, 2003) [hereinafter Working Together].

[FN17]. Department of Defense News Briefing, [2002 WL 22026773 at *11 \(June 12, 2002\)](#).

[FN18]. *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

[FN19]. [317 U.S. 1 \(1942\)](#).

[FN20]. *Id.* at 27-28.

[FN21]. *Id.* at 31-32.

[FN22]. [United States v. Lindh](#), 212 F. Supp. 2d 541, 557 (E.D. Va. 2002).

[FN23]. See generally John Cerone, Status of Detainees in International Armed Conflict, and their Prosecution in the Course of Criminal Proceedings, ASIL [American Society of International Law] Insights, at <http://www.asil.org/insights/insigh81.htm> (Jan. 2002); David B. Rivkin, Jr. et al., Enemy Combatant Determinations and Judicial Review, The Federalist Society for Law and Public Policy Studies, at <http://www.fed-soc.org/Laws%20of%20war/enemycomb.pdf> (last visited Jan. 16, 2004).

[FN24]. *Ex parte Quirin*, 317 U.S. 1, 22-23 (1942). An Order, dated July 2, 1942, and issued in the President's capacity as Commander-in-Chief of the armed forces after the petitioners had been captured in the United States, appointed a military commission and directed it to try the petitioners for offenses against the laws of war and the Articles of War enacted by Congress. *Id.* On the same day, the President issued a Proclamation that all who are:

subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation and who during time of war enter or attempt to enter the United States... through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.

Id. The Proclamation “also stated in terms that all such persons were denied access to the courts.” *Id.* at 23.

[FN25]. *Id.* at 26.

[FN26]. *Id.*

[FN27]. *Id.* at 25.

[FN28]. *Quirin*, 317 U.S. at 26.

[FN29]. [10 U.S.C. §§ 1471-1593 \(2003\)](#). The Articles of War cited by the Court, which have since been repealed, were then found at [10 U.S.C. §§ 1471-1593](#).

[FN30]. [Quirin](#), 317 U.S. at 26.

[FN31]. [Id.](#) at 29-30.

[FN32]. [Id.](#) at 37-38.

[FN33]. [Id.](#) at 21.

[FN34]. [Quirin](#), 317 U.S. at 36.

[FN35]. See generally [Hamdi v. Rumsfeld](#), 296 F.3d 278 (4th Cir. 2002) (Hamdi II). In a decision issued a month earlier, [Hamdi v. Rumsfeld](#), the Fourth Circuit dismissed petitions filed on Hamdi's behalf by a public defender and a private citizen, neither of whom had any “significant” relationship with [Hamdi](#), for lack of standing. [294 F.3d 598 \(4th Cir. 2002\)](#) (Hamdi I), rev'd in part, [296 F.3d 278 \(4th Cir. 2002\)](#). The petition that was the subject of [Hamdi II](#) was filed by Hamdi's father. [Hamdi II](#), 296 F.3d at 279.

[FN36]. [Hamdi v. Rumsfeld](#), 316 F.3d 450, 460 (4th Cir. 2003) (Hamdi III).

[FN37]. [Hamdi II](#), 296 F.3d at 280.

[FN38]. [Id.](#)

[FN39]. [Id.](#) at 280-81.

[FN40]. [Id.](#) at 283.

[FN41]. [Hamdi II](#), 296 F.3d at 278; see Ex parte [Quirin](#), 317 U.S. 1, 25-29 (1942); The Prize Cases, [67 U.S. 635, 670 \(1862\)](#).

[FN42]. [Hamdi II](#), 296 F.3d at 283.

[FN43]. [Id.](#) (citing [Quirin](#), 317 U.S. at 31, 37).

[FN44]. [Id.](#) at 283-84.

[FN45]. [Id.](#) at 284.

[FN46]. [Hamdi v. Rumsfeld](#), 316 F.3d 450, 461 (4th Cir. 2003) (Hamdi III).

[FN47]. [Id.](#) at 462.

[FN48]. [Id.](#) at 465.

[FN49]. [Id.](#) at 466.

