The U.S. Immigration Detentions in the War on Terror: Impact on the Rule of Law

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Abstract

The terrorist attacks on September 11, 2001, resulted in dramatic legal changes in the U.S. As part of its investigation into the attacks, the U.S. Government detained approximately 5,000 "aliens" from predominantly Muslim countries. These detentions were characterized by minimal, and sometimes non-existent, *habeas corpus* and due-process protections. During times of crisis, care should be taken that panic not be allowed to prevail over long-cherished constitutional values. This thesis examines Government actions in light of constitutional principles to examine the larger question of whether the War on Terror detention practices have permanently undermined the rule of law in the U.S.

The factual and legal scenarios in this area have been changing at a rapid rate, and they will certainly continue to change. Those constant changes have presented a special challenge in writing this thesis. The facts and legal scenarios described herein, therefore, are current as of January 31, 2005.

Résumé

Les attaques terroristes du 11 septembre 2001 ont donné lieu à des changements législatifs drastiques aux Etats-Unis. Dans le cadre des investigations suivant les attaques, le gouvernement américain a détenus approximativement cinq mille étrangers, la majorité provenant de pays musulmans. Les conditions de détention étaient caractérisées par un respect minimal, voire inexistant, du habeas corpus et du droit à un procès équitable. En période de crise, il est important de s'assurer que la panique ne prenne pas le dessus sur les valeurs constitutionnelles fondamentales. Cette thèse analyse ces actes gouvernementaux sous l'angle des principes constitutionnels, ceci le but d'examiner la question plus large de savoir si le traitement des détenus dans le cadre de la guerre contre le terrorisme a affaibli de manière permanente la règle de droit aux Etats-Unis.

L'état de faits et les scénarios légaux dans ce secteur ont changé rapidement, et continueront certainement à évoluer. Ces changements constants ont présenté un défi particulier pour la réalisation de ce mémoire de maîtrise. Les faits et les scénarios légaux décrits ci-dessus sont donc courants en date du 31 janvier 2005.

Acknowledgments

I first want to thank my wonderful supervisor, Professor Patrick Healy. His extensive knowledge, outstanding analytical skills, patience, and sense of humor all combined to make this thesis an extremely educational and enjoyable experience. I am deeply grateful for his assistance during my time at McGill, first as my professor for International Criminal Law, and then as my supervisor for this thesis.

I also thank my fiancé, Arman Tajarobi, who inspires me every day to learn new things, and to always challenge my assumptions. His love, support, and incredible patience have made all things seem possible. Thank you also to Paul A. Duffy for his extremely helpful comments, to Vanessa Thalmann for help with the French abstract, and to Jennifer Schuetze for her friendship and help.

This thesis involves developments in my home country, the United States. Recently, people there have been uneasy about speaking out against certain Government actions, and I have sometimes felt that uneasiness. As an American, I also constantly feel the burden of Government actions, purportedly taken in my name, which I find repugnant. I therefore dedicate this thesis to the memory of my mother, Ann Mary Kennedy Duffy, who taught me the importance of understanding history, so the horrors of the past will not repeat themselves, and of always speaking out against injustice, without fear of the consequences, and regardless of whether anybody listens.

Finally, this thesis is dedicated to the innocent people who were murdered on September 11, 2001, and to the countless innocent people whose lives have been devastated by the resulting War on Terror. They are not forgotten.

Introduction: The Rule of Law or the Rule of Fear?[1]

> *In Germany they came first for the Communists and I didn't speak up because I wasn't a Communist. Then they came for the Jews and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics and I didn't speak up because I was a Protestant. Then they came for me--and by that time no one was left to speak up.* [2]

It was immediately obvious, after terrorists attacked the U.S. on September 11, 2001, that some things might never be the same. During the initial shock, grief, fear, and anger over the attacks, it seemed easy to believe that the U.S. Government ("the Government") was responding in a way that was necessary to protect its people. As time passed, however, with no further attacks, and as specifics of some of the War on Terror initiatives began to emerge, questions also emerged. One question was whether, in the name of national security, the Government had gone too far in its response. The argument over whether civil liberties should be sacrificed in the name of national security regained prominence, and many people seemed to accept the Government's assurances that it only sacrificed civil liberties to the extent needed to protect the people from harm. Things that would have seemed inconceivable before the terrorist attacks – such as indefinite detentions, race-based roundups, secret trials, pre-emptive invasions, and even the torture of prisoners – seemed to gain some aura of acceptability as necessary parts of this new reality, or at least as unfortunate side-effects of an otherwise acceptable initiative.[3]

The Government's policies towards aliens after the attacks provided an example of some of these questions. In the months following the attacks, the Government, through various immigration-based programs, detained approximately 5,000 people within the

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[1] The idea for this title was taken from a conversation with my supervisor, Professor Patrick Healy, on 2 February 2005.

[2] Golden Gate University Library, "Who was Martin Niemöller and why should you care?" (explaining the history behind Martin Niemöller's famous quotation), reprinted online: Intellectual Freedom Page, Golden Gate University <http://internet.ggu.edu/university_library/if/Niemoller.html>. This quotation has appeared in several places, with wording variations in each place. The variations apparently result from the fact that Niemöller often used this quote in speeches he gave, varying the phrasing, and it has not been published in a formal version. During World War II, Niemöller was arrested for opposing the Nazis, and he spent much of the war in concentration camps (*ibid.*).

[3] See e.g. Dalia Sussman, "Poll: Govt Intruding on Rights, But It's OK," *ABCNews* (10 September 2004)(explaining that a majority of Americans polled were aware of rights deprivations in the War on Terror, but accepted them as necessary), online: ABCNEWS <http://abcnews.go.com/US/story?id=90260&page=1>.

U.S.[4] These people, who came to be known as the "special-interest detainees," were primarily immigrant men from specific, predominantly Muslim, countries. Many of them were held for long periods of time, with no charges, no access to lawyers, no appearances before any courts, and no opportunity to challenge their detentions. All of them were held in secret, and, even today, there is no complete listing of all of the detainees, and it is unclear if people are still being held.[5] Although they were arrested under the immigration system, the Government generally detained these people first to allow it to clear them of any terrorism connections.[6] Only once the people were cleared were they then specifically targeted for immigration investigations.[7] Some were held as "material witnesses."[8] Resulting deportation proceedings were often held in secret, without many of the due-process protections normally afforded in deportation proceedings.[9] Some detainees have alleged that they were subjected to harsh interrogation tactics and detention conditions.[10] Others have alleged that, without facing any criminal charges, they were deported to countries known to engage in torture, and that they were tortured on their arrival.[11]

The 5,000 people were not generally targeted because of a specific suspicion that they were terrorists. Rather, as the Government has acknowledged, they were targeted

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[4] David Cole, *Enemy Aliens* (New York: The New Press, 2003) at 25 (noting that, at least, 1,182 men were detained in the first seven weeks after the attacks; another 1,100 were detained as a result of the so-called "absconder" program; and 2,747 were detained as a result of the NSEERS special registration program, resulting in a "conservative estimate" of 5,000 detentions as of May 2003)[*Cole, Enemy Aliens*].

[5] *Ibid.*

[6] United States Department of Justice Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003) c. 4, online: U.S. Department of Justice Office of the Inspector General <http://www.usdoj.gov/oig/special/0306/index.htm> [*Special OIG Report*].

[7] *Cole, Enemy Aliens, supra* note 4; *Special OIG Report, ibid.*

[8] Lawyers' Committee for Human Rights (renamed Human Rights First), *A Year of Loss: Reexamining Civil Liberties Since September 11* (5 September 2002) at 15-16, online: Human Rights First <http://www.humanrightsfirst.org/pubs/descriptions/loss_report.pdf > [*A Year of Loss*].

[9] *Cole, Enemy Aliens, supra* note 4; David Cole, "The Priority of Morality: The Emergency Constitution's Blind Spot," (2004) 113 Yale L.J. 1753 at 1753 [*Cole, The Priority of Morality*}.

[10] *Turkmen v. Ashcroft, Class Action Complaint and Demand for Jury Trial*, No. 02-CV-02307-JG (filed 17 April 2002) (E.D.N.Y 2002), complaint and all court filings online: Findlaw.com <http://lawcrawler.findlaw.com/scripts/lc.pl?CID=ILC-LawcrawlerHomepage&sites=findlaw.com&sites=findlaw.com&entry=Turkmen> [*Turkmen Initial Complaint*].

[11] See e.g. John Crewdson, "Mysterious Jet Tied to Torture Flights," *Chicago Tribune* (8 January 2005), online: chicagotrbune.com <http://www.chicagotribune.com/news/nationworld/chi-0501080192jan08,1,1921181.story?coll=chi-news-hed&ctrack=1&cset=true /> [*Crewdson*]; Cheryl Krawchuk, "In Depth: Maher Arar: Maher Arar: Timeline," *CBC News Online* (26 November 2004), online: CBC News Online <http://www.cbc.ca/news/background/arar/> [*Krawchuk*].

because they shared "characteristics" that were similar to those of the September-11th hijackers -- namely, in terms of national origin, age, and gender -- and they were targeted under the immigration system, rather than the criminal system, presumably because required due-process safeguards are lower under the immigration system.[12] No successful terrorism convictions came out of these detentions, and only four of the detainees were ever charged with terrorism-related activities.[13] The convictions of those four were subsequently reversed after the prosecution admitted misconduct in withholding exculpatory information.[14]

The special-interest detentions appear to be part of a wider strategy involving detentions with abridged due-process protections, the most famous of which involve the Guantanamo Bay detainees, and American citizens Hamdi and Padilla. U.S. President George W. Bush ("Bush" or "President Bush") and members of his Administration say that the responses to the attacks fall within the parameters of constitutional war and emergency authority that has always existed for an Executive in times of national crisis. Any seeming differences, they maintain, are actually acceptable responses to what is clearly an unprecedented emergency, and are necessary to protect the security of the Nation.[15] Opponents of the policies argue, however, that these detention practices do not make the Nation safer, that they fall outside of constitutionally permissible responses to a crisis, and that they are different in character from past Presidential responses to emergencies. Moreover, they maintain, some of the War on Terror initiatives will have negative long-term repercussions for the rule of law in the United States.[16]

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[12] See *A Year of Loss*, *supra* note 8; United States General Accounting Office (now General Accountability Office), "Report to Congressional Committees: Homeland Security: Justice Department's Project to Interview Aliens After September 11, 2001" (April 2003), online: United States General Accounting Office <http://www.gao.gov/new.items/d03459.pdf> [*GAO Report*].

[13] As discussed further in Section 1.13., below, those four were initially convicted, then later exonerated when the Government admitted prosecutorial misconduct.

[14] *Ibid.*

[15] See e.g. United States Department of Justice, "The USA Patriot Act: Preserving Life and Liberty," online: United States Department of Justice: Life and Liberty <http://www.lifeandliberty.gov/> [*Life and Liberty*]("launched to educate Americans about how we are preserving life and liberty by using the USA PATRIOT Act."); "Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (Nov. 13, 2001)(codified at 3 C.F.R. pp. 918-21)[*November 13th Military Order*].

[16] See generally Cynthia Brown, ed., *Lost Liberties: Ashcroft and the Assault on Personal Freedom* (New York: The New Press, 2003)[*Ashcroft: Lost Liberties*].

This thesis will evaluate these differing perceptions. Chapter 1 of this thesis will explain the relevant immigration and other detention programs implemented after the terrorist attacks to clarify precisely what happened. Chapter 2 will contain an analysis of U.S. constitutional principles, including a historical view of measures taken in times of national crisis. That Chapter will emphasize the extent to which the Government is constitutionally allowed to suspend individual liberties in an emergency. Chapter 3 argues that the U.S. Constitution, as it existed on September 10, 2001, was adequate to address the crisis caused by the terrorist attacks, and that the Executive Branch's immigration detentions exceeded its constitutional authority and violated the individual, constitutional rights of the detainees. It will also be argued that these policies, which had serious consequences for those affected, had no countervailing benefit, because they did not result in the identification of a single terrorist, and because no public information suggests that the program prevented any terrorist attacks.[17] It is concluded herein that the Government's actions were not a temporary response to a perceived emergency, but that they were structured in a way that suggests they are permanent revisions to U.S. law and practice. As such, they represent potentially permanent changes to the constitutional system of government.

These changes, if successful, will be sufficiently extreme to call into question the continued viability of the rule of law within the U.S. And while this concern is raised with respect to the American experience, it is a question that would apply equally to any Nation that is governed by the rule of law, and which faces a threat that tests its commitment to that rule of law. It would indeed be ironic if, after all of the measures taken to protect Americans from outside attackers, the true legacy of the War on Terror turns out to be that it, and not the terrorists, resulted in the destruction of long-cherished constitutional principles in the U.S., and undermined the Nation's long commitment to upholding the rule of law. In the words of then-future President Abraham Lincoln:

> At what point then is the approach of danger to be expected? I answer, if it ever reach us, it must spring up amongst us. It cannot come from abroad. If destruction be our lot, we

[17] It is difficult to make a definitive statement regarding whether any terrorist attacks were prevented, based on the secrecy surrounding these programs. For instance, when the United States General Accounting Office asked the Department of Justice for specific information derived from its program to interview Muslim men after the attacks, the Department of Justice responded that this information was too "sensitive" to disclose. *GAO Report*, *supra* note 12 at 16.

> must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide.[18]

Some have recently suggested that the sort of self-destruction Lincoln envisioned has begun through the War on Terror. For example, William Rivers Pitt, an American writer, reflected on events in the U.S. after the attacks:

> It is entirely possible that this great democratic experiment has come to a close. There is no question that it absorbed a terrible blow from a September sky as blue as that which shelters me today. The tragic fact of September 11, and the grievous wound we received that day, do not in any way tell the whole story. The real tragedy lies in the wounds we have inflicted upon ourselves in the aftermath. No terrorist, armed with all the weapons of nightmare, could do the damage to this country that has been done in the name of freedom by those most warmed by its light ... Perhaps the experiment is finished. It will be years before we fully appreciate the damage we have done to the rule of law under our Constitution and Bill of Rights.[19]

The question now facing the U.S. in light of the terrorist attacks, and its response, is what the rule of law really means. Within that larger question is the issue of whether the Constitution allows for the specific initiatives undertaken in response to the attacks. The best test of a nation's commitment to its rule of law lies in how it responds to a perceived emergency.[20] And, if, in the name of national security, the U.S. Government has instituted systematic, permanent changes that violate its Constitution, a question arises as to whether the rule of law has ceased to exist in the U.S., or whether, if it continues to exist, it has become a meaningless concept. This thesis will address some of these larger questions in the context of the immigration detentions.

Finally, it is noted that the facts and legal scenarios outlined within this thesis have regularly changed during the course of drafting. It is certain, given the nature of the topic, that those changes will continue after this thesis is submitted. The information herein, therefore, is current as of January 31, 2005.

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[18] Abraham Lincoln, "The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois" (27 January 1838), online: Abraham Lincoln Online: Speeches & Writings <http://showcase.netins.net/web/creative/lincoln/speeches/lyceum.htm>.

[19] William Rivers Pitt, *The Greatest Sedition is Silence* (Pluto Press: Sterling, Va. 2003) at 1 [*William Rivers Pitt*].

[20] See "Letter from Russell D. Feingold, John D. Conyers, Jr., Patrick J. Leahy, Edward M. Kennedy, Jerrold Nadler, Robert C. Scott to U.S. Attorney General John Ashcroft" (31 October 2001)(noting "times of crisis are the true test of a democracy."), online: Center for Democracy and Technology <http://www.cdt.org/security/011031ashcroft.shtml> [*Congressional Letter 1*].

Chapter 1: The Treatment of Immigrants after September 11th[21]

> *Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore.*[22]

1.1. The Terrorist Attacks and the Search for Osama Bin Laden

September 11, 2001, is indelibly imprinted on the American consciousness as a day of sudden, and unimaginable, horror. It is notable, however, that the Government was extremely quick to identify the perpetrators of the attacks.[23] Even as buildings were collapsing at the World Trade Center, the Government identified Osama Bin Laden ("Bin Laden") as the perpetrator, as a result of information learned the day of the attacks.[24]

Bin Laden is originally from Saudi Arabia. At the time of the attacks, he was suspected of hiding with his terrorist organization, Al Qaeda, in Afghanistan. Even before the attacks, Bin Laden was well known in the U.S. and was under suspicion for the bombings of the USS Cole, and for the coordinated attacks on U.S. embassies in Africa in the late 1990's. He had called upon his followers to wage war on the United States, civilians included. He claims to act in the name of Islam.[25]

Immediately after the attacks, President Bush reassured the American people that he would not rest until he found Bin Laden, famously saying that he wanted him "dead or alive."[26] Throughout those first days, Bush forcefully and repeatedly cautioned against

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[21] Some of the facts laid out in this Chapter are loosely based on information contained in papers I wrote during my LL.M. program for Professor Healy and Professor El Obaid. Those facts have been substantially re-worked for this thesis.

[22] Emma Lazarus, "The New Colossus" (1883), reprinted in Kevin R. Johnson, *The "Huddled Masses" Myth: Immigration and Civil Rights* (Philadelphia: Temple University Press, 2004) at 1(these famous words are engraved on the Statute of Liberty, across the Harbor from the former site of the World Trade Center, and have long been viewed as symbolic of the American welcome extended to immigrants)[*Johnson, The "Huddled Masses" Myth*].

[23] See United States Department of Justice, Federal Bureau of Investigation, "Press Release" (14 September 2001), online: United States Department of Justice, Federal Bureau of Investigation <http://www.fbi.gov/pressrel/pressrel01/091401hj.htm>.

[24] CNN, "September 11: Chronology of Terror," *CNN* (12 September 2001), online: CNN.com/U.S. <http://www.cnn.com/2001/US/09/11/chronology.attack/index.html> [*Chronology of Terror*].

[25] Ian Christopher McCaleb, "Bush: U.S. feels 'quiet, unyielding anger,'" *CNN* (12 September 2001), online: CNN.Com <http://www.cnn.com/2001/US/09/11/white.house/> [*McCaleb*]; Sean D. Murphy, ed., "Contemporary Practice of the United States Relating to International Law," (2002) 96 A.J.I.L. 237 at 239 (describing background of Osama Bin Laden)[*Murphy*].

[26] Jeff Postelwait, "Column: The President's Often Short Attention Span," *Washington Week* (28 April 2003), online: PBS <http://www.pbs.org/weta/washingtonweek/voices/200304/0428span.html> [*Postelwait*]; Manuel Perez-Rivas, "Bush Vows To Rid the World of 'Evil-Doers,'" *CNN* (16 September 2001), online: CNN.com <http://edition.cnn.com/2001/US/09/16/gen.bush.terrorism/>; CNN, "Bush: Bin Laden 'Prime Suspect,'" CNN.com (17 September 2001), online: *CNN.com*

misplaced acts of vengeance against innocent members of the Muslim community.[27] A statement from the Arab-American Institute also cautioned that "[r]egardless of who is ultimately found to be responsible for these terrorist murders, no ethnic or religious community should be treated as suspect and collectively blamed."[28]

1.2. The Initial Investigation

1.2.A. The First Detentions

Although the Government publicly condemned discrimination against Muslims, it also began almost immediately to secretly arrest male immigrants from primarily Muslim countries.[29] Few of those detained were charged with any terrorism-related crimes, nor were they arrested based on a specific suspicion of criminal activity. Instead, the Government held them on supposed immigration violations.[30] The Government has never given a complete total of how many people it arrested in the initial sweeps, although it did acknowledge that almost 1,182 people were arrested in the first few weeks.[31]

As the immigrants were being detained, the Department of Justice ("DOJ") changed a rule that had limited immigration detentions to 24 hours before a determination had to be made for continued detention or release. The new rule extended this period to 48 hours or "within a reasonable period of time ... in the event of emergency or other extraordinary circumstance."[32]

1.2.B. The Creppy Memo and Challenges to Secret Proceedings

U.S. Attorney General John Ashcroft ("Ashcroft") ordered "special" handling of these immigration cases.[33] That order was set in motion on September 21, 2001, when Judge Michael Creppy ("Creppy"), the chief immigration judge, issued a memo laying

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<http://archives.cnn.com/2001/US/09/17/bush.powell.terrorism/> ("I want justice ... And there's an old poster out West... I recall, that said, 'Wanted, Dead or Alive.'").