[FN50]. [Hamdi III, 316 F.3d at 471-72](#). “The review of battlefield captures in overseas conflicts is a highly deferential one.” [Id. at 477](#).

[FN51]. [Id. at 473-74](#).

[FN52]. [Hamdi III, 316 F.3d at 467-68](#). In addition to holding, on the basis of *Quirin* and other Supreme Court decisions, that there is a clear basis in United States law for the detention of enemy combatants pending hostilities, the *Hamdi* court rejected legal challenges to that detention based on alleged noncompliance with [18 U.S.C. § 4001\(a\)](#) and Article 5 of the Geneva Convention. [Id. at 467](#). As to the challenge based on the statute (which provides that “[n]o citizen shall be imprisoned or otherwise detained except pursuant to an Act of Congress”), the court held that the September 18, 2001 Joint Resolution of Congress sufficed to provide congressional authorization for the detention, as did a statutory provision (10 U.S.C. § 965(a)) authorizing expenditures for custody of persons “similar to prisoners of war.” [Id. at 467-68](#). The Geneva Convention provision relating to determinations of prisoner status “by a competent tribunal,” the court held, is not self-executing and therefore does not provide a basis for a “private right of action in the domestic courts of signatory countries.” [Id. at 468](#) (quoting [Huynh v. Levi, 586 F.2d 625, 629 \(6th Cir. 1978\)](#)). The court further stated that any distinction between lawful and unlawful combatants made pursuant to an Article 5 determination would be irrelevant to *Hamdi*'s situation because the government was not seeking to punish him for his alleged belligerent acts and “the option to detain until the cessation of hostilities belongs to the executive in either case.” [Id. at 464-69](#).

[FN53]. See [id. at 464](#) (quoting [Powell v. Alabama, 287 U.S. 45, 67 \(1932\)](#)).

[FN54]. [Id. at 464-65](#).

[FN55]. [Id. at 465](#).

[FN56]. See [Hamdi III, 316 F.3d at 465](#).

[FN57]. [Id.](#)

[FN58]. The term “Government,” as used here, refers to the government of the United States as represented by the Justice Department.

[FN59]. The Justice Department, on grounds of grand jury secrecy, has refused to divulge the number or identities of the material witness detainees. See, e.g., Attorney General John Ashcroft, Provides Total Number of Federal Criminal Charges and INS Detainees, at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_27.htm (Nov. 27, 2001) [hereinafter INS Detainees].

[FN60]. There is no controversy about the propriety of appointment of counsel in connection with the detention of material witnesses. See INS Detainees, *supra* note 59. “An individual held on a material-witness warrant has a right to be represented by counsel, to have court-appointed counsel, and to be presented before a judge who determines the necessity of holding that individual on a material-witness warrant.” [Id.](#)

[FN61]. [Padilla v. Bush, 223 F. Supp. 2d 564, 568-71 \(S.D.N.Y. 2002\)](#) (*Padilla I*); see [Padilla v. Rumsfeld, 243 F. Supp. 2d 42, 50 \(S.D.N.Y. 2003\)](#) (*Padilla II*) (quoting January 9, 2003 Declaration of Vice Admiral Lowell E. Jacoby (*Jacoby Decl.*)).

[FN62]. [Padilla I, 223 F. Supp. 2d at 572](#).

[FN63]. *Id.* at 569.

[FN64]. *Id.* at 576-77 (distinguishing *Hamdi I* and [Coalition of Clergy v. Bush, 310 F.3d 1153 \(9th Cir. 2002\)](#)); see *infra* notes 84-86 and accompanying text.

[FN65]. *Padilla I*, 233 F. Supp. 2d at 588-90; see *infra* notes 84-86 and accompanying text. The court declined to address an argument that detention was unlawful because there was no foreseeable end to the state of hostilities between the United States and al Qaeda, observing that American troops remained engaged in Afghanistan and Pakistan, but also asserting that there is no *per se* constitutional ban on “indefinite confinement of one not convicted of a crime.” *Padilla I*, 233 F. Supp. 2d at 590 (citing *Hamdi I* and *Coalition of Clergy*).