[27] See BBC, "Bush Warns Against Arab-American Backlash," *BBC News* (13 September 2001), online: BBC News <http://news.bbc.co.uk/1/hi/world/americas/1540371.stm>.

[28] *Ibid.*

[29] Mohamed Nimer, "Islam in America Conference: DePaul University: Muslims in America after 9-11," (2002/2003) 7 J. Islamic L. & Culture 1 at 26 [*Nimer*].

[30] *David Cole, Enemy Aliens, supra* note 4 at 25.

[31] *Ibid.*

[32] Immigration and Naturalization Service, Department of Justice, "Custody Procedures," 66 F.R. 48334 (20 September 2001), online: FRWebgate <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-23545-filed>.

[33] "Memorandum by Judge Michael Creppy to all Immigration Judges re 'Cases Requiring Special Procedures'" (21 September 2001), online: Findlaw.com <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf.> [*Creppy Memo*].

out the new procedures, just for these "special-interest" cases.[34] The cases were to be handled in complete secrecy, with "no visitors, no family, and no press." Staff were not to confirm or deny if a case was on the docket.[35] Case names were not to be posted outside the courtroom, and administrators were ordered to buy stamps that said "Do not disclose contents of this record."[36]

A number of media challenges were later brought, attacking the secrecy behind the "special-interest" proceedings. In August 2002, the Sixth Circuit Federal Court of Appeals ruled in favor of a plaintiff media group, noting "[t]he Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors."[37] The Third Circuit Court of Appeals later criticized that ruling of the Sixth Circuit, and ruled differently, against the plaintiff newspapers in that case.[38] The newspapers appealed to the U.S. Supreme Court, which declined to hear the case in spite of the split between the circuits.[39] Ashcroft applauded the Supreme Court's declining of the case, saying he was "pleased the court let stand a decision that clearly outlined the danger of giving terrorists a virtual road map to our investigation that could have allowed them to chart a potentially deadly detour around our efforts."[40]

In another trial court ruling that was subsequently reversed by the Third Circuit, the federal district court had ordered release of the detainees' names, noting:

> Secret arrests are "a concept odious to a democratic society," ... and profoundly antithetical to the bedrock values that characterize a free and open one such as ours ... Difficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law. The Court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship.[41]

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[34] *Ibid*; Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* (August 2002)(outlining who the "special-interest" detainees were), online: Human Rights Watch <http://www.hrw.org/reports/2002/us911/USA0802.pdf>.

[35] *Creppy Memo*, *supra* note 33.

[36] *Ibid.*

[37] *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002)[*Detroit Free Press*].

[38] *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 at 203 (3rd Cir. 2002), *cert. denied*, *North Jersey Media Group v. Ashcroft*, 538 U.S. 1056, 123 S. Ct. 2215 (2003)[*North Jersey Media Group*].

[39] *Ibid.*

[40] Charles Lane, "Secrecy Allowed On 9/11 Detention: High Court Declines To Hear Appeal," *Washington Post* (13 January 2004), at A01.

[41] *Ctr. for Nat'l Sec. Studies v. United States DOJ*, 215 F. Supp. 2d 94 at 96 (D.D.C. 2002), *affirmed in part and remanded*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004)(citations

1.2.C. Ashcroft Links Immigration and Terrorism

That October, Ashcroft reassured representatives of the U.S. Muslim and Arab communities that the U.S. would not "tolerate" ethnic profiling against members of these groups.[42] In the same speech, however, he again linked immigration violations with the terrorism investigation, saying that his office would be "aggressive in detaining those who violated the law and those who are illegally in this country and who are associated with or been involved with terrorist groups or who are sympathetic with terrorist groups."[43] Later that month, he warned:

> Let the terrorists among us be warned: If you overstay your visa - even by one day - we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.[44]

Ashcroft further explained:

> Within days of the September 11 attacks, we launched this anti-terrorism offensive to prevent new attacks on our homeland. To date, our anti-terrorism offensive has arrested or detained nearly 1,000 individuals as part of the September 11 terrorism investigation. Those who violated the law remain in custody. Taking suspected terrorists in violation of the law off the streets and keeping them locked up is our clear strategy to prevent terrorism within our borders.[45]

In October 2002, Ashcroft instructed U.S. government attorneys to continue the work of the Foreign Terrorist Tracking Force, which he had created a year earlier. He told them to "[d]etain individuals who pose a national security risk for any violations of criminal or immigration laws."[46]

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omitted)[*Center for National Security Studies*]. This case involved a Freedom of Information Act request placed by a number of public-interest organizations, seeking information regarding the detainees. Although the trial court had compelled release, the appellate court reversed, and the Supreme Court declined to hear the case (*ibid.*).

[42] Sheilah Kast, contributing writer, "Terror Probe Raises Concerns About Civil Rights," *CNN* (22 October 2001), online: *CNN.com* <http://edition.cnn.com/2001/US/10/22/inv.civil.rights/>.

[43] *Ibid.*

[44] *Special Report of the OIG, supra* note 6; John Ashcroft, "Prepared Remarks for the US Mayors Conference" (25 October 2001), online: United States Department of Justice <http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm> [*Ashcroft Mayors Speech*].

[45] *Ashcroft Mayors Speech, ibid*; *Cole, Enemy Aliens, supra* note 4 at 23.

[46] John Ashcroft, "Remarks of Attorney General John Ashcroft: U.S. Attorneys Conference New York City" (1 October 2002)(with a disclaimer that Ashcroft often deviates from his prepared remarks), online: United States Department of Justice, <http://www.usdoj.gov/ag/speeches/2002/100102agremarkstousattorneysconference.htm>; *Cole, Enemy Aliens, ibid.*

1.2.D. The USA Patriot Act

In the weeks after the attacks, sweeping anti-terrorism legislation, called the "USA Patriot Act ("Patriot Act")" was working its way through Congress. [47] Democrat Senator Russell Feingold ("Feingold") spoke on the Floor of the U.S. Senate and expressed serious concerns about civil-liberties problems with the legislation. He noted:

> There is no doubt that if we lived in a police state, it would be easier to catch terrorists ... if we lived in a country where people could be held in jail indefinitely based on what they write or think, or based on mere suspicion that they are up to no good, the government would probably discover and arrest more terrorists ... But that probably would not be a country in which we would want to live. And that would not be a country for which we could, in good conscience, ask our young people to fight and die. In short, that would not be America ... Preserving our freedom is the reason we are now engaged in this new war on terrorism. We will lose that war without a shot being fired if we sacrifice the liberties of the American people in the belief that by doing so we will stop the terrorists. [48]

The Patriot Act has been criticized for many things, including its introduction so soon after the attacks, in a time of great national crisis, and especially during a time when Congress was on high alert because of ongoing anthrax attacks. Moreover, many Congress members admitted they had no time to actually read the Act, but still voted for it, under intense pressure to have a unanimous vote, and to not be seen as voting against something with a name like "Patriot Act."[49] Senator Feingold was the only member of the Senate who ultimately voted against it.[50] President Bush signed it on October 26, 2001.[51]

The Act is very long and changes a wide range of U.S. laws. Under a Section called "Enhanced Immigration Provisions," the Act clarifies the definition of "terrorist" and "terrorist activity" as a basis for inadmissibility to the U.S.[52] The Act requires the Attorney General to detain anybody certified as a terrorist, until that person is removed from the U.S.[53] It requires this detention "irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien," until the

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[47] "USA Patriot Act" is an acronym for *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)(revising various sections of the U.S. Code) [*USA Patriot Act*].

[48] Russell Feingold, "Opening Statement of U.S. Senator Russ Feingold at the Debate of the Anti-Terrorism Bill From the Senate Floor" (11 October 2001), online: *Russell Feingold* <http://feingold.senate.gov/~feingold/statements/01/10/101101at.html> [*Feingold Statement*].

[49] Philip A. Thomas, "Emergency and Anti-Terrorist Power: 9/11: USA and UK" (2003) 26 Fordham Int'l L.J. 1193 at 1210; *A Year of Loss*, *supra* note 8, at 8.

[50] Aryeh Neier, "Introduction," in *Ashcroft: Lost Liberties*, *supra* note 16 at 7.

[51] *USA Patriot Act*, *supra* note 47.

[52] *Ibid.* at § 411 (amending the Immigration and Nationality Act (8 U.S.C. 1182(a)(3))).

[53] *Ibid.* at § 412 (amending 8 U.S.C. 1101 et seq., adding § 236A (a)).

Attorney General certifies the person is no longer subject to certification under the terrorist definition of the Act, at which point the alien must be released.[54] It allows the Attorney General to detain aliens suspected of terrorism for up to seven days before initiating either removal or criminal proceedings, and failure to meet this timeframe requires release of the alien.[55] If proceedings are initiated, the detention must be reviewed every six months to continue the determination that the alien's release would threaten national security.[56] A person certified as meeting the definition of a terrorism suspect under the Act can be held for "additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person."[57] The statute provides for judicial review of these detentions only under a specific *habeas corpus* procedure.[58] The Attorney General is required to submit to Congress, every six months, a report on aliens certified under this provision.[59] Finally, the Act contains extensive revisions to admission processes for aliens.[60]

Although the Patriot Act's alien detention provisions have created controversy by some who see them as too harsh, the special-interest detainees were not subjected to its limited review and extensive detention standards. Rather, the Government held many of them with no review at all.[61]

Because the powers given in the Patriot Act were so sweeping, many of the provisions were temporary, set to automatically expire on December 31, 2005, while Congress was authorized to pass a resolution causing others to expire. These so-called "sunset provisions" did not include the changes to immigration law, including those for alien detentions, so those changes were permanent.[62] The Department of Justice asserts,

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[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*; see also Ambrose B. Ewing, *The USA Patriot Act* (New York: Novinka Books, 2002) at 58 (citing to the *USA Patriot Act*, *supra* note 47 § 412).
[59] *Patriot Act*, *ibid.* at § 412.
[60] *Ibid.*
[61] Kate Martin, "Secret Arrests and Preventive Detentions," in *Ashcroft: Lost Liberties*, *supra* note 16 at 76 ("Although the administration demanded and received new detention powers from Congress in the USA PATRIOT Act, claiming that such authority was urgently needed to counter an imminent terrorist threat, as of early 2003 it had not used those new statutory powers.").
[62] See Charles Doyle, CRS Report for Congress, "USA Patriot Act Sunset: Provisions That Expire on December 31, 2005" (10 June 2004) at 16, online: Congressional Research Service <http://www.fas.org/irp/crs/RL32186.pdf>.

> ... in passing the Patriot Act, Congress provided for only modest, incremental changes in the law. Congress simply took existing legal principles and retrofitted them to preserve the lives and liberty of the American people from the challenges posed by a global terrorist network.[63]

1.2.E. Congressional Concerns Over the Detentions

On October 31, 2001, several members of Congress wrote a letter to Ashcroft, expressing concerns about the large numbers of Muslim male immigrants who were being secretly detained, and about reports that detainees were being denied their "fundamental right to due process of law, including their right to counsel ..."[64] The letter demanded specific information, such as the names of the detainees, the due process provided, and specific information on any investigation of the detainees for terrorism.[65] The letter pointedly reminded Ashcroft that "times of crisis are the true test of a democracy."[66]

In November 2001, the Department of Justice responded to criticism over the detainees by refusing to release any more information on how many people it was holding.[67] The Government also set up a special process for these detainees, under which the FBI first cleared them of criminal charges. Once detainees were cleared, the Government either released them or began deportation proceedings.[68]

That month, Democrat Senator Patrick Leahy again wrote to Ashcroft about the detentions, specifically mentioning the case of Muhammad Rafiq Butt, a Pakistani national who was detained after September 11th. Mr. Butt had overstayed his visa, and he agreed to be deported. He was not deported, however, but, instead, was sent to a detention center in New York, where he apparently died of a heart attack.[69] Senator Leahy cited media reports that Mr. Butt was held for 33 days, until he died in custody, and that he was held for eight days after agreeing to be deported, even though he was not

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[63] *Life and Liberty*, *supra* note 15.
[64] *Congressional Letter 1*, *supra* note 20.
[65] *Ibid.*
[66] *Ibid.*
[67] Amy Goldstein & Dan Eggen, "U.S. to Stop Issuing Detention Tallies," *Washington Post* (9 November 2001) at A16; Russell Feingold, "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Statement of the Honorable Russell Feingold" (4 December 2001), online: United States Senate Committee on the Judiciary <http://judiciary.senate.gov/member_statement.cfm?id=128&wit_id=85>.
[68] David Cole, "The Course of Least Resistance: Repeating History in the War on Terrorism," in *Ashcroft: Lost Liberties*, *supra* note 16 at 28.
[69] "Letter from Senator Patrick J. Leahy to John Ashcroft" (7 November 2001), online: Center for National Securities Studies <http://www.cnss.org/arrests.htm> [*Congressional Letter 2*].

a suspect in the terrorist attacks.[70] The Pakistani Consulate only learned of his detention when reporters contacted them for comments on his death.[71]

On November 16th, a Department of Justice official replied to these requests for information. His letter refers to attached lists of detainees but notes the lists had been "redacted" so no information on the individuals' identities is included. The official refused to provide the Senators with the detainees' names, noting that "disclosure of the identities of individuals in INS custody and their whereabouts could adversely impact our pending criminal investigation." He also said it would violate the detainees' privacy.[72]

On November 27th, Ashcroft released these redacted lists to the public. He told reporters that 548 people, initially detained in the September 11th terrorism investigation, were being held on immigration charges, while others were being held as material witnesses.[73] He declined to provide identities or any other information on the detainees, saying he was unwilling to give information to terrorist groups, and also adding that he was concerned with the detainees' privacy, in case they "might someday, by further investigation, be shown not to be terrorists."[74] Ashcroft also repeatedly referred to the fact that the laws relating to immigration protections differed from the protections in criminal cases, specifically noting that these INS detainees did not have the right to court-appointed counsel.[75] Referring to those in immigration custody, Ashcroft said:

> I do not think it is responsible for us, in a time of war, when our objective is to save American lives, to advertise to the opposing side that we have al Qaeda membership in custody. When the United States is at war, I will not share valuable intelligence with our enemies. We might as well mail this list to the Osama bin Laden al Qaeda network as to release it. The al Qaeda network may be able to get information about which terrorists we have in our custody, but they'll have to get it on their own and get it from someone other than me.[76]

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[70] *Ibid.*
[71] "Transcript of 'Statement of Kate Martin, Director, Center for National Security Studies Before the Judiciary Committee of the United States Senate on DOJ Oversight: Preserving our Freedoms while Defending against Terrorism'" (28 November 2001), online: Center for National Security Studies <http://www.cnss.org/kmtestimony.htm>.
[72] "Letter from Assistant Attorney General Daniel J. Bryant to The Honorable Russell Feingold et al" (16 November 2001), online: Center for National Security Studies <http://www.cnss.org/arrests.htm>.
[73] "Statement of Attorney General Ashcroft: Attorney General Ashcroft Provides Total Number of Federal Criminal Charges and INS Detainees"(27 November 2001), online: Center for National Security Studies <http://www.cnss.org/arrests.htm>[*Ashcroft Provides Total Number*].
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*

The redacted list shows that the detainees were primarily nationals of predominantly Muslim countries. The document also shows that the detainees were primarily charged with immigration violations.[77] The list does not show any criminal charges related to the terrorist attacks.[78]

Ashcroft later told the Senate Committee on the Judiciary: "[w]e have waged a deliberate campaign of arrest and detention to remove suspected terrorists who violate the law from our streets ... the INS has detained 563 individuals on immigration violations." He further noted "[e]very action taken by the Department of Justice ... is carefully drawn to target a narrow class of individuals – terrorists."[79] He also issued a warning to his critics:

> To those who pit Americans against immigrants, and citizens against non-citizens; to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists – for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil.[80]

1.2.F. "Voluntary" Interviews of Muslim Men

In the weeks after the attacks, the Department of Justice announced voluntary interviews with 5,000 men from Muslim nations. It later announced another 3,000 of these voluntary interviews. According to a subsequent report, completed by the U.S. General Accounting Office ("GAO"), a large number of the interviewees felt that the interviews were not at all voluntary, and felt intimidated and angry at having been singled out for the questioning.[81]

The Department of Justice issued guidelines, indicating that those interviewed were not suspects, but were being questioned as part of the terrorism investigation. People were interviewed if they had "characteristics [that] were similar" to those of the September 11th terrorists, and those "characteristics," drawn from an immigration database, were related to gender, national origin, and date of birth.[82] The Department of

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[77] "INS Custody List" (27 November 2001), online: Center for National Security Studies, online: <http://www.cnss.org/incustodylist1.pdf> [*INS Custody List*].
[78] *Ibid.*
[79] John Ashcroft, "The War on Terror Has Not Eroded Civil Liberties," reprinted in Auriana Ojeda, ed., *Civil Liberties: Opposing Viewpoints* (Farmington Hills, Mi.: Greenhaven Press, 2004) 173 at 177 (originally testimony given to the Senate on December 6, 2001).
[80] *Ibid.* at 178.
[81] *GAO Report, supra* note 12 at 1.
[82] *Ibid* at 7.

Justice refused to tell the GAO, when it later investigated this program, specifics of any information that may have come from these interviews, because this information was "too sensitive" to disclose.[83] No terrorism charges arose from any of these interviews, although 20 people were charged with immigration violations, and three were arrested on unrelated criminal charges.[84]

Many of these immigration strategies are ongoing. For example, on May 26, 2004, Ashcroft and FBI Director Robert Mueller announced another "voluntary" round of interviews with approximately 5,000 Muslim men.[85] Little additional information was given on who these interviewees would be. An FBI agent insisted that those being questioned were specifically identified through intelligence, or other investigations, and that they were not themselves necessarily the targets of an investigation. One interviewee, a student from Yemen, who is applying for permanent residency, was asked if he knew anybody who had recently returned from Pakistan, anybody who was interested in government buildings, and anybody who had shown extreme hostility towards the U.S.[86]

The American Civil Liberties Union ("ACLU") filed a Freedom of Information Request, asking for specific information on the men who were interviewed. In October 2004, when the Government refused its request, the ACLU filed a lawsuit, seeking information on approximately 13,000 interviews.[87]

1.2.G. U.S. Measures Regarding Those Outside of the United States

The Government also introduced stricter visa policies for men from Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates and Yemen.[88] A special waiting

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[83] *Ibid* at 17.
[84] *Nimer, supra* note 29 at 27-28; *GAO Report, ibid.* at 13.
[85] American Civil Liberties Union, "ACLU Warns of Resurrecting 'Voluntary' Interview Program; Arab and Muslim Communities Should Not be Targets of Racial Profiling," *ACLU* (22 June 2004), online: American Civil Liberties Union <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15994&c=206>.
[86] Mary Beth Sheridan, "Interviews of Muslims To Broaden: FBI Hopes to Avert A Terrorist Attack," *Washington Post* (17 July 2002), online: Washingtonpost.com <http://www.washingtonpost.com/wp-dyn/articles/A56080-2004Jul16.html>.
[87] Associated Press, "ACLU Sues Over FBI Muslim Interviews" (23 October 2004), online: Voices of September 11th <http://www.voicesofsept11.org/security_issues/102304a.htm>.
[88] Nimer, *supra* note 29 at 28.

period for these men allowed the Government to complete an additional background check.[89]

On November 13, 2001, Bush issued a Military Order, creating a Military Commission to try "certain non-citizens."[90] The Military Commissions lack many of the standard due-process protections found in U.S. criminal proceedings, and they purport to deny those before it a right of judicial review.[91] As of the date of this thesis, no proceedings have been held yet before the Military Commissions, although some are scheduled. The defendant in one case, however, won a ruling in a Washington, D.C., federal court, that the Military Commissions, as they stand, are unconstitutional.[92] Among other things, the Court rejected the Administration's argument that the President's determination of the Guantanamo prisoners' status was sufficient, noting,"[t]he President is not a 'tribunal,' however."[93] The Government has appealed the case, and the Defendant's lawyers asked the Supreme Court to expedite consideration of a petition for writ of certiorari and directly review the matter.[94] In December 2004, the Supreme Court denied the request.[95]

The Military Commissions are believed to apply primarily to those detained at the U.S. military base in Guantanamo Bay, Cuba, although the language establishing them has no such limitations.[96] People allegedly captured in Afghanistan have been held there, some for as long as three years. Little is known of the identities of the Guantanamo Bay detainees, because the U.S. refuses to release information on them, although it is known that they are largely nationals of primarily Muslim countries. The U.S. Government has labeled these people "enemy combatants' and denied them the protections of the Geneva

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[89] *Ibid.*
[90] *November 13th Military Order, supra* note 15.
[91] *Ibid.*
[92] *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 at 171-72 (D.D.C. 2004), *cert. denied.* 125 S. Ct. 680 (2004)[*Hamdan*]. Oral arguments are set before the appellate court on this case for March 8, 2005. Tom Curry, "High Court May Decide Limit of Geneva Protections," (12 January 2005), online: MSNBC <http://www.msnbc.msn.com/id/6812453/>.
[93] *Hamdan, ibid.* at 162.
[94] *Hamdan v. Rumsfeld*, 125 S. Ct. 680 (2004).
[95] *Ibid.*
[96] See generally Barbara Olshansky, *Secret Trials and Executions: Military Tribunals and the Threat to Democracy* (New York: Seven Stories Press, 2002) [*Olshansky*].

Conventions, as well as denying them any judicial proceedings, except through its Military Commissions.[97]

1.2.H. The "Absconder" Program

In January 2002, the Administration began an "absconder" program to track down and deport people who were in the country illegally.[98] The program targeted men from predominantly Muslim countries, although this group made up less than 2% of the overall U.S. absconder population. Approximately 6,000 of these men were deported. The U.S. Government said that this and other such programs would be expanded beyond nationals of those largely Muslim countries, but this expansion never happened.[99] During the time that the Government focused on these 6,000 Muslim men, the overall absconder population in the U.S. rose from 300,000 to 400,000.[100] As of May 2003, the Government had included approximately 1,100 men as special-interest detainees from this program.[101]

In announcing the program's requirements, the Department of Justice said:

> As we have previously stated, the Justice Department's highest priority in the aftermath of September 11 is to prevent terrorists from killing more innocent Americans. As part of that mission, the Justice Department has begun a proactive initiative to locate and apprehend 314,000 absconders who have violated U.S. immigration laws, been ordered deported, and are criminal fugitives from deportation. [102]

One of those arrested as part of this "absconder" program was Farouk Abdel-Muhti. The Center for Constitutional Rights ("CCR"), which represented him in subsequent release proceedings, alleged that, during his more than two years in

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[97] See generally *Rasul v. Bush,* 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004)[*Rasul*]. Although the Government has repeatedly stated that the detainees have been determined to be enemy combatants, groups of detainees have been released at varying times since the detentions began. On February 3, 2005, the U.S. Government announced that three of its detainees had been incorrectly classified as "enemy combatants," and were being released. Reuters, "U.S. Says 3 at Guantanamo Not Enemy Combatants," *MSNBC Wire Services* (3 February 2005), online: MSNBC <http://www.msnbc.msn.com/id/6909612/>.

[98] An "absconder" is somebody who is in the country illegally, who has already been ordered deported. Nimer, *supra* note 29 at 26.

[99] Karen C. Tumlin, "Comment: Suspect First: How Terrorism Policy Is Reshaping Immigration Policy," (July 2004) 92 Calif. L. Rev. 1173 at 1190-91 [*Tumlin*]; Louise Cainkar, Ph.D., "Special Registration: A Fervor for Muslims," (2002/2003) 7 J. Islamic L & Culture 73 at 80-81[*Cainkar*].

[100] Cam Simpson, Flynn McRoberts & Liz Sly, "Immigration Crackdown Shatters Muslims' Lives," *Chicago Tribune* (16 November 2003), online: chicagotribune.com <http://www.chicagotribune.com/news/nationworld/chi-0311160374nov16,1,7819446.story?coll=chi-news-hed>.

[101] *Cole, Enemy Aliens, supra* note 4 at 25.

[102] *Tumlin, supra* note 99 at 1191.

immigration detention, he was "beaten, harassed and denied proper medical care."[103] Abdel-Muhti was a Palestinian, arrested in April 2002 on an outstanding deportation order, and, because he had no State to which he could be deported, he was simply held indefinitely. A federal court finally ordered his release in April 2004.[104]

Three months after his release, Abdel-Muhti died suddenly of a heart attack, after giving a speech condemning detentions and torture.[105] CCR commented that his sudden death, so soon after his release, was a reminder of "the human costs of the Bush administration's response to 9/11."[106]

1.3. Legal Challenges to the Detentions

When Ashcroft released the redacted detainee list to the public, he defended his tactics by saying "while I am aware of various charges being made by organizations and individuals about the actions of the Justice Department, I have yet to be informed of a single lawsuit filed against the government charging a violation of someone's civil rights as a result of this investigation."[107] Legal actions, however, began to emerge. In April 2002, a group of special-interest detainees, who had been deported, brought a federal class-action lawsuit against Ashcroft and other U.S. officials, titled *Turkmen v. Ashcroft.*[108] The class consists of male Muslim non-citizens detained in the U.S. after September 11th, on minor immigration violations, who received final deportation orders or voluntarily agreed to removal, but who still continued to be held for long periods in detention. The plaintiffs alleged that they were detained so the Government could investigate whether they had ties to terrorism, even though there was no reasonable

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[103] Center for Constitutional Rights, "CCR Mourns the Los[s] of Freedom Fighter Farouk Abdel-Muhti," online: Center for Constitutional Rights <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=MGvRXc7PZB&Content=422> [*CCR Mourns*].
[104] *Abdel-Muhti v. Ashcroft*, 314 F. Supp. 2d 418 at 430, n. 9 (D.C. Cir. 2004) 73 [*Abdel-Muhti*].
[105] *CCR Mourns, supra* note 103; NJ Committee to Free Farouk Abdel-Muhti, "Farouk Abdel-Muhti: Friend and Comrade" (22 July 2004)(noting that Abdel-Muhti died of a massive heart attack after giving a speech at a forum against detentions and torture, and that he had been detained for 718 days), online: NJ Committee to Free Farouk Abdel-Muhti <http://www.anti-racist.org/freefarouk/>.
[106] *CCR Mourns, ibid.*
[107] *Ashcroft Provides Total Number, supra* note 73.
[108] *Turkmen Complaint, supra* note 10.

suspicion that they were terrorists, and even though none of them had any criminal history or ties to terrorism. None of the men were ever charged with any crimes.[109]

The plaintiffs alleged harsh detention conditions, including being kept in overcrowded jails with dangerous criminal defendants, being placed in cells with no windows for 23 hours a day, and being subjected to body-cavity strip-searches and shackling whenever they were removed from those cells. Some of the plaintiffs also alleged physical and verbal abuse, including beatings "to the point of unconsciousness" and taunts about their religious beliefs and ethnic backgrounds.[110] The petition notes that the number of people who fit into this class action would be quite high, and that it was difficult to identify all of the class members, because Ashcroft and the other defendants were keeping their identities secret.[111] They further alleged violations of their due-process rights, in that they were denied access to counsel and their right to timely judicial proceedings.[112] The lawsuit alleges that people were targeted for this treatment based solely on ethnic and religious profiling.[113]

There were other legal challenges to the special-interest detentions, some addressing detention conditions, rather than the detentions themselves.[114] Hady Hassan Omar alleged three main things: first, that he was subjected to humiliating strip searches in front of camera crews and female staff; second, that he was repeatedly fed pork, in violation of his religious beliefs, refused requests to know the time of day for mandatory prayers, and refused requests to know the proper dates for beginning of mandatory religious fasts; and, third, that he was denied assistance of counsel.[115] Omar did not challenge his initial detention, unlike many of the special-interest detainees, and the decision gives some insight into why he may have been targeted. Omar was arrested the day after the terrorist attacks, based on an expired visa. He came under suspicion, because he had bought a plane ticket for early on September 11th from "the same internet

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[109] *Ibid.*
[110] *Ibid.*, paras. 3, 16.
[111] *Ibid.*, para. 27.
[112] *Ibid*, para. 64.
[113] *Ibid.*
[114] *Omar v. Casterline*, 288 F. Supp. 2d 775 at 777 (W.D. La. 2003)[*Omar*].
[115] *Ibid.* at 780-83.

account and in the same state as two of the known hijackers."[116] A federal court ruled on the Government's motions for summary judgment and dismissal, ironically, on September 11, 2003. It found that Omar had identified a constitutional issue relating to mistreatment based on his religious beliefs.[117] It found, however, that he had not done so relating to the strip searches, based on deference given to prison officials in such matters, and that he had not done so regarding assistance of counsel, because he had, in fact, been allowed to meet with an attorney.[118] Omar was released after 73 days.[119]

1.4. The Inspector General's Report

In June 2003, the Office of the Inspector General for the United States Department of Justice ("OIG") issued a special report, in which it found many problems with the way the "special-interest detainees" were treated. Among other things, it faulted the Department of Justice for failing to distinguish between those detainees who were suspected of terrorism ties, and those rounded up with no individualized suspicion of terrorism. The OIG also found that the Department of Justice had a policy of holding immigration detainees until they were affirmatively cleared of terrorism suspicion, even though they were arrested in immigration, not criminal, proceedings. The report noted that this policy was never put into writing, but was "clearly understood" and applied

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[116] *Ibid.* at 777. It is not clear exactly what is meant by the same "internet account," since, if taken literally, it would mean he would have had access to the hijackers' accounts. If that were the case, he seems highly unlikely that he would have been released. See Seth M. Haines, "Comment: Rounding Up the Usual Suspects: The Rights Of Arab Detainees In a Post-September 11 World," (2004) 57 Ark. L. Rev. 105 at 105, 109 (presenting a case study of Hady Hassan Omar, and saying one basis for the arrest was that he was Egyptian, and that he bought a one-way plane ticket for September 11th, at the same copy shop terminal used by the actual September 11 hijackers) [*Haines*].

[117] *Omar, ibid.* at 781.

[118] *Ibid.* at 779-81, 782.

[119] *Ibid.* at 777. There were other legal challenges to various types of post-9/11 detentions, such as those at Guantanamo Bay and those of the "enemy combatants" held within the U.S., which the Supreme Court decided, and which are discussed in Chapter 2, Section 2.3.A.2., below. Some cases also challenged detentions of those called "material witnesses" relating to the attacks, which also took place in a widespread basis. *See, e.g., United States v. Awadallah,* 202 F. Supp. 2d 55 at 55-61 (S.D.N.Y. 2002), rev'd, 349 F.3d 42 (2d Cir. 2003), *cert. denied* 125 S. Ct. 861 (2005)(detainee alleged he was held in solitary confinement, denied access to family or counsel, beaten repeatedly, and denied a proper religious diet, even though he was detained as a material witness and had never been charged with a crime. Awadallah says he was strip searched every time he was removed from his cell, even though he only had contacts with Government officials, and the Government admitted that, after his detention, he had numerous bruises and other injuries. When he finally testified at a grand jury hearing, he did so dressed in prison clothing and shackled to the chair, with no immunity granted for his testimony).

within the Department.[120] The report extensively criticizes the Department of Justice for numerous aspects of the detentions, ranging from its blanket "no bond" policy to the actual detention conditions.[121]

Based in part on the OIG report, the Plaintiffs in the *Turkmen* case filed a seconded amended complaint in their class-action lawsuit. A previous motion by the Government to dismiss the case had been denied. In the second amended complaint, the Plaintiffs incorporated the information in the OIG report regarding deprivation of due process, racial and ethnic profiling, and harsh detention conditions.[122]

1.5. Special Registration and Detentions of Muslim Male Immigrants

Effective September 2002, the Administration began its National Security Entry-Exist Registration System ("NSEERS"), requiring people from specified countries to submit to special fingerprinting, photographing, and registration on entry into the U.S.[123] The DOJ claimed this program was the first step of a wider U.S. Visit Program, which had been mandated by Congress to be implemented at all points of entry. The justification for this new rule was included in its opening paragraph, which reads:

> Recent terrorist incidents have underscored the need to broaden the special registration requirements for nonimmigrant aliens from certain designated countries, and other nonimmigrant aliens whose presence in the United States requires closer monitoring, to require that they provide specific information at regular intervals to ensure their compliance

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[120] *Special OIG Report, supra* note 6 at c. 4. The Office of the Inspector General has the responsibility of oversight within the Department of Justice and is responsible for conducting audits and other assessments of Department of Justice activities. See generally U.S. Department of Justice, Office of the Inspector General, "Introduction," online: U.S. Department of Justice Office of the Inspector General <http://www.usdoj.gov/oig/igintro.htm>.

[121] *Special OIG Report, ibid.*

[122] Center for Constitutional Rights, "Synopsis: *Turkmen v. Ashcroft*" online: Center for Constitutional Rights <http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=35KQUuFROg&Content=96> [*Turkmen* synopsis]. In September 2004, the Center for Constitutional Rights was granted leave to amend its complaint in the Turkmen case, adding officers of the Metropolitan Detention Center as defendants and including new allegations, based on newly discovered information. In December 2004, a Government Motion to Dismiss was denied. *Turkmen v. Ashcroft, Order Denying Motion to Dismiss,* 02-CV-2307 (JG) (3 December 2004).

[123] United States Department of Justice, Rules and Regulations, Immigration and Naturalization Service (INS), 8 CFR Parts 214 and 264, [INS No. 2216-02; AG Order No. 2608-2002], RIN 1115-AG70, "Registration and Monitoring of Certain Nonimmigrants: Final Rule," 67 F.R. 52584 (12 August 2002), *codified at* 8 C.F.R. 264.1(f); [INS No. 2232-02; AG Order No. 2612-2002]; "Registration and Monitoring of Certain Nonimmigrants From Designated Countries," 67 FR 52584 (6 September 2002) [*First NSEERS Regulations*].

with the terms of their visas and admission, and to ensure that they depart the United States at the end of their authorized stay.[124]

The registration program was also designed to apply to certain aliens who had already entered the U.S. Failure to comply with all of the NSEERS requirements created a rebuttable presumption of inadmissibility on future visits.[125] The program initially applied to visiting male nationals of Syria, Iraq, Iran, Sudan, and Libya who were over the age of 16.[126] The Department of Justice refuted allegations that this policy was discriminatory, by saying, among other things, that individual aliens can be targeted based on intelligence information. The program, however, applied to all nationals within these parameters, and from those countries, not to individuals specifically identified through intelligence.[127]

In November 2002, Ashcroft expanded the NSEERS system to males over 16 who were visiting nationals from several other countries.[128] The Registration program applied to males from Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen."[129] The Government claimed, once again, that its program applied only to men from countries with a known Al Qaeda presence, although it did not explain why North Korea would be placed on such a list. Britain and Germany, where some of the September 11th hijackers lived at some point, were not, however, on the list.[130] The Department of Homeland Security described the program as a "pilot project focusing on a smaller segment of the nonimmigrant alien population deemed to be of risk to national security."[131]

In California, hundreds of people were detained on alleged immigration violations when they appeared to register. Most of those detainees were Iranian.[132] In one incident, which garnered extensive media attention, a 16-year-old boy was forcibly removed from

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[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.*
[127] *Ibid.*
[128] United States Department of Justice, Immigration and Naturalization Service, AG Order No. 2631-2002, "Registration of Certain Nonimmigrant Aliens From Designated Countries, Part V," 67 FR 70526 (20 November 2002)[*Second NSEERS Regulations*].
[129] *Ibid*
[130] *Cainkar, supra* note 99 at 73.
[131] *Second NSEERS Regulation, supra* note 128.
[132] *Cainkar, supra* note 99, at 83.

his distraught mother. The boy was reported to have been in the U.S. on a student visa and had applied for permanent residency. His mother did not know why he was detained, and a witness overheard an immigration official telling her that her child was "never coming home."[133]

Another man, who had dual Canadian-Iranian citizenship, registered two days late, apparently because he was not sure the program applied to him. He was detained for five days. During that time, he said he was placed in handcuffs and leg shackles, forced to sleep on a cement floor, and prevented from sleeping by guards who woke him up every 15 minutes to shout questions at him.[134] After large public protests in California, most of the detainees were released, but deportation proceedings began in a number of the cases.[135] The NSEERS program continued to be expanded through late 2002, with men of a certain age from Pakistan and Saudi Arabia being added to the registration requirement.[136]

In late December 2002, a lawsuit was filed on behalf of those required to register under the NSEERS program.[137] The complaint alleges that these individuals had, in many cases, applied for permanent residency status in the U.S. Rather than deciding their residency applications, however, the Government had required them to register, and had subsequently detained and deported many of them.[138]

On December 23, 2002, three Democratic members of Congress, Senators Feingold and Edward Kennedy, and Representative John Conyers, sent Ashcroft another letter, asking him to suspend the NSEERS program. The letter said the program "appears to be a component of a second wave of roundups and detentions of Arab and Muslim

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[133] Megan Garvey, Martha Groves, Harry Weinstein, "Hundreds Are Detained After Visits to INS," *Los Angeles Times* (19 December 2002), online: Common Dreams News Center <http://www.commondreams.org/headlines02/1219-09.htm>.
[134] *Cainkar*, *supra* note 99 at 93-94.
[135] *Ibid.* at 83.
[136] United States Department of Justice, Immigration and Naturalization Service, AG Order No. 2636-2002, "Registration of Certain Nonimmigrant Aliens From Designated Countries," 67 FR 77135 (16 December 2002) [*Third NSEERS Regulation*]; Maggie Shiels, "Immigrants Fear New U.S. Policy," *BBC* News (10 January 2003), online: BBC News <http://news.bbc.co.uk/1/hi/world/americas/2645275.stm>; Associated Press, "U.S. Widens Checks on Visitors," *BBC* (16 January 2003), online: BBC News http://news.bbc.co.uk/1/hi/world/americas/2664953.stm; Cainkar, *supra* note 99 at 83-85.
[137] *AAADC v. Ashcroft*, *Complaint* (C.D. Cal. 2002)(purported class action), online: Findlaw <http://news.findlaw.com/legalnews/us/terrorism/cases/civil.html#aaadc>. No disposition of the case is yet available.
[138] *Ibid.*

males disguised as a perfunctory registration requirement." The letter also expressed concerns that people appearing to register were being detained, often without access to counsel and in "deplorable conditions." The writers again reminded Ashcroft that "times of crisis are the true test of a democracy," and reminded him that the U.S. "still bears the scars" of earlier detentions based on ethnicity, such as the detentions of Japanese, German, and Italian-Americans during World War II.[139]

The Government ended its call-in registry in early 2003.[140] Throughout the program, it is estimated that 83,000 men and boys registered, and almost 14,000 of them were determined to be in the country illegally, often, however, as a result of INS backlogs, rather than an intent to evade the immigration system. The DOJ claimed that the program led to the capture of 11 terrorism suspects, but the DHS reported that none of them were charged with any terrorism-related activity. Most of the 14,000 faced deportation proceedings.[141] Detainees reported terrible detention conditions, some saying they did not have enough food or water, and others saying they were hosed down with cold water and forced to sleep standing up because of crowded detention centers.[142]

As of May 2003, it was estimated that 2,747 men had been detained under the program.[143] The Department of Homeland Security ultimately assumed control over the NSEERS program, and, in December 2003, it announced that it was suspending the re-registration component of its NSEERS program, under which registrants were required to register a second time after a specified time period.[144] It has subsequently acknowledged that the program was not useful in fighting terrorism.[145]

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[139] "Letter from Russell Feingold, Edward Kennedy and John Conyers to Ashcroft" (23 December 2002), online: United States House of Representatives <http://www.house.gov/judiciary_democrats/dojentryexitltr122302.pdf>.