[FN66]. *Padilla I*, 233 F. Supp. 2d at 594.

[FN67]. *Id.* at 594-95 (emphasis in original).

[FN68]. *Id.* at 595.

[FN69]. *Id.* at 596 (discussing court's acceptance of executive's power to detain unlawful combatants indefinitely). The district court also rejected *Padilla's* argument that [18 U.S.C. § 4001\(a\)](#) and provisions of the USA PATRIOT Act placing restrictions on the length of detention of aliens suspected of endangering national security imposed relevant constraints on the executive's authority to detain enemy combatants in the context of the current conflict. *Id.* at 596-99.

[FN70]. *Id.* at 599-600 (citing [28 U.S.C. §§ 2241, 2243, 2246 \(2002\)](#)).

[FN71]. *Id.* at 600-01. The *Padilla* Court stated that the Sixth Amendment right to counsel and the Fifth Amendment protections against self-incrimination are inapplicable to *Padilla's* current situation because no criminal proceedings have been initiated against him. *Id.* The court nonetheless found authority to appoint counsel for *Padilla* in a statute relating to habeas proceedings and appointed counsel for him, finding that “the interests of justice so require [d].” *Id.*; see [18 U.S.C. § 3006A\(2\)\(B\) \(2003\)](#) (granting court power to appoint counsel when required by justice). But see *Rivkin*, *supra* note 23, at 12-13 (criticizing *Padilla* Court's reliance on [18 U.S.C. § 3006A\(2\)\(B\)](#)). *Rivkin* points out that the statute is found in a substantive criminal law title of the United States Code, and criticizes the *Padilla* Court for “go[ing] far beyond Congress' purpose in enacting this section.” *Id.* at 13.

[FN72]. The pending prosecution of attorney Lynne Stewart on charges of conspiring to provide material support to terrorist organizations, based on allegations that she assisted her client, a convicted terrorist, in conveying information to others, is indicative of the Government's view of the risks posed by improper communications. See Prepared Remarks of Attorney General John Ashcroft, Islamic Group Indictment/SAMs, available at <http://www.usdoj.gov/ag/speeches/2002/040902agpreparedremarkedislamicgroup.htm> (Apr. 9, 2002).

[FN73]. *Padilla I*, 233 F. Supp. 2d at 604-05. The court instructed the parties to negotiate logistical parameters for consultation including monitoring procedures, and stated that, if the parties were unable to come to agreement, the court would impose a set of procedures. *Id.*

[FN74]. *Id.* at 604.

[FN75]. *Id.* at 606.

[\[FN76\]](#). *Id.* at 607.

[\[FN77\]](#). *Padilla I*, 233 F. Supp. 2d at 608.

[\[FN78\]](#). [Padillay. Rumsfeld, 243 F. Supp. 2d 42, 49 \(S.D.N.Y. 2003\)](#) (*Padilla II*) (quoting Jacoby Decl.). The declaration said,

DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator.... There are numerous examples of situations where interrogators have been unable to obtain a valuable intelligence from a subject until months, or even years, after the interrogation process began.... Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool.... Any insertion of counsel into the subject-interrogator relationship, for example--even if only for a limited duration or for a specific purpose--can undo months of work and may permanently shut down the interrogation process.

Id.

[\[FN79\]](#). *Id.* at 51-52.

[\[FN80\]](#). *Id.* at 54.

[\[FN81\]](#). *Id.* at 56.

[\[FN82\]](#). [Padilla v. Rumsfeld, 256 F. Supp. 2d 218, 233 \(S.D.N.Y. 2003\)](#) (*Padilla III*).

[\[FN83\]](#). "Major General Miller Takes Command of the Joint Task Force," Press Rel. #26, available at <http://www.nsgtmo.navy.mil> (Nov. 8, 2002).

[\[FN84\]](#). [310 F.3d 1153 \(9th Cir. 2003\)](#).

[\[FN85\]](#). *Id.* at 1163.

[\[FN86\]](#). *Id.* at 1165.