[140] Cam Simpson & Flynn McRoberts, "U.S. Ends Muslim Registry," *Chicago Tribune* (2 December 2003), online: Chicagotribune.com <http://www.chicagotribune.com/news/local/chi-0312020136dec02,1,1073561.story?coll=chi-news-hed> [Simpson, "U.S. Ends"].

[141] *Ibid.*

[142] Amnesty International, "Special Registration of Immigrants May Violate Human Rights Standards: Issue Brief" (January 2003), online: Amnesty International USA <http://www.amnestyusa.org/countries/usa/document.do?id=142F55F615260D3D85256F0100550BE6>.

[143] *Cole, Enemy Aliens, supra* note 4 at 25.

[144] United States Department of Homeland Security, "Press Releases: Fact Sheet: Changes to National Security Entry/Exit Registration System (NSEERS)" (1 December 2003), online: Department of Homeland Security <*http://www.dhs.gov/dhspublic/display?content=3020*>; Simpson, "U.S. Ends," *supra* note 140.

[145] See Rachel L. Swarns, "Program in Dispute as a Tool to Fight Terrorism," *The New York Times* (21 December 2004) at A26.

1.6. Maher Arar's Deportation to Syria

The detentions were not limited to those present within the United States, but often affected those crossing over its Borders.[146] On September 26, 2002, Maher Arar, a man holding dual Canadian-Syrian citizenship, changed airplanes in New York on his return to Canada from a family vacation in Tunisia. U.S. authorities detained and questioned him.[147] Arar says, during his time in U.S. custody, he repeatedly asked for an attorney, but only saw an attorney once, briefly, and she never returned. When he learned he would be deported from the U.S., he says he begged U.S. authorities to send him to Canada, where he was a long-time resident, instead of sending him to Syria, as they mentioned they would do. Because Arar had not completed his military service in Syria, he was afraid he would be imprisoned and tortured there.[148] Arar had moved to Canada with his family when he was 17 years old, had never returned to Syria, and was living in Canada at the time with his wife and children.[149]

Arar was never brought before any judicial body, and nobody ever informed him of any criminal charges against him. Without explanation, he says, U.S. officials sent him first to Jordan, then to Syria. In Jordan, he was beaten repeatedly, and, on his arrival in Syria, he was placed in a small, filthy cell.[150] He was there for 10 months, during which

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[146] The author of this thesis was unable to locate any statistics as to how many people in this situation may have been detained pursuant to the terrorism investigation. The figure of 5,000 special-interest detentions does not include people who may have been detained at the Border.

[147] *Krawchuk*, *supra* note 11. The Arar case is discussed extensively in Chapter 3, below, in relation to the detention procedures for non-admitted aliens.

[148] *Ibid.*

[149] *Ibid.*

[150] The U.S. has acknowledged it deported Arar to Syria, although Government officials have refused to explain the reasons behind this action. *Ibid.* In its annual human-rights reports, relating to the period during which Arar was deported, the U.S. Department of State accused Syria of using

> torture methods [that] include administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine.

United States Department of State, "Annual Human Rights Report: Syria" (2003), online: U.S. Department of State <http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm>.

Similarly, as to Jordan, where Arar says he was sent first, the Department of State has alleged that:

> Allegations of torture were difficult to verify because the police and security officials frequently denied detainees timely access to lawyers, despite legal provisions requiring such access. The most frequently alleged methods of torture included sleep deprivation, beatings on the soles of the feet, prolonged suspension with ropes in contorted positions, and extended solitary confinement. Defendants in high-profile cases before the State Security Court claimed to have been subjected to physical and psychological abuse while in detention. Government officials denied allegations of torture and abuse.

time he says he was "... whipped with a thick electric cable and threatened with a metal chair, a tire, and electric shocks."[151] The U.S. Government has not, to date, explained its actions, nor has it brought any criminal charges against Arar. According to a *Washington Post* investigation, a deputy attorney general signed the deportation order, which noted that sending Arar to Canada would be "prejudicial" to the U.S.[152] Arar is now free and has filed lawsuits against Jordan, Syria, and the United States, and a public inquiry into what happened to him was convened in Canada.[153]

1.7. Increased Protests of U.S. Immigration Policies

In late 2002, a controversy arose over Canadians crossing into the U.S. who held dual citizenship with one of the countries targeted in the registration program. They were subjected to the registration, regardless of their Canadian citizenship. This situation prompted Canada to take the rare step of issuing a travel advisory to those of its citizens who held such dual citizenship. The travel advisory was later withdrawn, although news media gave conflicting reports as to why. Some reported that the U.S. had agreed not to subject dual-nationality Canadian citizens to these requirements, while others reported that the U.S. had simply agreed to treat Canadian citizens better.[154]

The Human Rights Panel of the Organization of American States ("OAS") also ruled that the U.S. should either release the detainees, or justify their continued detentions. The U.S. has never responded to this ruling.[155]

The American Jewish Committee, the Anti-Defamation League, and other Jewish-affiliated rights organizations sent a letter to the President, protesting the round-ups and

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United States Department of State, "Annual Human Rights Report: Jordan" (2003), online: U.S. Department of State <http://www.state.gov/g/drl/rls/hrrpt/2002/18279.htm>.

[151] *Krawchuk, supra* note 11.

[152] Paul Koring & Jeff Sallot, "Ottawa Handed Arar File to U.S.," *The Globe and Mail* (20 November 2003) at A1 [*Koring*].

[153] DeNeen L. Brown , "Canadian Sent to Mideast Files Suit: Deportee Alleging Torture Seeks Redress From Jordan, Syria, U.S.," *The Washington Post* (25 November 2003), online: Washingtonpost.com <http://www.washingtonpost.com/ac2/wp-dyn/A11584-2003Nov24?language=printer>;
Center for Constitutional Rights, "John Ashcroft Sued by CCR for Torture" (24 January 2004), online: Center for Constitutional Rights <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=vRQgEt97ZX&Content=318>.

[154] Lawyers' Committee for Human Rights (renamed Human Rights First), "Imbalance of Powers: How Changes to U.S. Law &Policy Since 9/11 Erode Human Rights and Civil Liberties" (2002-03) online: Human Rights First <http://www.humanrightsfirst.org/us_law/loss/imbalance/imbalance.htm> at 44 [*Imbalance of Powers*].

[155] *Ibid.*

detentions. The Board of Directors of the Hebrew Immigrant Aid Society recommended that the registration program be suspended pending a Congressional review. In so doing, they cited the round-up of Jews by the Nazis in World War II and criticized the targeting of immigrant groups based on their ethnicity and religion.[156]

1.8. Refusals of Refugee Claims for Iraqi Nationals

On January 10, 2003, the U.S. Department of State said it was refusing to grant refugee status to anyone from Iraq. Resulting controversy caused the policy to be reversed.[157] On March 13, 2003, President Bush said of Bin Laden, who had still not been found, "I don't know where he is and I really don't care. It's not that important. It's not our priority."[158] On March 19, 2003, the U.S. attacked Iraq.[159]

1.9. Further Merging of Immigration and Anti-Terrorism Measures

On March 1, 2003, the INS ceased to exist as a separate agency and was instead placed under the auspices of the new Department of Homeland Security ("DHS").[160] A few days later, a report in the *Washington Post* accused the Government of sending some of the "special-interest detainees" to countries known to use torture, in a process known as "extraordinary rendition." The Reporter said that one investigator told him he sends detainees to such countries with his "eyes open." The article quotes another official who

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[156] Lawyers' Committee for Human Rights (renamed Human Rights First), "Assessing the New Normal: Liberty and Security for the post-September 11 United States" (2002-03), online: Human Rights First <http://www.humanrightsfirst.org/us_law/immigrants/index.htm> at 38 [*Assessing the New Normal*].
[157] *Imbalance of Powers, supra* note 154 at 30.
[158] *Postelwait, supra* note 26. President Bush made a similar statement in a press conference held in March 2002 when he said of Bin Laden "So I don't know where he is. You know, I just don't spend that much time on him, Kelly, to be honest with you ... Well, as I say, we haven't heard much from him. And I wouldn't necessarily say he's at the center of any command structure. And, again, I don't know where he is. I -- I'll repeat what I said. I truly am not that concerned about him." The White House, "President Holds Press Conference" (13 March 2002), online: The White House <http://www.whitehouse.gov/news/releases/2002/03/20020313-8.html>. During one of the Presidential debates with Democratic candidate John Kerry, Bush denied this statement, saying "Gosh, I just don't think I ever said I'm not worried about Osama bin Laden. It's kind of one of those exaggerations. Of course we're worried about Osama bin Laden. We're on the hunt after Osama bin Laden. We're using every asset at our disposal to get Osama bin Laden." Commission on Presidential Debates, "The Third Bush-Kerry Presidential Debate," Debate Transcript (13 October 2004), online: Commission on Presidential Debates <http://www.debates.org/pages/trans2004d.html>.
[159] CNN, "Bush Announces Military Campaign," *CNN* (19 March 2003), online: CNN.com <http://edition.cnn.com/2003/US/03/19/sprj.irq.war.bush.transcript/index.html>.
[160] *Cainkar, supra* note 99 at 78-79.

bluntly said "[w]e don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them."[161]

1.10. Operation Liberty Shield

Shortly before the attack on Iraq, the Department of Homeland Security announced a new program called "Operation Liberty Shield." Under the program, the U.S. would unilaterally detain people from specified countries who were seeking asylum. The Department of Homeland Security did not release the list of countries from which asylum seekers would be detained, except to say that 33 countries where Al Qaeda was believed to operate were affected. In announcing the program, the Department said that the purpose of the detention was, first, to be sure the people were really fleeing persecution, and, second, to be sure they were not entering the U.S. to commit acts of terrorism.[162] Although the Department refused to release the list of countries, the Lawyers' Committee for Human Rights claimed to have learned that, in addition to Iraq, the countries included Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Jordan, Kazakhstan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Thailand, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, Yemen, and Gaza and the West Bank. Again, Great Britain and Germany were not on the list. Although asylum seekers were already detained under certain circumstances, they were otherwise released on bail pending a final outcome.[163]

The next month, after considerable controversy, the Department of Homeland Security terminated its Operation Liberty Shield Program. It refused, however, to disclose how many people were detained under the program, or if they had been released.[164]

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[161] Dana Priest & Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post* (4 Mar. 2003), online: Washingtonpost.com <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A37943-2002Dec25&notFound=true> ("[expletive]" substitute was in the original quote)[*Priest, U.S. Decries Abuse*].
[162] *Assessing the New Normal, supra* note 156 at 41.
[163] *Ibid.* at 42.
[164] *Ibid.* at 42.

1.11. Congressional Action on the Special-Interest Detentions

In June 2004, several members of the Senate, including Senators Leahy, Feingold, and Kennedy, introduced proposed legislation in both the House of Representatives ("House") and the Senate, which is designed to curb future immigration detentions like the ones that took place after September 11th. The Bill, called the "Civil Liberties Restoration Act of 2004," specifically indicates that steps taken to fight terrorism "should not undermine constitutional rights and protections," and that "some of the steps" by the Executive Branch after the attacks did "undermine constitutional rights and protections."[165] Among other things, the Bill proposes strict limits on secret immigration proceedings, with greater Government burdens to prove secrecy is needed; stronger due-process protections in immigration proceedings; and a special, independent Immigration Review Commission within the DOJ, to oversee all detention cases.[166] It also terminates the NSEERS program and terminates most cases brought under the program.[167] It lays out parameters for the use of prosecutorial discretion, noting that this discretion is "not an invitation to violate or ignore the law."[168] Finally, it requires Federal agencies engaging in certain types of surveillance activities to provide reports to Congress.[169] The legislation is still actively before Congress as of January 2005.

Other Legislation currently before Congress includes the "End Racial Profiling Act," and the "Benjamin Franklin True Patriot Act." The latter would reverse portions of legislation like the Patriot Act and certain immigration regulations.[170] The "Patriot Oversight Act" would extend the "sunset provisions" to include, among other provisions, the Patriot Act's immigration-detention provisions.[171]

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[165] *Civil Liberties Restoration Act of 2004 ("CLRA"),* S.2528IS (Senate Version): H.R. 4591.IH (House Version), Sec. 2, online: United States Senate <http://thomas.loc.gov/cgi-bin/query,>.
[166] *Ibid.*, Title II.
[167] *Ibid.*, Title III.
[168] *Ibid.*
[169] *Ibid.*
[170] *End Racial Profiling Act,* H.R.3847; S.2132, *pending; Benjamin Franklin True Patriot Act,* H.R.3171, *pending.*
[171] Senator Leahy, "Statements on Introduced Bills and Joint Resolutions," (1 October 2003), online: Congressional Record <http://www.fas.org/irp/congress/2003_cr/s1695.html>.

1.12. The 9/11 Independent Commission's Conclusions

In July 2004, an independent Commission investigating the terrorist attacks issued a report, concluding that numerous intelligence failures and a "failure of imagination" contributed to the attacks. While the report does find fault with specific failures in the visa-approval system, it does not cite Muslim immigrants as a factor behind the attacks, nor does it suggest targeting specific immigrant populations to prevent future attacks. Instead, it recommends dramatic changes in the U.S. intelligence structure.[172]

As a result of the report, Congress passed, in late 2004, the Intelligence Reform and Terrorism Prevention Act of 2004, which, among other things, contains changes to immigration programs, primarily relating to admissibility requirements.[173] The Act recognizes that the Executive Branch might need increased powers to fight terrorism, but also establishes, among other things, a Privacy and Civil Liberties Oversight Board that will oversee the actions of the President, to establish "an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life."[174]

1.13. The Reversal of the Convictions of the Detroit Four

Of the at least 5,000 people who were detained as a result of the September-11th sweeps, only four were ever charged with any terrorism-related activities.[175] The four were accused of being members of Al Qaeda, and planning terrorist attacks, although they were not charged with the September 11th attacks.[176] According to Professor David Cole, a Georgetown University professor who has written extensively on the special-interest detentions, the primary evidence consisted of sketches and a videotape, which the Government described as "casing" materials for a plot, and one witness, who was offered a plea deal in return. In September 2004, the convictions were overturned, after the

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[172] National Commission on Terrorist Attacks Against the United States, "The 9/11 Commission Report" (22 July 2004), online: National Archives <http://www.9-11commission.gov/>.
[173] *Intelligence Reform and Terrorism Prevention Act of 2004*, S. 2845, Conference Report online: House of Representatives <http://www.house.gov/rules/s2845confrept.pdf>.
[174] *Ibid.* at Sec. 1061.
[175] David Cole, "Taking Liberties," *The Nation* (22 September 2004) online: Alternet, <http://www.alternet.org/rights/19948/> [*Taking* Liberties]. Another person, Zaccharias Moussaoui, was arrested prior to the attacks on purported immigration violations. He is presently on trial, charged with direct involvement in the September 11th attacks. Moussaoui is not considered a "special-interest detainee," since he was arrested prior to the terrorist attacks. See generally *Center for National Security Studies*, *supra* note 41 at 98, n. 6.
[176] *Ibid.*

Government admitted withholding evidence from the Defense that experts did not think the sketch and videotape were "casing" materials, and that its main witness admitted lying.[177]

1.14. Ongoing Disputes over *Habeas* Review of Detentions

In a recently filed case, an American citizen, Abu Ali, who was arrested and is being held indefinitely in Saudi Arabia, filed a petition for a writ of *habeas corpus*, alleging that the U.S. was responsible for his arrest and detention.[178] In a District Court ruling on the Government's motion to dismiss, the Judge pointed out evidence that the U.S. initiated Abu Ali's arrest in Saudi Arabia, that it has questioned him in prison there, that the U.S. controls his detention there, that the Saudis would release him immediately to the U.S. if requested to do so, that the U.S. is having him held there to avoid constitutional safeguards, and that Abu Ali is being tortured.[179] The Court noted that Abu Ali was arrested while taking an exam.[180] The U.S. Government presented no evidence to rebut these allegations, because, it alleged, the federal district court could not hear a *habeas* petition for somebody held by another country.[181] The Court rejected the Government's argument, noting:

> The position advanced by the United States is sweeping. The authority sought would permit the executive, at his discretion, to deliver a United States citizen to a foreign country to avoid constitutional scrutiny, or, as is alleged and to some degree substantiated here, work through the intermediary of a foreign country to detain a United States citizen abroad ... The Court concludes that a citizen cannot be so easily separated from his constitutional rights.[182]

1.15. Continued Plans for "Permanent" Detentions

In January 2005, the *Washington Post* alleged that the Government was seeking long-term detention facilities for "suspected terrorists," who would not face trial because

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[177] *Ibid.*
[178] *Abu Ali v. Ashcroft, Memorandum Opinion*, Civil Action No. 04-1258 (JDB), (D.C. Cir. 2004), online: United States District Court for the District of Columbia <http://www.dcd.uscourts.gov/04-1258.pdf>.
[179] *Ibid.*
[180] *Ibid.*
[181] *Ibid.*
[182] *Ibid.*

of a lack of evidence.[183] A spokesman said that the emergency had passed, and that "[n]ow we can take a breath. We have the ability and need to look at long-term solutions." The article alleges "[t]he CIA has been scurrying since Sept. 11, 2001, to find secure locations abroad where it could detain and interrogate captives without risk of discovery, and without having to give them access to legal proceedings."[184]

1.16. UN Criticisms of the U.S. on its Treatment of Detainees

On February 4, 2005, inspectors from the United Nations issued a statement, saying the U.S. was not doing enough to address serious allegations of mistreatment of prisoners at Guantanamo Bay.[185] The inspectors called for the U.S. to "objectively assess the allegations of torture, and other cruel, inhuman or degrading treatment or punishment, particularly in relation to methods of interrogation of detainees."[186]

1.17. Conclusion

The special-interest detentions represented just one manifestation of the Government's domestic reaction to September 11th. In the name of the War on Terror, people have been arrested in secret, with no individualized suspicions of criminal activity, then held without charge, denied access to counsel, denied access to any judicial proceedings, and presumed guilty until the Government could establish otherwise – all based on the Government's assertions that such procedures are essential to protecting national security. Moreover, many of those detentions have been extremely long term, and some have the appearance of being potentially indefinite. These procedures, regardless of whether they applied to the special-interest detainees or to other detainees,

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[183] Dana Priest, "Long-Term Plan Sought For Terror Suspects," *Washington Post* (2 January 2005), online: Washington Post <http://www.washingtonpost.com/wp-dyn/articles/A41475-2005Jan1.html> [*Priest, Long-Term Plan Sought*].

[184] *Ibid.*

[185] Reuters, "U.N. says U.S. not done enough on Guantanamo," *MSNBC Wire Services* (4 February 2005), online: MSNBC <http://www.msnbc.msn.com/id/6913242/>.

[186] *Ibid.* On February 12, 2005, Reuters reported that an independent UN expert had said he was "gravely concerned" after visiting Afghanistan, based on "allegations of mistreatment and even torture of local people by foreign forces ..." The U.S. disputed the statement, with a spokesman saying an investigation had concluded "[c]onditions that exist in our holding facilities are humane." Cherif Bassiouni, a well-known international law expert, is expected to provide more information on the allegations at the UN Human Rights Commission's annual meeting in March and April 2005. Reuters, "U.S. Rejects U.N. Expert's Afghan Rights Concerns" (12 February 2005), online: The New York Times <http://www.nytimes.com/reuters/international/international-rights-usa-afghanistan.html?oref=login>.

such as the "enemy combatants," directly conflict with the most basic understanding of the U.S. rule of law.

The special-interest detentions, however, were distinguishable from other War on Terror detentions, such as those at Guantanamo Bay, in a couple of respects. First, it is apparent that the Guantanamo detentions have stirred much more of an outcry, both domestically and around the world. This may be based, in part, on the traditional tendency to scapegoat domestic immigrant populations in times of crisis, which is an issue that is explored in more depth in Chapter 2 of this thesis.[187] It may also be because of the Government's greater success in keeping information on the special-interest detainees secret. As people continue to be released from Guantanamo Bay, and as lawyers gain access to the detainees because of the Supreme Court's *Rasul* decision, a more complete picture of the overall circumstances of Guantanamo Bay has begun to emerge. One Guantanamo detainee can often report on other detainees. But such an overall picture is not as likely to emerge from contact with the special-interest detainees, who were apparently arrested and held in different places in the country. Even in its third amended complaint in the *Turkmen* class-action litigation, filed in late 2004, the Center for Constitutional Rights reasserted that Government secrecy had blocked it from fully identifying the class members.[188]

More importantly for the purposes of legal analysis, the Guantanamo and other "enemy combatant" detentions have produced significantly more litigation, and more guiding court rulings, than have the special-interest detentions. Attorneys seeking to contest the "enemy combatant" detentions have an increasingly powerful arsenal at their

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[187] See Chapter 2, Sections 2.3.A.3. and 2.3.B.2.b., below.

[188] *Turkmen v. Ashcroft, Third Amended Class Action Complaint and Demand for Jury Trial*, No. 02 CV 2307 (JG) (filed 13 September 2004), online: Center for Constitutional Rights <http://www.ccr-ny.org/v2/legal/september_11th/docs/Turkmen_3rd_Amended_Complaint_9-13-04.pdf>. Specifically, the Center for Constitutional Rights stated in its complaint:

> The members of the class are too numerous to be joined in one action, and their joinder is impracticable in part because Defendants have kept their identities secret. While the exact number is presently unknown to Plaintiffs' counsel, the Department of Justice Office of Inspector General was able to identify approximately 475 September 11 detainees who were held at MDC and Passaic and were subjected to the policies challenged in this action. (OIG Report at 5). Moreover, the subclass of Plaintiffs detained after they could have been deported likely exceeds 87 individuals. See Though Not Linked to Terrorism, Many Detainees Cannot Go Home, N.Y. Times, Feb. 18, 2002, at A1 (reporting that the United States Department of Justice blocked the departure of 87 mostly Arab or Muslim non-citizens who received voluntary departure or removal orders, Awhile investigators comb[ed] through information pouring in from overseas to ensure that they have no ties to terrorism)(*ibid.* at para. 55).

disposal, first from two U.S. Supreme Court rulings, *Rasul* and *Hamdi*, which are discussed at length in Chapter 2, and second in terms of subsequent rulings, such as the federal trial courts' rulings in *Hamdan* and *In re Guantanamo Detainees*, both also discussed in more detail in Chapter 2, which deal with the constitutional rights of Guantanamo detainees.[189]

Litigation on behalf of the special-interest detainees, however, has been much slower to progress, although the detainees certainly can benefit, by inference, from judicial detention rulings in other contexts. It is difficult to explain this disparity, although, from an assessment of the known cases, it appears some of this might be a result of the form of the litigation brought. For example, the only special-interest cases to reach the U.S. Supreme Court were brought, not on behalf of the detainees themselves, but by newspaper groups, or public-interest groups, who objected to being denied access to the secret special-interest hearings.[190] The Supreme Court declined to hear that case, although, even if it had, the issue would have been more that of First Amendment rights of the Press, rather than any individual-rights violations for the detainees.[191] The most significant case brought expressly on behalf of the special-interest detainees may be the *Turkmen* class action case, brought by the Center for Constitutional Rights, on behalf of special-interest detainees who were held for terrorism clearance after agreeing to deportation.

As discussed in this Chapter, that case involved an unknown number of class members, although it was clear that the number included in the class might be significant. Perhaps because it was styled as a class action, the case has progressed exceedingly slowly and is still in preliminary motion stages before the trial court, even almost three years after it was first filed. A third amended complaint was filed in the case in September 2004[192] and disputes were ongoing in early 2005 as to whether the action should be dismissed.[193] It will, therefore, be some time before any meaningful rulings come from that case.

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[189] See Chapter 2, Section 2.3.A.2.
[190] *North Jersey Media Group*, *supra* note 38; *Center for National Security Studies*, *supra* note 41.
[191] *Ibid.*
[192] *Turkmen v. Ashcroft*: Synopsis, *supra* note 122.
[193] *Ibid.* For example, the Center for Constitutional Rights filed a brief in response to a Government motion to dismiss the action on January 10, 2005 (*ibid).*

The immigration factor may also explain why fewer individual challenges have been brought on behalf of the special-interest detainees. Many of the special-interest detainees, after being cleared of terrorism involvement by the Government, were then subjected to deportation proceedings.[194] The deportation proceedings themselves, undertaken under the auspices of the immigration system, would be much harder to contest than the initial detentions for terrorism suspicion, and detention conditions, would have been. It is entirely possible that, faced with the uphill battle of contesting their treatment against a country from which they had already been deported, many of the special-interest detainees may have chosen, instead, to simply proceed with their lives. Alternatively, as noted in the General Accounting Office's report, many of the men included in the "voluntary" interview program of Muslim men said they felt compelled to cooperate, out of fear of adverse immigration actions if they did not do so.[195] It may be, as well, that those detained as "special-interest" immigrants, who were not deported, felt a similar reluctance to antagonize U.S. immigration officials. Given the overwhelming secrecy surrounding these detentions, any views as to the reasoning behind this disparity must, however, remain speculative.

In spite of the shortage of specific litigation relating to the special-interest detainees, however, U.S. law does provide parameters under which the general validity of those detentions may be examined. Chapter 2 will explore some of those parameters, largely in the context of past scenarios under which civil rights were suspended in the name of national emergency, but also with an eye to the War on Terror detention decisions that have emanated from U.S. Courts. As that chapter will demonstrate, U.S. law, while providing certain procedures for emergency situations, has never permitted the unilateral suspension of *habeas corpus* and due-process rights in the name of even the greatest emergency. In those rare historical situations in which such actions were undertaken by the Executive, they were virtually always later repudiated, and viewed with great disapproval. In the end, past scenarios may have tested the rule of law, but it has ultimately prevailed.

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[194] See *Cole, Enemy Aliens, supra* note 4; *Cole, The Priority of Morality, supra* note 9 at 1753.

[195] *GAO Report, supra* note 12 at 2 ("... interviewed aliens did not perceive the interviews to be truly voluntary ... although aliens were not coerced to participate in the interviews, they worried about repercussions, such as future INS denials for visa extensions or permanent residency, if they refused to be interviewed.").

Chapter 2: The National Interest Under the U.S. Constitution

> *To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.*[196]

2.1. Human Rights in the U.S.

Certain notions of human rights in the U.S. can be traced to its founding documents, most notably the Declaration of Independence and the U.S. Constitution. Those documents, in turn, owe their origins to other famous instruments, such as the *Magna Carta* and the English Bill of Rights of 1689, suggesting that certain ideals have a long-standing historical basis.[197] Throughout U.S. history, however, the Government has often tragically strayed from the fundamental ideals of these documents, particularly in times of perceived emergency. The trend, however, has been for the Constitution to be strong enough for the rule of law to ultimately prevail.[198]

The War on Terror initiatives, however, seem more permanent in character than past Government crisis responses, and there is nothing to suggest that the special-interest detainees, or any other detainees, will be receiving any apologies, or that other, similarly situated people will be spared their experiences. This scenario, which began immediately after the attacks, seems unchanged more than three years later, even though there have been no further attacks within the U.S.[199] Moreover, the changes in detentions in general under the War on Terror, whether they relate to the special-interest detainees, the Guantanamo Bay captives, or the enemy combatants, have the potential to be more wide-ranging, long-term, and indefinite in duration than anything the U.S. has ever before seen.

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[196] William Blackstone, *Commentaries on the Laws of England*, Book One, Chapter 1, "Of the Absolute Rights of Individuals," online: LONANG Library <http://www.lonang.com/exlibris/blackstone/index.html?bla-101.htm&bla-101fn.htm&../footer.htm>[*Blackstone's Commentaries*]; partially reproduced in Kate Martin, "Secret Arrests and Preventive Detentions," in *Ashcroft: Lost Liberties*, *supra* note 16 at 75.

[197] "Text of the Magna Carta," online: The British Library http://www.bl.uk/collections/treasures/magnatranslation.html; "English Bill of Rights, 1689," online: The Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/england.htm> (criticizing the British King for, among other things, hearing cases in the Court of the King's Bench that were within the realm of Parliament alone).

[198] *David Cole, Enemy Aliens*, *supra* note 4 at 228.

[199] See e.g. *USA Patriot Act*, *supra* note 47 and accompanying discussion (regarding immigration detentions, which are permanent unless changed by Congress, or deemed unconstitutional by the Courts).

In order to understand where the special-interest detentions fit into the general constitutional scheme, it is instructive to review some aspects of the history of individual rights in the U.S., and this Chapter will explore that history.

2.2. The Declaration of Independence and Slavery

The U.S. Declaration of Independence, signed on July 4, 1776, lays out a number of simple but profound principles.[200] In his Declaration, Thomas Jefferson wrote that the then-British colonies were declaring themselves a sovereign state. In so declaring, Jefferson explained:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[201]

Even as it was written and approved by the Continental Congress, however, the Declaration of Independence was modified from its original form, to remove an express condemnation of the practice of slavery. In his original draft, Jefferson had called slavery an "execrable commerce" and listed it as one of King George III's offenses.[202] Representatives from Colonies in which slavery was practiced objected to this provision, however, and it was removed to ensure passage of the Declaration.[203] Because slaves, obviously, did not have citizenship status, it is painfully obvious that, from the very moment it began, the new Government set a precedent for depriving non-citizens of their most fundamental human rights. Few would dispute that slavery was the most appalling

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[200] The White House, "Thomas Jefferson," online: The White House <http://www.whitehouse.gov/history/presidents/tj3.html>. This event was viewed as sufficiently important that the date, July 4, remains a major national holiday – Independence Day -- in the U.S.

[201] *The Declaration of Independence: A Transcription* (4 July 1776), online: The National Archives <http://www.archives.gov/national_archives_experience/charters/declaration_transcript.html>. The Declaration of Independence is not a legal instrument in the sense of being binding on the Government, but, rather, was a statement issued to the British King George III, outlining the grievances of the new Nation, as well as the ideals on which the Nation was to be based (*ibid*).

[202] PBS, "Declarations of Independence, 1770-83," online: Public Broadcasting System http://www.pbs.org/wgbh/aia/part2/2narr3.html >; Tania Tetlow, "The Founders and Slavery: A Crisis of Conscience" (2001) 3 Loy. J. Pub. Int. L. 1 at 11; "The Lost Paragraph in the Declaration of Independence," online: AOL <http://members.aol.com/clarkweb/lost.htm>.

[203] *Ibid.*

human-rights abuse ever sanctioned by the U.S., and refusal to condemn it made a mockery of the noble ideals set out in the newly signed Declaration.

Those ideals, however, did ultimately prevail. Slavery was abolished, but not until almost 100 years later and not until after a Civil War.[204] Recognizing, albeit too late, the horrors of slavery, the U.S. ratified two Constitutional Amendments, one outlawing slavery, and the other demanding that all citizens be entitled to equal protection under the law.[205] The damage from that practice lingers even to the present day, however. Nearly 200 years after the Declaration of Independence was signed, Dr. Martin Luther King, Jr., inspired millions of people by describing the continuing gap between the Declaration's principles and the treatment of African-Americans in the U.S.:

> When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness. It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned ... I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident: that all men are created equal."[206]

2.3. The United States Constitution and National Crises

The federal law of the United States was established in the U.S. Constitution, which is the document that continues to govern today. It says:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[207]

The first three articles of the Constitution lay out the authority of the three branches of Government, as well as an elaborate system of checks and balances, designed to ensure

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[204] See United States National Archives, "Featured Documents: The Emancipation Proclamation," online: National Archives <http://www.archives.gov/exhibit_hall/featured_documents/emancipation_proclamation> (noting that even The Emancipation Proclamation only abolished slavery in States that had seceded from the Union, not for Border States that remained loyal to the Union.); U.S. Const. Amend. XIII (abolishing slavery).

[205] See U.S. Const. Amend. XII (abolishing slavery) and U.S. Const. Amend XIV (among other things, making it illegal to deprive people of "equal protection under the law.").

[206] Martin Luther King, Jr., "'I have a Dream' Address Delivered at the March on Washington for Jobs and Freedom" (28 August 1963), online: The Martin Luther King Jr. Papers Project at Stanford University <http://www.stanford.edu/group/King/popular_requests/>.

[207] U.S. Const. Art. VI, Clause 2.

that no one branch has greater power than another, and that certain duties are only given to specific, designated branches.[208]

Generally, Government actions that conflict with the Constitution are, by definition, invalid. That presumption has been taken seriously over the years by U.S. Courts, which have the power to declare laws enacted by Congress and the President to be "void" if they conflict with the Constitution.[209]

2.3.A. Habeas Corpus and the Constitution in Emergencies

Some of the "special-interest" detainees were held with no access to counsel or the courts, so, by definition, this means they were denied access to *habeas corpus* proceedings to challenge the legality of their detentions. A review of American history shows that the Courts have overwhelmingly rejected such deprivation of *habeas* relief, even in times of the gravest crisis.[210]

The notion of *habeas corpus* was one of the few individual-rights protections contained in the original Constitution.[211] Although the original Constitution did not refer to due process, *habeas corpus* has long been recognized as the vehicle through which imprisonment can be challenged if it does not comply with due-process standards.[212] In writing on the Constitution of England, Blackstone noted, regarding *habeas corpus*, that it was a protection against arbitrary detentions, which he described as "a ... dangerous

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[208] U.S. Const. Art. I-III; James Madison, *Federalist Paper 51*. Madison was a drafter of the Constitution, and subsequently President of the United States. The *Federalist Papers* were a series of articles written by him, Alexander Hamilton, and John Jay. The *Federalist Papers* were written before the Constitution had been fully ratified, in an attempt to gain support for the proposed document. "The Federalist Papers," online: University of Oklahoma Law Center <http://www.law.ou.edu/hist/federalist/> [*Federalist Papers*].

[209] As one Supreme Court Justice put it:

> An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that . . . the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus.*

Ex parte Siebold, 100 U.S. 371, 376-77 (1880). This principle has been applied in some aspects of the War on Terror. For example, a federal trial court judge recently ruled that a specific provision of the Patriot Act was unconstitutional. *Doe v. Ashcroft*, 334 F. Supp. 2d 471 at 476 (2004); Associated Press, "Ashcroft Likely to Appeal Patriot Ruling," *FindlawNews* (30 September 2004), online: Findlaw.com <http://news.findlaw.com/ap_stories/a/w/1152/9-30-2004/20040930063008_44.html>. The precedential effect of such a ruling depends on the level of the Court, with such a ruling by the U.S. Supreme Court being binding on all federal districts. See generally U.S. Const. Art. III, Section 2, Clause 1.

[210] See e.g. Sections 2.3.A.1. and 2.3.A.2., below.

[211] U.S. Const. Art. I, Section 9, Clause 2.

[212] Karen M. Marshall, "Tribute to Dean Stanley A. Samad: Note: Finding Time for Federal *Habeas Corpus*: Carey v. Saffold," (2004) 37 Akron L. Rev. 549 at 555, n. 22.

engine of arbitrary government." Yet, he acknowledged that certain emergency situations might warrant suspending *habeas corpus*, but pointed out how critical it was that the power to suspend it never rest with the "executive."[213]

Alexander Hamilton cited Blackstone to explain why the power to suspend the writ of *habeas corpus* is reserved only for specified emergencies, and is a power given only to Congress, not to the President. He observed that "... the practice of arbitrary imprisonments, ha[s] been, in all ages, the favorite and most formidable instrument of tyranny."[214] Specifically, the Constitution says that the writ of *habeas corpus* shall not be suspended, except "when in Cases of Rebellion or Invasion the public Safety may require it."[215]

U.S. history has provided some famous examples in which Presidents have infringed on *habeas* rights in a time of emergency.[216] One such case involved Abraham Lincoln, who formally suspended *habeas corpus* during the U.S. Civil War. More recently, President Bush, while never formally suspending *habeas corpus,* denied access to such proceedings for certain detainees in the War on Terror. The U.S. Supreme Court looked at both of these situations, greatly separated by time, but not greatly separated in outcome. Read together, these decisions present parameters on the Government's authority to limit *habeas* review even under a proclaimed national emergency.

2.3.A.1. Abraham Lincoln and the Civil War

In 1861-62, during the U.S. Civil War, the Confederate Army was camped across the Potomac River from Washington, D.C., and President Lincoln could see them from the White House.[217] His apparent perception of danger to the Union must have been aggravated by the fact that many in Washington, D.C., itself, were highly sympathetic to the Confederate cause.[218] In 1862, Lincoln's Secretary of War issued an executive order,

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[213] *Blackstone's Commentaries*, *supra* note 196.
[214] Alexander Hamilton, *Federalist Papers*, *supra* note 208, No. 84.
[215] U.S. Const. Art. I, Section 9, Clause 2.
[216] The detentions of more than 110,000 people of Japanese descent also provide such an example. That scenario, however, had some unusual procedural steps in terms of the U.S. Courts, and it is more fully discussed in Section 2.4.2., below.
[217] Kenneth C. Davis, *Don't Know Much About the Civil War* (William Morrow & Co.: New York 1996) at 181.
[218] *Ibid.*

suspending the writ of *habeas corpus* for "persons arrested for disloyal practices."[219] Subsequent orders established military commissions to try such people. Almost a year later, Congress authorized Lincoln to suspend the writ when necessary.[220] The Congressional authorization also gave Lincoln broad detention powers.[221]

Lambdin P. Milligan was convicted of treason before a military commission and sentenced to death. His case came before the U.S. Supreme Court, where the Government argued it had authority to try civilians before military commissions because of the suspension of *habeas corpus*.[222] The Court rejected the Government's assertion, saying that the Constitution still applied during wartime, and that a claim of necessity is not adequate to allow for suspension of the writ:

> [T]he theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority. [223]

The Court went on to discuss the risks of such a precedent:

> This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.[224]

The Court finally concluded that martial law was only appropriate in actual case of warfare in the area where the martial law was applied, and only for a finite period of time. Thus, it could have been appropriate in Virginia, where the legitimate Government had been overthrown, but it was not appropriate in Indiana, where Milligan was tried, because there was no imminent threat of invasion in Indiana, and the courts there were "open, and in the proper and unobstructed exercise of their jurisdiction."[225]

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[219] Major Kirk L. Davies, "The Imposition of Martial Law In The United States" (2000) 49 A.F. L. Rev. 67 at 96.
[220] *Ibid.*
[221] *Ibid.*
[222] *Ibid.*
[223] *Ex parte Milligan*, 71 U.S. 2 at 121 (1866)[*Milligan*].
[224] *Ibid.* at 125. Regarding the viability of military commissions to try civilians, some controversy has existed since *Milligan* as to the extent of that ruling. Because, however, the *Milligan* proclamations regarding *habeas* remain undisturbed, that controversy need not be addressed herein. See e.g. *Ex parte Quirin*, 317 U.S. 1 (1942).
[225] *Milligan, supra* note 223 at 127.