[\[FN87\]](#). [321 F.3d 1134 \(D.C. Cir. 2003\)](#).

[\[FN88\]](#). [339 U.S. 763 \(1950\)](#).

[\[FN89\]](#). *Al Odah*, 321 F.3d at 1144 (quoting [Eisentrager, 339 U.S. at 777-78](#)).

[\[FN90\]](#). [18 U.S.C. § 3144 \(2003\)](#).

[\[FN91\]](#). [202 F. Supp. 2d 55 \(S.D.N.Y. 2002\)](#).

[\[FN92\]](#). *Id.* at 63-78.

[\[FN93\]](#). *Id.* at 76-77.

[\[FN94\]](#). [213 F. Supp. 2d 287 \(S.D.N.Y. 2002\)](#). Unlike the proceedings in *Awadallah*, which became public after *Awadallah* was indicted for perjury in connection with his grand jury testimony, the docket, record, and name of the

person involved in the proceeding before Judge Mukasey were sealed in accordance with grand jury secrecy rules. See [id. at 288 n.1.](#)

[FN95]. [Awadallah, 202 F. Supp. 2d at 71.](#)

[FN96]. [Material Witness, 213 F. Supp. 2d at 297-98.](#)

[FN97]. [Id. at 300, 302.](#)

[FN98]. INS Detainees, supra note 59. As of November 27, 2001, 548 persons arrested on immigration charges in connection with the September 11th investigation were in custody. *Id.* More than eleven hundred individuals were arrested in all. See Matthew Brzezinski, Hady Hassan Omar's Detention, N.Y. Times Mag., Oct. 27, 2002, at 52.

[FN99]. INS Detainees, supra note 59.

[FN100]. [Detroit Free Press v. Ashcroft, 303 F.3d 681, 683-84 \(6th Cir. 2002\)](#), reh'g denied and reh'g en banc denied 2003 U.S. App. LEXIS 1278 (6th Cir. Jan. 22, 2003); see [N.J. Media Group, Inc. v. Ashcroft, 308 F.3d 198, 199 \(3d Cir. 2002\)](#).

[FN101]. [Detroit Free Press, 303 F.3d at 683-84.](#)

[FN102]. [Id. at 683.](#)

[FN103]. [Id. at 685.](#)

[FN104]. [Id. at 687.](#)

[FN105]. [448 U.S. 555 \(1980\).](#)

[FN106]. [Detroit Free Press, 303 F.3d at 700-05.](#)

[FN107]. [Id. at 706-07.](#)

[FN108]. [Id. at 707-11.](#)

[FN109]. [308 F.3d 198 \(3d Cir. 2002\).](#)

[FN110]. [Id. at 208-13.](#)

[FN111]. [Id. at 217.](#)

[FN112]. The Sixth Circuit had alluded to case-by-case closures as appropriately protective of both security concerns and First Amendment rights. See [Detroit Free Press, 303 F.3d at 707, 711.](#)

[FN113]. [N.J. Media Group, 308 F.3d at 219.](#)

[FN114]. *Id.*

[FN115]. *Id.* at 221.

[FN116]. Dan Christensen, *Secrecy Within*, *Miami Daily Bus. Review*, Mar. 12, 2003, at A1.

[FN117]. *Id.*

[FN118]. See *Working Together*, *supra* note 16.

[FN119]. [United States v. Lindh](#), 212 F. Supp. 2d 541, 558 (E.D. Va. 2002).

[FN120]. Phillip Shenon, *Judge Critical of Secrecy in Terror Case Prosecution*, *N.Y. Times*, Apr. 5, 2003, at B13.

[FN121]. See David Ashenfelter, *Luck Helped Nab Terror Suspect*, *Detroit Free Press*, available at <http://www.freep.com/newslibrary> (Apr. 5, 2003).

[FN122]. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, [Pub. L. No. 107-56](#), 115 Stat. 272 (2001).

[FN123]. USA PATRIOT Act § 203 (amending [Rule 6 of Federal Rules of Criminal Procedure](#)).