2.3.A.2. The War on Terror Cases

2.3.A.2.a. Rasul v. Bush

The U.S. Supreme Court has not to date reviewed the status of the "special-interest" detainees.[226] It has, however, examined the Government's arguments in favor of suspending court review for other War on Terror detainees.[227] In *Rasul v. Bush*, the Supreme Court considered the *habeas* requests of several detainees being held at the Guantanamo Bay Naval Base in Cuba. The Government had designated these detainees as "enemy combatants," not entitled to the protections of the Geneva Conventions. Moreover, because the detainees were being held outside U.S. borders, and because they had been called "enemy combatants," the Government argued that they were not entitled to any review in U.S. courts.[228] A lower court had agreed, dismissing the *habeas* petitions brought by some of the detainees, saying U.S. Courts lacked jurisdiction to hear the cases because the detainees were outside of U.S. Borders.[229] The detainees were separated into two groups for the court proceedings. The first group had filed *habeas* petitions, "seeking release from custody, access to counsel, freedom from interrogations, and other relief." The second group had also sought *habeas* relief, "seeking to be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal."[230]

In June 2004, the Supreme Court ordered that the petitioners be granted the right to seek *habeas* review of their detentions.[231] Justice Stevens, writing for the majority, reaffirmed that the basis of *habeas* relief has always been to protect against "arbitrary Executive detentions."[232]

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[226] The Court generally reviews rulings of lower courts, so this is the vehicle for bringing a matter to the Court's attention. One case involving the special-interest detainees was brought before the Court on an application for writ of *certiorari*, but the Court declined to hear the case. *North Jersey Media Group*, *supra* note 38. It is notable, however, that this case was not brought by one of the detainees, and did not challenge the actual detentions. Rather, it was brought by a newspaper group asserting a violation of its own First Amendment right to freedom of the Press because of the secret nature of the special-interest proceedings (*ibid*).
[227] *Rasul*, *supra* note 97.
[228] *Ibid.* at 2690-93.
[229] *Ibid.* at 2691-92.
[230] *Ibid.* at 2691.
[231] *Ibid.* at 2699.
[232] *Ibid.* at 2692.

As to Guantanamo Bay, the Government had argued that it did not have "sovereign jurisdiction" over the area, so the people held there were not within U.S. territory, and, thus, not entitled to relief from the U.S. Courts.[233] The Court noted a dispute rising from the earlier *Johnson v. Eisentrager* case, in which there was a question as to whether petitioners held outside of U.S. jurisdiction had a constitutional right to *habeas* relief, noting that, regardless of a constitutional right to relief, the *habeas* statute, revised since the *Eisentrager* days, provided a statutory right to relief.[234] The Court pointed out that the Government had conceded that *habeas* relief would apply to any U.S. citizen held at Guantanamo Bay. It therefore noted:

> Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.[235]

The Court concluded that, because the petitioners claimed they were being held in violation of the Constitution and laws of the United States, and U.S. Courts had jurisdiction over the custodians, the requirements for *habeas* relief had been met.[236] The Court also noted that "[t]he courts of the United States have traditionally been open to nonresident aliens."[237]

In his concurring opinion, Justice Kennedy noted the problematic nature of claiming that a national crisis necessitates indefinite detentions:

> Indefinite detention without trial or other proceeding ... allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of *habeas corpus*. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.[238]

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[233] *Ibid.* at 2693.
[234] *Ibid.* at 2695 (citing *Johnson v. Eisentrager, 339* U.S., at 777, 94 L. Ed. 1255, 70 S. Ct. 936.). The Court also factually distinguished the *Johnson* case, which involved German combatants convicted in a tribunal in China, who subsequently sought and were denied *habeas* relief, noting that those people had received judicial process and were undeniably combatants. Moreover, the Court noted that the Guantanamo detainees were not nationals of any country with whom the U.S. was at war, and had been held for over two years in territory over which the U.S. had sole control. (*ibid.* at 2693).
[235] *Ibid.* at 2696.
[236] *Ibid.* at 2698.
[237] *Ibid.*
[238] *Ibid.* at 2700 (Kennedy J, concurring).

2.3.A.2.a.1. Responses to Rasul v. Bush

Ashcroft responded by saying that the Court had given new rights to terrorists.[239] Nine days after the ruling, the Government created the "Combatant Status Review Tribunals," which were designed to provide a forum for the detainees to seek review of their status.[240] Like the Military Commissions created shortly after the terrorist attacks, these Tribunals are extra-judicial bodies, which do not allow for those brought before it to seek relief in United States federal courts.[241] In creating these tribunals, the Government noted that the detainees had already been deemed "enemy combatants" through the Department of Defense, and that the Tribunals were designed to confirm those determinations.[242]

The constitutional validity of these tribunals is currently under dispute before the U.S. Courts, and, to date, two courts have issued conflicting rulings. In January 2005, in *Khalid v. Bush*, a federal district judge dismissed the *habeas* petitions brought by a number of Guantanamo detainees, pursuant to *Rasul*, saying there was no "viable legal theory" under which they could be granted relief.[243] In so ruling, the Judge concluded that "non-resident aliens detained under these circumstances have no rights under the Constitution," and also concluded that no law renders the detentions illegal, that there was no treaty prohibiting the detentions, and that international law did not apply.[244] The Court concluded that the *Rasul* decision had only been limited to the question of whether U.S. District Courts had jurisdiction to hear *habeas* petitions, not whether the detainees had underlying constitutional rights to be protected in such proceedings.[245]

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[239] Catherine Wilson, "Ashcroft: Supreme Court giving more rights to terrorists," *Associated Press* (30 June 2004), online: Herald.com <http://www.miami.com/mld/miamiherald/news/state/9049330.htm?1c>.
[240] *In re Guantanamo Detainee Cases, Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law*, Case Numbers Omitted, *Classified Version for Public Release* (D.C.Cir. 2005)(explaining the history of the Combatant Status Review Tribunals), available online at <http://www.dcd.uscourts.gov/02-299b.pdf> [*In re Guantanamo Detainee Cases*].
[241] United States Department of Defense, "Combatant Status Review Tribunal Order Issued" (7 July 2004), online: United States Department of Defense <http://www.defenselink.mil/releases/2004/nr20040707-0992.html> [*DOD CSRT Statement*].
[242] United States Department of Defense, "Order Establishing Combatant Status Review Tribunal" (7 July 2004), online: United States Department of Defense <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.
[243] *Khalid v. Bush*, Civil Case No. 1:04-1142, Memorandum Opinion and Order (D.C. Cir. 2005), at 2 [*Khalid*].
[244] *Ibid.* at 2.
[245] *Ibid.* at 20.

Two weeks later, another court in the same federal district reached the opposite conclusion. In *In re Guantanamo Detainee Cases*, the Court denied the Government's motion to dismiss, ruling that the detainees whose *habeas* petitions were before it had stated valid claims under the U.S. Constitution, and that their classification as "enemy combatants" and indefinite detentions breached their right to "due process of law." [246] The Court also ruled that some of the detainees had stated valid claims under the Third Geneva Convention.[247] The Court further found the Combatant Status Review Tribunals unconstitutional, in part because of due-process abridgements in the Tribunals, and in part based on different issues specific to the various cases.[248] The ruling includes transcript excerpts, in which detainees asked, during Tribunal proceedings, to know what evidence was being used against them, and in which these requests were denied.[249] The opinion is also striking in that large portions of it are blacked out, evidently because the discussion therein concerns classified information relating to national security.[250]

The Court agreed that granting constitutional rights to the detainees might make it more difficult for the Government to pursue its War on Terror, but noted:

> Of course, it would be far easier for the government to prosecute the war on terrorism if it could imprison all suspected "enemy combatants" at Guantanamo Bay without having to acknowledge and respect any constitutional rights of detainees. That, however, is not the relevant legal test. By definition, Constitutional limitations often, if not always, burden the ability of government officials to serve their constituencies. Although this nation unquestionably must take strong action under the leadership of the Commander in Chief to protect itself against enormous and unprecedented threats, that necessity cannot negate the existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years.[251]

The Court rejected the Government's contention that the detainees should be deprived of due process because they had been deemed terrorists, noting "[t]he purpose of imposing a due process requirement is to prevent mistaken characterizations and erroneous detentions, and the government is not entitled to short circuit this inquiry by

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[246] *In re Guantanamo Detainee Cases*, *supra* note 240.
[247] *Ibid.*
[248] *Ibid.* at 44-45.
[249] *Ibid.*
[250] See e.g. *ibid.* at 49-53.
[251] *Ibid.* at 37 (citing with approval *Milligan*, supra note 223; and *United States v. Robel*, 389 U.S. 258 at 264 (1967)(including the quotation: "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile.").

claiming *ab initio* that the individuals are alleged to have committed bad acts."[252] In making her ruling, the Judge noted she was previously the Chief Judge of the U.S. Foreign Intelligence Surveillance Court, and was aware of the risk of terrorist threats, and she noted that a balance must be struck between preventing innocent people from being detained, and allowing the Executive and Military to protect national security.[253] Because of the conflict between the two rulings, the Judge granted the Government leave to immediately appeal her ruling.[254]

2.3.A.2.b. Hamdi v. Rumsfeld

On the same day that it decided *Rasul*, the Supreme Court decided a second case, which involved another aspect of indefinite detention and *habeas* review. In the *Hamdi*, case, a U.S. citizen, who was living outside of the country, was held, within the United States, for almost three years, with no charges, no lawyer, and no court proceeding, after the President had designated him an "enemy combatant."[255]

The Supreme Court was more fractured on this case and issued a plurality decision.[256] The Plurality concluded that the Congressional authorization for the use of force after the terrorist attacks allowed for the "detention of combatants in the narrow circumstances alleged here, [but] 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."[257]

The Plurality went to great lengths to narrowly tailor its decision to the facts of the *Hamdi* scenario, and to give leeway to the President in detaining citizens as

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[252] *Ibid.* at 40.
[253] *Ibid.*
[254] Associated Press, "Judge Gives OK for Detainees to See Papers," *MSNBC Wire Service*, online: MSNBC <http://www.msnbc.msn.com/id/6293039/>. In the same day's rulings, the Judge also granted the detainees access to classified documents relating to their detentions. Although she stayed the underlying proceedings pending the appeal, she did not stay that portion of her order. (*ibid*). In the other case, the Judge had dismissed the *habeas* petitions of several other detainees. *Khalid, supra* note 243.
[255] *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) [*Hamdi*].
[256] *Ibid.* at 2633. A "plurality" decision is one in which a majority of the Court joins in the ruling, but a majority does not agree on the reasonings for the ruling. In this case, four justices agreed with the decision of the Court, three agreed with an opinion concurring in part, dissenting in part, and concurring in the judgment, and two dissented. A plurality ruling is binding as to the parties before the Court, but is questionable in terms of precedential value. Ken Kimura, "Note: A Legitimacy Model for the Interpretation of Plurality Decisions, (1992) 77 Cornell L. Rev. 1593 at 1595-96.
[257] *Hamdi, supra* note 255 at 2633.

combatants. The Court concluded, at the outset, that the Congressional authorization for the use of military force authorized Hamdi's initial detention.[258]

Having justified Hamdi's initial detention, however, the Plurality turned to the potentially indefinite nature of the War on Terror, and the fact this meant Hamdi could face "perpetual detention."[259] It agreed with Hamdi that indefinite detention for the purpose of interrogation was not permissible.[260] The Plurality also pointed out that all parties conceded the writ of *habeas corpus* had not been suspended. The Court also rejected the argument that Hamdi's status as an enemy combatant could be accepted as a matter of law, without him having the opportunity to combat his status as a combatant.[261]

The Court then compared the competing interests of a government at war, and the individual interests of people like Hamdi, and noted "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[262] It concluded, then, that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker ... These essential constitutional promises may not be eroded."[263] The Plurality conceded that initial battlefield captures did not require this due process, but that it was necessary after the decision was made to continue the detentions.[264] Finally, the Plurality noted, without explaining, that the circumstances of this case might justify shifting burdens of proof or otherwise changing traditional due process protections.[265] But, it added, "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[266]

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[258] *Ibid.* at 2639.
[259] *Ibid.* at 2640-41.
[260] *Ibid.* at 2641.
[261] *Ibid.* at 2644.
[262] *Ibid.* at 2648.
[263] *Ibid.* (citations omitted).
[264] *Ibid.* at 2649.
[265] *Ibid.* at 2650.
[266] *Ibid.*

Justice Antonin Scalia wrote a surprising dissent to this ruling. Justice Scalia has long been known as exceptionally conservative, and as a strict constructionist of the Constitution. That day, for example, he had strongly dissented to the Supreme Court's granting of *habeas* rights to Guantanamo detainees. When discussing Hamdi, however, Justice Scalia disputed the Plurality's conclusion that initial detention of Hamdi as an enemy combatant was justified, and he disagreed with the Government's actions in much stronger terms than those used by the Plurality. Justice Scalia argued that, when the Government accuses a citizen of waging war against it, it has three options. The first is to try the citizen for treason. The second is to properly suspend the writ of *habeas corpus*. The third is to release the citizen. The Constitution, he argued, allows for no further possibility.[267] Justice Scalia also noted "[i]t is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing."[268] Justice Scalia continued:

> If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.
>
> .....
>
> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis -- that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.[269]

The unusual nature of the War on Terror detentions was illustrated during oral arguments, when one of the Justices asked Hamdi's lawyer a question about the Government's allegations.[270] The lawyer told the Justice he could not respond to the Court's question, because the Government had deemed the information his client had given him to be classified.[271]

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[267] *Ibid.* at 2660 (Scalia, J., dissenting).
[268] *Ibid.*at 2662 (Scalia, J., dissenting).
[269] *Ibid.* at 2674 (Scalia, J., dissenting).
[270] Anthony Lewis, "Bush and the Lesser Evil," *The New York Review of Books* (27 May 2004), online: The New York Review of Books <http://www.nybooks.com/articles/17111>. [*Lewis/Ignatieff*].
[271] *Ibid.*

The Supreme Court remanded the case to the lower court for consideration of Hamdi's *habeas* petition. It never made it before a court for hearing, however, because the Government decided, instead, to release Hamdi. The Government had held him for almost three years, saying that holding him with virtually no due process was necessary to protect state secrets and to protect the national safety. When ordered to grant Hamdi a hearing, however, the Government concluded that "considerations of United States national security did not require his continued detention."[272] Three months after the Supreme Court ruled, and almost three years after his initial detention, Hamdi was released. He was sent to Saudi Arabia, restricted in his travel, and required to renounce his U.S. citizenship.[273] Apparently, there was a delay in his release, because, according to Hamdi's lawyer, "[t]he Saudis were wondering why there were all these restrictions on someone who was never charged with anything,"[274]

2.3.A.2.c. Padilla v. Rumsfeld and Bush v. Gherebi

The Court declined to rule in two other *habeas* cases. The first, *Padilla v. Rumsfeld*, was sent back to the lower courts, because it was determined that Padilla, another citizen being held as an enemy combatant, had improperly named his custodian in his *habeas* petition.[275] This time, it was Justice Stevens, who had written the majority opinion in the *Rasul* case, who wrote an outraged dissenting opinion. Joined by three other Justices, he scolded the Court for avoiding the issue. He noted that the case raised issues of "profound importance to the Nation. The arguments set forth by the Court do

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[272] United States Department of Defense, "Transfer of Detainee Control Completed," News Release (11 October 2004), online: United States Department of Defense <http://www.defenselink.mil/releases/2004/nr20041011-1371.html>.

[273] Jerry Markon, "Hamdi Returned to Saudi Arabia," *Washingtonpost.com* (12 October 2004), online: The Washington Post < http://www.washingtonpost.com/wp-dyn/articles/A23958-2004Oct11.html>.

[274] *Ibid.*

[275] *Rumsfeld v. Padilla*, 124 S. Ct. 2711 at 2766 (2004) [*Padilla*]. In a later ruling relating to the Guantanamo detainees, a federal district judge noted that the term "enemy combatant" was never formally defined until after the Supreme Court decisions, when the Government created its Combatant Status Review Tribunals, discussed in detail at Section 2.3.2.a.1, above. *In re Guantanamo Detainees, supra* note 240. The Government then formally announced that "enemy combatant"

> [s]hall mean an individual who was part of or supporting Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."

(*ibid*) (quoting CSRT order). The District Court hearing the Guantanamo cases noted that this definition was much broader than the one considered by the Court in the *Rasul* case. (*ibid.* at 60). In response to hypothetical questions from the District Court, the Government asserted it could hold, among others, as an "enemy combatant," "a little old lady" in Switzerland who wrote a check to a charity that helps Afghan orphans, but really supports terrorism (*ibid.* at 61).

not justify avoidance of our duty to answer those questions ... this is an exceptional case that we clearly have jurisdiction to decide."[276] He added:

> At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.
>
> Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.[277]

Padilla, who, like Hamdi, is an American citizen being held as an "enemy combatant," has continued his court battle in the lower federal courts.[278]

Based on its ruling in the *Padilla* case, the Supreme Court also declined to decide another Guantanamo Bay case, *Bush v. Gherebi*, based on similar questions relating to the form of the action.[279] The case was remanded to a lower court to reconsider its grant of *habeas* relief, in light of the *Padilla* ruling. On remand, the appellate court for the Ninth Circuit reinstated its original decision.[280] In its initial opinion, the Court had noted:

> However, even in times of national emergency - indeed, particularly in such times - it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike. Here, we simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement. We hold that no lawful policy or precedent supports such a counter-intuitive and undemocratic procedure ... In our view, the government's position is inconsistent with

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[276] *Padilla, ibid.* at 2729-30 (Stevens, J., dissenting).
[277] *Ibid.* at 2735.
[278] CBS News, "'Combatant' Padilla Sues Again," *CBS News* (6 July 2004), online: CBSNews.com <http://www.cbsnews.com/stories/2004/06/29/terror/main626584.shtml>.
[279] *Bush v. Gherebi*, 124 S. Ct. 2932 (2004)[*Gherebi*].
[280] *Bush v. Gherebi*, 2004 U.S. App. LEXIS 14094 (reinstating *Gherebi v. Bush*, 352 F.3d 1278 with some revisions), online: LEXIS <https://www.lexis.com/research/retrieve/frames?_m=c91d3f19dbd0820e881055778174587c&csvc=le&cform=&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAl&_md5=1acbda98b85a02478539fe3fb4d63039>.

fundamental tenets of American jurisprudence and raises most serious concerns under international law.[281]

2.3.A.3. Habeas Corpus in Immigration Cases

Habeas corpus recourse is generally available to challenge immigration detentions, although the parameters of that right have often been disputed.[282] For example, in January 2005, the United States Supreme Court resolved differing outcomes in two cases, and granted the *habeas corpus* petitions of two Cuban nationals who had been detained beyond the allowable period after being ordered deported, saying they should be released from custody.[283] It is somewhat of a common reaction, in times of national crisis, for the rights of immigrants to *habeas* and other protections to be set aside as a first response. This phenomenon occurred after the Oklahoma City bombings, even though none of the people ultimately found responsible for it were even immigrants.

2.3.A.3.a. Oklahoma City Bombing

After the Oklahoma City bombing, legislation was passed limiting court reviews, and increasing the Government's ability to deport immigrants who have been convicted of certain crimes. The most prominent piece of legislation, the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, eliminated a specific *habeas* provision relating to deportation decisions for these so-called "criminal aliens."[284] Arguably, however, the general *habeas corpus* statute would still provide a remedy for such people, although the federal courts have disagreed as to whether this is the case, and the Supreme Court made a rather complex statement, generally asserting that it was available.[285] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), passed around the same time, also limited judicial review for criminal aliens, but retained some measure of review as to whether an alien fit that category in the first place.[286] One

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[281] *Gherebi v. Bush*, 352 F.3d 1278 at 1283 (9th Cir. 2003).
[282] *Zadvydas* v. *Davis*, 533 U.S. 678 at 685 (2001)(citing the Federal *Habeas Corpus* statute, 28 U.S.C. § 2241 as conferring on the Court jurisdiction to hear the challenge to the immigration detentions in post-removal-order cases) [*Zadvydas*]; *INS* v. *St. Cyr*, 533 U.S. 289 at 360, 362 (2001)(noting that the U.S. Constitution's Suspension Clause, which protects the writ of *habeas corpus* requires some "judicial intervention" in deportation cases)[*INS v. St. Cyr*]; U.S. Const. Art. I, Section 9.
[283] *Clark v. Martinez*, 125 S. Ct. 716 at 719 (2005)[*Clark*].
[284] *Antiterrorism and Effective Death Penalty Act*, Pub. L. No. 104-132, 110 Stat. 1214 (amending sections of 8, 18, 22, 28, 40, and 42 U.S.C.)[*Antiterrorism and Effective Death Penalty Act*].
[285] *Zadvydas*, *supra* note 282.
[286] See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 8 U.S.C. 1229a (2003) [*Illegal Immigration Reform and Immigrant Responsibility Act of 1996]*; *Magana-Pizano* v. *INS*, 152 F.3d

notable change brought about by these statutes is that they changed the definition of whether an immigrant is deemed admitted: an alien who enters the country illegally is now deemed not to have been admitted yet, and, thus, would be subject to proceedings barring admission, with lowered due-process safeguards, rather than to a deportation proceeding, with its heightened protections.[287]

Generally speaking, even though immigrant populations are often targeted in times of perceived crisis, there are limitations on the measures that can be taken. For instance, even in the times of the greatest national crisis, *habeas* rights are almost never suspended, and when those rights are abridged, they are inevitably found to have been improperly curtailed.[288] According to the Constitution, even Congress' ability to suspend the writ is extremely tailored. To the extent that the Oklahoma City statutes allow for infringements on the writ, without meeting the circumstances laid out in the Constitution, they are arguably unconstitutional.[289] It remains to be seen whether the Courts will agree.

2.3.B. Due Process Under the Law

The constitutional notion of due process comes from the Fifth Amendment within the Bill of Rights, which lays out several prohibitions relating to fair judicial proceedings, and, as to due process, says "no person shall ... be deprived of life, liberty, or property, without due process of law."[290] This requirement to protect due process, applied to the federal government through the Fifth Amendment, also extends to State governments through the Fourteenth Amendment, which says " ... nor shall any State deprive any

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1213 at 1216 (9th Cir. 1998), *amended* 159 F.3d 1217 (9th Cir. 1998). As the Supreme Court recently explained, this Act changed the immigration terminology. Where, before, an alien found "excludable" could be ordered "deported," the terminology now is such that the alien would be found "inadmissible" and ordered "removed." *Clark, supra* note 283 at 721-22.

[287] *Illegal Immigration Reform and Immigrant Responsibility Act of 1996, ibid.*

[288] See discussion of rare circumstances under which the Writ has been suspended in *Hamdi, supra* note 255 at 2643.

[289] See generally Alison Holland, "Note: Across the Border and Over the Line: Congress's Attack on Criminal Aliens and the Judiciary Under the Antiterrorism and Effective Death Penalty Act of 1996," (2000) 27 Am. J. Crim. L. 385 at 385 (discussing problems with the judicial-review limitations in these statutes). The Supreme Court did suggest, in *dicta* to one of its rulings, that Congress could suspend *habeas* relief in certain such cases, if it provided a "particularly clear statement" that it intended to do so. Because the Court did not find that to be the case in that decision, and did not explain the circumstances under which such a finding would occur, and additionally because the statement was made in a fractured opinion, it is not clear that this statement is definitive as to *habeas* rights of aliens held in detention as criminal aliens. *Demore v. Hyung Joon Kim*, 538 U.S. 510 at 516 (2003)[*Demore*].

[290] U.S. Const. Amend. V.

person of life, liberty, or property, without due process of law."[291] The Constitution contains no express provision for suspending due process, even in an emergency.

The Court has expressly rejected necessity, on its own, as a basis for overriding due-process guarantees. In *Chambers* v. *Florida*, the U.S. Supreme Court ruled that abusive interrogation techniques invalidated subsequent confessions under the Due Process Clause. The *Chambers* Court rejected the Government's argument that such techniques were necessary, noting that necessity was not a permissible basis for overriding constitutional due-process guarantees.[292] The Court pointed out that "[n]o higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution -- of whatever race, creed or persuasion."[293] A later Supreme Court Justice defined due process as the "protection of ultimate decency in a civilized society."[294]

Although the specific reference to due process is found within the 5th and 14th Amendments, the general concept is considered to include provisions from other Amendments, such as the right to a speedy trial, the right to an attorney, or the right to be free of excessive bail.[295] The Supreme Court has also included other protections, not expressly mentioned in the Bill of Rights, as part of constitutionally required due process. For example, a criminal defendant is presumed innocent until proven guilty.[296] Moreover, the right to a fair trial has been deemed a "fundamental right" by the Supreme Court, meaning that any possible deprivation of that protection must be subjected to "strict

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[291] U.S. Const. Amend. XIV. In general, the Fourteenth Amendment incorporates the provisions of the Bill of Rights, applicable to the Federal Government, and applies them to State Governments as well. It should be noted, however, that while it is widely assumed that the 14th Amendment requires the States to follow the mandates of the Bill of Rights, this is by no means settled, and there has been some controversy about this position. See e.g. Hilary Salans, "Book Review: 'No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights,'" (1987) 38 Hastings L.J. 1023. Because that general point does not have to be established for the purpose of this thesis, the controversy is simply noted for informational purposes.

[292] *Chambers* v. *Florida*, 309 U.S. 227 at 240-41 (1940).

[293] *Ibid.* at 241.

[294] Kevin E. Broyles, "Contents: NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan," (1995) 46 Ala. L. Rev. 487 at 548 (quoting *Adamson* v. *California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring)).

[295] U.S. Const. Amend. VI, XIII.

[296] *Estelle* v. *Williams*, 425 U.S. 501 at 503 (1976)(finding that requiring a criminal defendant to wear prison clothing to his trial unconstitutionally undermined the presumption of innocence).

scrutiny" by the Courts.[297] Defendants have a right to a public trial.[298] A defendant must be given a fair opportunity to present a defense.[299] This right to a defense includes "as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."[300] Criminal defendants who cannot afford to pay for counsel must have free assistance of counsel.[301] Moreover, a defendant held in custody must be informed of his or her right to remain silent, and of the right to counsel, or any statements made are deemed inadmissible at trial.[302] Proof of guilt must be under the highest standard of "beyond a reasonable doubt" to satisfy due process.[303]

The right to due process in a criminal proceeding is not limited to U.S. citizens. Several high-profile terrorism prosecutions, brought before September 11th, involved non-citizen defendants, and the procedures were indistinguishable from those followed in cases involving citizens. For instance, Ahmed Ressam, the so-called "millennium bomber" was not a U.S. citizen or even a U.S. resident, and he had technically never been admitted to the U.S. He had been stopped at the U.S.-Canadian Border, after trying to enter the U.S. with a truckload of explosives, supposedly to be used to blow up the Los Angeles Airport at the start of the millennium celebrations in 2000. He was arrested and criminally convicted in the U.S. with full due-process protections.[304]

2.3.B.1. Due Process and National Security

Governmental concerns over national security, and the risks inherent in disclosure of information related to national security, are not new and certainly pre-date September 11th. For example, in response to concerns that classified information would become public if used in criminal trials, the Government had enacted the Classified Information Procedures Act.[305] Under the Act, which is still active law, defendants in criminal

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[297] *Ibid.*
[298] *In re Oliver*, 333 U.S. 257 at 267-68 (1948).
[299] *Ibid.* at 273-74.
[300] *Ibid.* at 273.
[301] *Gideon* v. *Wainwright*, 372 U.S. 335 at 344 (1963).
[302] *Miranda* v. *Arizona*, 384 U.S. 436 at 466 (1966).
[303] *In re Winship*, 397 U.S. 358 at 363-64 (1970)(holding that the due process clause requires proof beyond a reasonable doubt of every element of the charged offense).
[304] PBS Frontline, "Trail of a Terrorist: Ahmed Ressam's Millenium Plot" (2001), online: Public Broadcasting Service <http://www.pbs.org/wgbh/pages/frontline/shows/trail/inside/cron.html>.
[305] Major Joshua E. Kastenberg, "Analyzing the Constitutional Tensions and Applicability of Military Rule of Evidence 505 in Courts-Martial Over United States Service Members: Secrecy in the Shadow of

proceedings were allowed access to the classified information, but subject to protective orders barring release of the information.[306] A Federal District Court considered this provision in ruling that a protective order was valid when the Prosecution had provided the Defendant with evidence it planned to use at trial, and the evidence was classified. The protective order included, among other things, a requirement that the Defense counsel's staff members (but not defense counsel or the defendant) have an appropriate security clearance, the documents could only be read in a specified location, and strict limitations were placed on access for everybody except defense counsel.[307] In other cases, courts have found *ex parte* and *in camera* proceedings between the Judge and the Prosecutor valid in determining the relevancy of information claimed to be classified, as well as to determine the need for protective measures.[308] Procedures such as this were often used in terrorism prosecutions before September 11, 2001.[309]

2.3.B.2. Due Process in Immigration Proceedings

The U.S. Supreme Court has held that aliens present in the U.S. are entitled to the due-process protections of the Fifth and Fourteenth Amendments.[310] That is the case regardless of whether the alien's presence in the U.S. "is unlawful, involuntary, or transitory."[311] In so stating, however, the Supreme Court also said that aliens are not necessarily entitled to all of the benefits of citizenship, noting that the entire immigration law is premised on the assumption that aliens are not treated exactly the same way as

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Lonetree" (2005) 55 A.F.L. Rev. 233 at 233 (discussing *Classified Information Procedures Act*, 18 U.S.C. App. § 3 1-16 (1982) and comparing it to a similar rule in the military court-martial rules).

[306] *Classified Information Procedures Act*, 18 U.S.C. App. § 3 1-16 (1982).

[307] *United States v Musa*, 833 F Supp 752 at 755-58 (E.D. Mo. 1993).

[308] See e.g. *United States v. Klimavicius-Viloria*, 144 F.3d 1249 at 1261 (9th Cir. 1998).

[309] Sam A. Schmidt and Joshua L. Dratel, "Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions" (2003/2004) 48 N.Y.L. Sch. L. Rev. 69 (discussing Schmidt's role in defending one of those accused in the 1998 U.S. Embassy bombings in Tanzania and Kenya. Dratel is presently representing David Hicks, an Australian national detained at Guantanamo Bay). In describing the barriers imposed by the Classified Information Procedures Act, the authors caution:

> If the court appears reluctant to afford counsel adequate rein over classified material, counsel should always be quick to remind the court that CIPA does not change the laws of discovery. For example, material's classified status does not make it less discoverable or admissible. A court should also be reminded that CIPA is not supposed to place the defendant in any worse position than he or she would be absent the classified status of the unavailable evidence (*ibid*).

[310] *Mathews v. Diaz*, 426 U.S. 67 at 77 (1976).

[311] *Ibid.*

citizens.[312] The Court also noted, in the same decision, that various federal laws allow immigrants to be treated differently among themselves.[313] Congress has "plenary" authority over immigration policy, which the Courts are traditionally reluctant to disturb. And, since the treatment of immigrants relates, the Court reasoned, to foreign policy, it is a matter, in general, best left to the Executive or Legislative branches.[314] Thus, the Courts would have a limited role in reviewing actual immigration decisions of Congress or the President, so, for example, admission decisions based on things like national origin are generally not reviewed by the Courts.[315]

That general reluctance to review immigration matters, however, does not apply to the constitutionality of immigration procedure itself.[316] Particularly where matters of due process are at issue, the Courts will review the actions of the other branches, in a manner that is not deferential to the other branches' authority.[317] Moreover, the Courts have upheld a long-standing policy that immigration proceedings are open to the public, even in those cases in which a great deal of power was left to the other branches. In a now-controversial case involving Chinese immigrants, discussed in more detail later in this Chapter, the Supreme Court said:

> The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race ... For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than of the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.[318]

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[312] *Ibid.* (citing Title 8 *U.S.C.* and a variety of other federal statutes allowing for disparate treatment of aliens in things like the provision of health benefits and employment).
[313] *Ibid.*
[314] *Ibid.*
[315] *Ibid.*
[316] *Zadvydas*, *supra* note 282 at 689, 693 (holding that the indefinite detention of aliens ordered deported, but unable to be deported because the countries of deportation would not accept them, was an unconstitutional deprivation of Due Process).
[317] Rebekah J. Kennedy, "Case Note: *Detroit Free Press* v. *Ashcroft* & *North Jersey Media Group* v. *Ashcroft*: Enduring Freedom: Can Post-September Eleventh Closure of 'Special Interest' Deportation Hearings Withstand First Amendment Scrutiny?" (2004) 57 Ark. L. Rev. 171 at 179-80 (and accompanying cases).
[318] *Kwock Jan Fat v. White*, 253 U.S. 454 at 464 (1920).

Deportation proceedings are not intended to be punitive, so they are considered civil, rather than criminal, thus justifying fewer due process protections.[319] The Supreme Court has generally noted that it is "well-settled" that due process protections apply to aliens in deportation proceedings.[320] The specific nature of that due process, however, differs significantly from criminal proceedings. One commentator recently summed up the current due-process standards for immigration proceedings as follows:

> Unlike criminal defendants, noncitizens in immigration proceedings do not enjoy a presumption of innocence, and silence may be used against them. There is no grand jury, no right to appointed counsel, no speedy trial guarantee, no jury trial and increasingly, no right to release on bond pending trial or removal. The exclusionary rule does not apply, and immigration regulations may be applied retroactively, without violating the Ex Post Facto Clause. Although Fifth Amendment due process rights apply in theory, the protections are minimal at best. The rules of evidence do not apply, and the government may use secret evidence against the noncitizen. Moreover, the government has tried, with some success, to close proceedings to the public.[321]

The reason for the differences in due process is related to the purpose for each system. The purpose of the criminal justice system, put simplistically, is to punish past offenses, and to possibly deter future criminal activity, although it is generally illegal to punish a person based on a potential to commit future crimes.[322] The criminal system is generally unavailable to address future actions.[323] The Government cannot arrest and punish somebody based on the possibility that the person might do something illegal in the future.[324]

The immigration system, by contrast, is designed to allow a determination as to whether an alien can be admitted to, or remain in, the U.S.[325] The only relevance of criminal activity is its connection to either a denial of admission, or its connection to a deportation decision. Such decisions, however, are not designed as punishment, but as a

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[319] Muneer I. Ahmad, "A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion," (2004) 92 Calif. L. Rev. 1259, at 1272-73 [*Ahmad*].
[320] *Demore, supra* note 289 at 517.
[321] *Ahmad, supra* note 319 at 1272-73 (citations omitted). It is noted, however, that, while an alien facing an immigration proceeding has no right to court-appointed counsel at the Government's expense, that alien does have a right to be represented by counsel in these proceedings, at his or her own expense. (*ibid*).
[322] *David Cole, Enemy Aliens, supra* note 4 at 23.
[323] *Ibid.*
[324] *Ibid.*
[325] See generally David Cole, "In Aid of Removal: Due Process Limits on Immigration Detention," (2002) 51 Emory L.J. 1003 at 1007 ("The only legitimate purpose of immigration proceedings is to remove those aliens who do not have a legal basis for remaining here")[*Cole, In Aid of Removal*].

means of serving the national interest in removing people deemed undesirable.[326] Certain immigration violations, moreover, can bring criminal consequences, but those cases are then handled through the criminal, not the immigration, system.[327] Other than determining whether the person should be admitted or allowed to stay, these processes do not result in criminal punishment.[328] It is because these cases are specifically not viewed as criminal in nature that the Supreme Court has found, in the past, that fewer due process protections are necessary.[329]

2.3.B.2.a. Limiting Criminal Due Process for Aliens: Alien and Sedition Acts and the Enemy Alien Act

A general suspicion of immigrants dates back to the founding of the Nation, however, and the Government has enjoyed some success in limiting due process rights for aliens. In the late 1790's, the Alien Act allowed the Government to deport any alien the President thought dangerous, without any judicial review, and the Sedition Act allowed anybody who criticized the Government to be prosecuted.[330] These views have largely been repudiated. One commentator notes "the Alien and Sedition Acts are now widely viewed as an illustration of what can go wrong when we fail to adhere to basic respect for First Amendment freedoms and due process."[331]

The Alien Enemy Act, which went into effect at about the same time, is still in force.[332] It allows the President to "detain, expel, or otherwise restrict the freedom" of any citizen of a country with which the U.S. is at war.[333] It allows for executive detentions with no judicial review.[334] The Act has been used more than once, such as by President Wilson during World War I to detain approximately 2,000 people who were German or

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[326] *Cole, Enemy Aliens, supra* note 4, at 23. As will be discussed in Chapter 3, below, however, such processes are themselves subject to abuse if the Government fails to provide the lesser due process required in such cases.
[327] *Human Rights First, A Year of Loss, supra* note 8 at 15.
[328] *Ibid.* at 23.
[329] See discussion in Sections 2.3., above and below, of criminal versus immigration due process.
[330] *David Cole, Enemy Aliens, supra* note 4, at 91.
[331] *Ibid.*
[332] *Alien Enemies*, 50 USCS § 21 (2005) [*Alien Enemies*].
[333] *Cole, Enemy Aliens, supra* note 4 at 118. The language of the Act suggests it must be a "declared war," which calls into question whether it would apply to the conflicts in Afghanistan and Iraq. The Supreme Court, however, in the *Rasul* decision, seemed to think it might, since it found so significant the fact that the detainees at Guantanamo were not nationals of any country with which the U.S. was at war. *Rasul, supra* note 97 at 2689.
[334] *Alien Enemies, supra* note 332.