[FN124]. [50 U.S.C. §§ 1804\(a\)\(7\)\(B\), 1823\(a\)\(7\)\(B\) \(1978\)](#). The PATRIOT Act substitutes “a significant purpose” for “the purpose.” See *infra* notes 125-26.

[FN125]. [50 U.S.C. §§ 1804\(a\)\(7\)\(B\), 1823\(a\)\(7\)\(B\) \(1978\)](#) (emphasis added).

[FN126]. USA PATRIOT Act § 218 (amending [50 U.S.C. §§ 1804\(a\)\(7\)\(B\), 1823\(a\)\(7\)\(B\)](#)) (emphasis added). The Justice Department made over one thousand applications to the FISA Court in 2002. See *Working Together*, *supra* note 16.

[FN127]. [50 U.S.C. § 1801\(a\) \(2003\)](#).

[FN128]. 18 U.S.C. §§ 1805(a)(3), 1824(a)(3) (2003) (defining probable cause requirements).

[FN129]. *Id.* Although FISA provides specifically that the finding of probable cause to believe that a person is an agent of a foreign power cannot be based solely on First Amendment protected activities as to U.S. citizens and permanent residents, no such proviso applies to aliens present in the United States who do not have permanent resident status, and the statute does not preclude partial reliance on First Amendment-protected activity for findings of probable cause as to U.S. citizens or permanent residents. *Id.*; see 18 U.S.C. § 1801(i) (2003) (defining “United States Person”); USA PATRIOT Act § 214 (amending [50 U.S.C. § 1842](#)) (similarly limited First Amendment proviso in connection with pen register and trap and trace authority under FISA); USA PATRIOT Act § 216 (adding [50 U.S.C. § 1863](#)) (regarding FBI access to business records in First Amendment context).

[FN130]. USA PATRIOT Act § 504 (adding [50 U.S.C. § 1806\(k\)](#) and [§ 1825\(k\)](#), authorizing coordination efforts).

[FN131]. USA PATRIOT Act § 214 (amending [50 U.S.C. § 1842](#)).

[FN132]. USA PATRIOT Act § 216 (amending [18 U.S.C. § 3127\(c\)](#)).

[FN133]. See Jeralyn E. Merritt, commentary on Title II of PATRIOT Act, United and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001: An Analysis (LexisNexis 2002) at 7-8; see also American Civil Liberties Union Freedom Network, Surveillance Under the “USA/PATRIOT” Act, at http://archive.aclu.org/issues/privacy/USAPA_surveillance.html (last visited Jan. 16, 2004).

[FN134]. [50 U.S.C. § 1842\(c\)\(2\), \(d\)\(1\) \(2003\)](#).

[FN135]. [18 U.S.C. § 3123\(a\) \(2003\)](#).

[FN136]. USA PATRIOT Act § 213 (amending [18 U.S.C. § 3103a](#)).

[FN137]. [50 U.S.C. § 1861 \(2003\)](#).

[FN138]. USA PATRIOT Act §§ 507, 508 (amending [20 U.S.C. §§ 1232g](#)).

[FN139]. USA PATRIOT Act § 505 (amending 50 U.S.C. § 1681u).

[FN140]. USA PATRIOT Act § 411 (amending [8 U.S.C. § 1182\(a\)\(3\)](#)). Certain exceptions are provided for spouses and children. *Id.*

[FN141]. See [In re Designation of Lashkari Jhangvi, 68 Fed. Reg. 4811 \(Jan. 30, 2003\)](#) (designating Jhangvi as foreign terrorist based on facts pursuant to Immigration and Naturalization Act).

[FN142]. USA PATRIOT Act § 412 (adding [8 U.S.C. § 1226a](#)).

[FN143]. *Id.*; cf. [Zadvydas v. Davis, 533 U.S. 678, 701 \(2001\)](#) (establishing six months as “presumptively reasonable period of detention” in connection with removal proceedings).

[FN144]. [8 U.S.C. § 1226a\(b\) \(2003\)](#).

[FN145]. [Marbury v. Madison, 5 U.S. 137, 177 \(1803\)](#).

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