Austro-Hungarian in camps.[335] And it likely served as a partial basis for the infamous detentions of Japanese, German, and Italian nationals during World War II, although U.S. citizens of those nationalities were detained as well.[336] When Congress paid reparations to the Japanese detention victims many years later, it included non-citizens among those to whom an apology was extended.[337]

2.3.B.2.b. Use of the Administrative Immigration Process in Criminal Proceedings: The Palmer Raids

The post-September-11th detentions do not represent the only time that immigrants have been rounded up after a terrorist attack. In 1919, a series of simultaneous bombings, including that of the U.S. attorney general's home, resulted in the "Palmer Raids." The bomber was killed in the explosion, and subsequent evidence, apparently revealed that he was an Italian immigrant who supported violent means of achieving anarchy.[338]

Certain immigrants were rounded up, based entirely on allegations about their political beliefs.[339] Estimates of how many people were rounded up vary widely, between 4,000 and 10,000.[340] A large number of the people rounded up were ultimately deported, although none was shown to have any connection with the bombings.[341] The Secretary of Labor, Louis Post, who was heavily involved in reviewing these deportations, later said immigrants were targeted primarily because they were easier to target than citizens, noting "the force of the delirium turned in the direction of a deportation crusade with the spontaneity of water flowing across the course of least resistance."[342]

Ongoing fears over national security caused a second series of raids to happen a year later, targeting another supposedly objectionable political group of immigrants, and backed by heavy public support.[343] In the interim, immigrants had been given specific advice on their rights to an attorney. The Government responded by amending the

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[335] *David Cole, Enemy Aliens, supra* note 4 at 92.
[336] *Ibid.* at 95.
[337] See e.g. *ibid.* at 99.
[338] *Ibid.* at 118.
[339] Kevin Johnson, "Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement," 1993 B.Y.U.L. Rev. 1139 at n. 98 [*Johnson*].
[340] *Cole, Enemy Aliens, supra* note 4 at 127.
[341] *Johnson, supra* note 339.
[342] *Cole, Enemy Aliens, supra* note 4 at 118-19 (quoting Louis Post).
[343] *Ibid.*

immigration rules to delay the ability of a detainee to consult an attorney, and this rule went into effect a day before the second series of raids.[344] Moreover, bails for those detained were ordered to be set at high levels.[345] Interrogation and arrest techniques completely avoided normal due-process protections.[346] Post objected to the infringements on civil liberties and stopped many deportations from happening.[347] Specifically, Post reversed deportation orders in those cases in which due-process protections had been lacking.[348]

A federal judge, after noting such abuses as harsh interrogations, and instructions from the Government to hold the detainees with no communication until the Government authorized communication, said "A mob is a mob, whether made up of government officials acting under instructions from the Department of Justice, or of criminals, loafers, and the vicious classes."[349] The Judge then found most of the deportation orders he was reviewing invalid for, among other things, failing to meet basic standards of "fairness."[350]

Prominent members of the legal profession joined in the criticism of the Government's actions.[351] According to Professor Cole, "[t]he Palmer raids are now viewed as a tragic mistake, another in a long line of government overreactions in times of crisis."[352] And, like most previous abuses of constitutional rights in the name of crisis, public opinion eventually turned against the detentions and other abuses represented by the Palmer Raids.[353]

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[344] *Ibid* at 120.
[345] *Ibid.*
[346] *Ibid.* at 121.
[347] *Ibid.* at 122.
[348] *Cole, Enemy Aliens, ibid.*
[349] *Ibid.* at 124 (quoting Federal District Judge George Anderson); *Colyer v. Skeffington*, 265 F. 17 at 62 (1920).
[350] *Ibid.*
[351] *Ibid.* at 125 and n. 38 (citing National Popular Government League, *Report Upon the Illegal Practices of the Department of Justice* (Washington D.C., 1920)).
[352] David Cole, "We've Aimed, Detained and Missed Before," *Washington Post*, 8 June 2003, at B1, quoted in Jonathan L. Hafetz, "The First Amendment and the Right of Access to Deportation Proceedings," (2004) 40 Cal. W. L. Rev. 265, at n. 385.
[353] *Cole, Enemy Aliens, supra* note 4 at 127.

2.4. The Equal Protection Clause: Are All People Really Equal Under the Constitution?

Another major constitutional issue arises in the special-interest cases, based on the criteria used to select the "special-interest" immigrants. Although the U.S. Government has given token denials of the accusation, it is fairly clear that the people chosen were selected based on their nation of origin, gender, age, and arguably religion.[354] Thus, in addition to addressing whether the due-process deprivations for the special-interest detainees were valid, the issue of how the special-interest detainees were selected must be assessed. Simply put, can the Government bring adverse immigration action against people based solely on immutable characteristics, such as national origin?

Immigration law is a bit different from other areas of law in this respect, because it allows for national-origin discrimination in a manner that would be absolutely forbidden in any other context.[355] For example, it is virtually undisputed that the Government can restrict entry into the U.S. based solely on the applicant's national origin.[356] The reasoning behind this is that an applicant who has not been admitted to the U.S. has not triggered U.S. constitutional protections, so such an applicant could not invoke the equal-protection argument.[357] It has also been justified on the Executive's authority to handle foreign-policy matters with other nations.[358] Immigration laws that seem discriminatory have been upheld.[359] Arguably, however, a person within the U.S. who is deprived of fundamental due-process rights based on national origin, regardless of immigration status, would be able to raise an equal-protection claim.

The Equal Protection Clause says " ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[360] Although the 14th Amendment generally applies to the States, the Equal Protection Clause has been held to apply to the federal

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[354] See e.g. *First NSEERS Regulations*, *supra* note 123.
[355] See e.g. *Narenji v. Civiletti,* 617 F.2d 745 at 747 (D.C. Cir. 1979)(finding that a registration of only students of Iranian origin was not an equal-protection violation, but was within the President's exercise of foreign affairs)[*Narenji*].
[356] *Ibid.*; *Zadvydas*, *supra* note 282 at 693 (noting that the distinction between admitted and non-admitted aliens, in terms of Constitutional rights, is common in immigration law).
[357] *Ibid.*
[358] *Narenji*, *supra* note 355.
[359] *Ibid.*
[360] U.S. Const. Amend. XIV, sec. 1.

government under some circumstances.[361] In its ruling in *Bolling v. Sharpe*, the Supreme Court noted, in relation to school segregation in the District of Columbia, that discrimination can be sufficiently extreme to rise to the level of a due process violation.[362] Generally speaking, the Equal Protection Clause requires that classifications based on generally unacceptable factors, such as race, national origin, or gender, be subjected to "strict scrutiny," and, absent a showing of justification, and a showing that the category is "narrowly tailored" to a legitimate objective, such distinctions are generally deemed unacceptable.[363] Thus, if a person's legitimate due-process rights are undermined in a way that is discriminatory, that could potentially implicate equal-protection issues as well.

2.4.A. Chinese Exclusion Cases

The now-infamous "Chinese Exclusion" cases from the 19th Century provide a good overview of the circumstances under which an immigrant can claim equal protection under the law. The Government had assumed an increasingly restrictive view of immigration, such as in the Immigration Act of 1891, which gave the Federal Government sole authority over immigration.[364] Immigrants of Chinese origin – the disfavored immigrant group at that time -- bore the brunt of these policies.[365]

The most prominent case addressing this tendency was *Chai Chan Ping v. United States*, or the *Chinese Exclusion Case*.[366] In one of its less noble moments, the Supreme Court upheld legislation barring Chinese nationals from entering the U.S., even in the face of a treaty between the U.S. and China that should have permitted such entry.[367]

The Court described the supposed difficulties that had occurred when laborers from China had moved to the West Coast, after discovery of gold in California:

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[361] *Bolling v. Sharpe*, 347 U.S. 497 (1954)(ruling that racial segregation in Washington, D.C., schools violated due-process protections).
[362] *Ibid.*
[363] Kevin R. Johnson, *The "Huddled Masses" Myth*, *supra* note 22 (while noting this general rule, however, Johnson points out that national-origin discrimination is allowed in the U.S. in relation to immigration – admission decisions); *Locke v. Davey*, 540 U.S. 712 at 714 (2005)(mentioning long-standing requirement that, in order to justify actions that are otherwise discriminatory, the Government must establish, among other things, that the action is "narrowly tailored" to a government interest).
[364] Lucy E. Salyer, *Laws Harsh As Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (The University of North Carolina Press: Chapel Hill, North Carolina & London 1995) at 1.
[365] *Ibid.*
[366] *Ibid.* at 22-23.
[367] *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*), 130 U.S. 581 at 590-594 (1889).

> The differences of race added greatly to the difficulties of the situation ... they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living ...[368]

Finally, the Court concluded that Congress and the U.S. Government had the right to exclude, essentially, anybody through the immigration system that it deemed undesirable.[369] In another case, the Supreme Court upheld the expulsion of people, based on their status as Chinese nationals.[370]

Having opened the door to national-origin-based exclusions in the immigration system, the Supreme Court was subsequently confronted with other allegations of rights deprivations from people of Chinese origin. These policies were examined in the equal protection context in the U.S. Supreme Court case of *Wong Wing v. United States*.[371] In that case, the Supreme Court discussed Congressional enactments barring Chinese nationals from entering the U.S., suggesting that such prohibitions were entirely within Congress' domain.[372] Wong Wing was a Chinese immigrant, who, having been found in violation of the laws barring Chinese laborers from the country, was then sentenced to a year of hard labor before deportation. He had been arrested pursuant to a federal immigration statute, barring entry for Chinese nationals, and allowing for deportation of anybody caught violating the law.[373] The Supreme Court concluded, however, that, once in the U.S., an alien is entitled to equal protection of the law, and that, before a punishment of hard labor could be imposed, due-process protections must be met.[374]

2.4.B. Preventive Detentions

Preventive detentions, such as the ones Ashcroft purported to have made in the "special-interest" cases, could arguably implicate both due process and equal protection concerns when the detainees are selected for their detention with no individualized basis

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[368] *Ibid.* at 594.
[369] *Ibid.* at 606.
[370] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) [*Fong Yue Ting*].
[371] *Wong Wing v. United States*, 163 U.S. 228 (1896).
[372] *Ibid.* at 228.
[373] *Ibid.* (citing the Act of September 13, 1888, § 13, 25 Stat. 476, 479 and quoting first section of the act of October 1, 1888, c. 1064, 25 Stat. 504).
[374] *Ibid.* at 238; see also *Fong Yue Ting*, *supra* note 370,at 716; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (concluding that the Fourteenth Amendment prohibited the Government from denying Chinese immigrants the right to hold laundry businesses simply by virtue of their ineligibility to become citizens).

for suspicion of criminal activity, but, rather, solely based on immutable factors, such as national origin, race, or religion. In the post-September-11th round-ups, people were apparently selected for detention based solely on such factors. This sort of detention has happened before in the U.S.

Perhaps the most infamous case involved the detentions of people of Japanese origin or ancestry during World War II.[375] Although those detentions were not undertaken specifically under the auspices of the immigration system, they did involve the systematic arrest of people based solely on the belief that their national origin made them a potential threat to U.S. security. After the Japanese attacks on Pearl Harbor, panic struck the U.S. about further domestic attacks, and especially about internal espionage. That panic led to approximately 110,000 civilians of Japanese origin or ancestry being placed in detention camps, with no due process, and with no cause to believe any of them had any ties to the attack or posed any threat to the U.S. Their status in terms of U.S. citizenship was also completely disregarded, so both citizens and non-citizens were treated in the same manner.[376] The detentions were pursuant to an executive order, allegedly premised on national security, issued by President Roosevelt.[377]

The issue of the detentions came before the U.S. federal courts, and ultimately the Supreme Court. In *Korematsu v. United States*, for example, Fred Korematsu was arrested for failing to comply with specific provisions of the Military Order, and the Supreme Court upheld the actions of the President regarding the detainees, and of Mr. Korematsu in particular.[378] Among other things, the Supreme Court noted that the Fifth Amendment, applying to the Federal Government, did not have an Equal Protection provision comparable to that in the Fourteenth Amendment for the States, so Korematsu had no recourse in a discrimination claim against the Federal Government.[379] The Court

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[375] See *Haines*, *supra* note 116 at 109 (presenting a case study of Hady Hassan Omar, who was arrested after September 11, based on, among other things, his Egyptian origins, and his purchase of a one-way plane ticket to travel on September 11, 2001. He had purchased that ticket at the same copy shop terminal used by the actual September 11 hijackers).

[376] *Ibid.*at 105.

[377] *Ibid.* (citing Exec. Order No. 9066, 7 Fed. Reg. 1,407 (Feb. 19, 1942)).

[378] *Korematsu* v. *United States*, 323 U.S. 214 (1944)(subsequently superseded by Congressional Statute, as stated in *Adarand Constructors* v. *Pena*, 515 U.S. 200 at 214-15 (1995)) [*Korematsu*].

[379] *Adarand Constructors, ibid* at 214-15 (1995)(attempting to explain the *Korematsu* reasoning). The Supreme Court later reversed itself on that specific issue, in a different context, in *Bolling* v. *Sharpe*, *supra* note 361.

also supported its conclusion by claiming necessity for national security.[380] In a strong dissent, one of the Justices said that the treatment of the detainees "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[381]

Congress ultimately agreed with the dissent in that case, but not until approximately 40 years later. In passing the Civil Liberties Act, Congress formally apologized to those victimized by this discrimination and offered token reparations.[382] The detentions were denounced and blamed on "racial prejudice," "wartime hysteria," and a "failure of political leadership."[383] The Act was followed by a formal letter of apology, written by President William Clinton in 1993, in which he acknowledged the wrongful nature of the detentions and said "[w]e must learn from the past and dedicate ourselves as a nation to renewing the spirit of equality and our love of freedom."[384]

Korematsu's conviction was overturned, 40 years later, under a procedure allowing for correction of errors in criminal convictions, with the Government conceding he was entitled to this relief.[385] The Court noted that, technically, the *Korematsu* decision was still an undisturbed ruling, adding:

> As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.[386]

The Court might have added that the *Korematsu* case also stands as an example of the evils that can happen when all three branches of government fail in their constitutional duties at the same time, thus eliminating the checks and balances that are supposed to keep the Constitution on its course. President Clinton awarded Korematsu

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[380] *Korematsu*, *supra* note 378 at 216.
[381] *Ibid.* at 233 (Justice Murphy, dissenting).
[382] *Civil Liberties Act of 1988* 2, Pub. L. No. 100-383, 102 Stat. 903; Victor Bascara "Cultural Politics of Redress: Reassessing the Meaning of the Civil Liberties Act of 1988 After 9/11," (2003) 10 Asian L.J. 185 at 185 [*Bascara*].
[383] *Bascara, ibid.*
[384] William Jefferson Clinton, "Letter" (1 October 1993), online: Children of the Camps <http://www.children-of-the-camps.org/history/clinton.html>.
[385] *Korematsu* v. *United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).
[386] *Ibid.* at 1420.

the Presidential Medal of Freedom for his struggle against the detentions.[387] Korematsu is still actively fighting for civil rights and authorized an *amicus* brief to be filed in his name before the Supreme Court in the *Hamdi* and *Rasul* cases.[388]

2.5. Conclusion

It can be inferred from the discussion herein that, even in an emergency, there are limits on the President's ability to suspend individual civil rights. During the Civil War, when Lincoln could see Confederate forces from the White House, he was still constrained from suspending *habeas corpus*, and that constraint was notwithstanding a Congressional authorization.[389] And after World War II, the U.S. was later deemed to have acted wrongly in imprisoning civilians based on their national origin. In that case, it took many years for the Government to admit that it was wrong, and that its actions were outside of the rule of law. Ultimately, however, each of the branches of Government, including the President, Congress, and a federal district court, definitively stated that the detentions were illegal, and that the U.S. should learn from its mistakes so no such rights deprivations would happen in the future.[390] Ultimately, when the emergency had passed and calmer minds prevailed, it was acknowledged that sacrificing individual rights in the name of national security was not a valid action for a nation governed by a strong Constitution and by the rule of law.

It is apparent from the War on Terror court rulings that the terrorist attacks do not present an exception to this general parameter. The U.S. Government, even in an emergency situation, must act within its rule of law, and nothing within that legal regime allows the President to suspend habeas corpus and due-process protections for thousands of people. As will be argued in Chapter 3, the Government did not, in fact, act within its rule of law relating to the special-interest detainees. The conflicts between the law and the Government's actions will be explained in that Chapter.

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[387] Nat Hentoff, "Fred Korematsu v. George W. Bush" (19 February 2004), online: The Village Voice <http://www.villagevoice.com/issues/0408/hentoff.php>.
[388] *Ibid.*
[389] *Milligan*, *supra* note 223.
[390] See *supra* notes 382-88 and accompanying discussion.

Chapter 3: Implications for the U.S. Rule of Law

> *The concept that the Bill of Rights and other Constitutional Protections against arbitrary Governments are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine that if allowed to flourish would destroy the benefits of a written Constitution and undermine the basis of our Government.*[391]

3.1. Introduction: Impressions Concerning the Detentions

The U.S. Government's conduct towards the "special-interest" detainees violated basic principles of its own constitutional structure of Government. A Government based on the ideals of the Declaration of Independence, governed by a strong Constitution, and supposedly stronger from the lessons of past mistakes, should never have rounded people up for secret, indefinite detentions, as the Government did after the attacks. Moreover, it is disturbing, especially given some of the Nation's ignoble actions in the past, that the U.S. Government rounded these people up based on nothing more than their immigration status, national origin, gender, age, and religion. Perhaps most disturbing, however, is that this happened with little public protest, little opposition from the media, little opposition from Congress, and no definitive opposition from the U.S. Courts.

The Government claims it acted legally in its handling of the special-interest immigrants.[392] In large part, this argument is based on the notion that such actions were necessary to protect the Nation from further terrorist attacks. Oddly, though, the Government never charged most of the detainees with any terrorism offenses.[393] And, in the four cases in which terrorism charges were brought, the convictions were thrown out because of prosecutorial misconduct.[394] It is therefore difficult to believe that these detentions were necessary or useful in fighting terrorism. Moreover, even if the Government had found terrorists among the people it detained, that would hardly justify arbitrarily stripping thousands of people of their fundamental constitutional rights.[395]

Professor Cole summed up, appropriately, twin themes of the War on Terror, saying the Government "has repeatedly sought to maximize police power while

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[391] *Reid v. Covert*, 354 US 1 at 14 (1957).
[392] See e.g. *Koring*, *supra* note 152 (quoting Ashcroft as saying no laws were broken in the Arar case).
[393] *Cole, Enemy Aliens*, *supra* note 4; *Special OIG Report*, *supra* note 6.
[394] *Taking Liberties*, *supra* note 175; Section 1.13., above.
[395] See *Feingold Statement*, *supra* note 48 (saying that the harm to the U.S. of infringing on civil liberties outweighs the benefits of catching more terrorists).

minimizing public oversight."[396] It is increasingly clear that, once a person is called a "terrorist," that person can be instantly, and without recourse, stripped of protections once deemed inviolable under the Constitution.[397] Moreover, those rights can be taken away in the strictest of secrecy, and the person can be whisked away to languish in prison, potentially indefinitely. The Government, at the same time, claims to be exempt from any constitutional obligation to ever justify its detention of that person. Or, if the person is given some legal recourse, the President controls how much, and what type, of due process, if any, to accord, and controls the question of whether government "evidence" can be kept in secret even from the accused. Lord Scott, of the British Lords of Appeal, described a similar scenario in the U.K. as the "stuff of nightmares."[398] It certainly has an intuitive feel that is incompatible with the oldest constitutional Democracy on earth.

The special-interest detentions are just one component of much wider structural changes after September 11th. Detentions with no due process have been a central component of the War on Terror, whether they involved immigrants, detainees at Guantanamo Bay, or domestic "enemy combatants."[399] Those policies continue more than three years after the terrorist attacks, and the Government has set up sometimes complex, and seemingly permanent, structures, such as its Military Commissions, to continue these policies into the indefinite future. Faced with obstacles to these types of detentions, such as the Supreme Court ruling in *Rasul*, the Executive Branch simply tries a new avenue to continue doing the same thing – such as setting up the Combatant Status Review Tribunals to circumvent the Supreme Court's order that it give the Guantanamo detainees

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[396] David Cole, "On the Road With Ashcroft," *The Nation* (8 September 2003), online: *AlterNet* <http://www.alternet.org/story/16734/>. Professor Cole is also a volunteer attorney for the Center for Constitutional Rights, which is handling the majority of the special-interest litigation. See e.g. *Turkmen v. Ashcroft, No. 02 CV 2307 (JG)Third Amended Class Action Complaint and Demand for Jury Trial* (filed 13 September 2004), online: Center for Constitutional Rights http://www.ccr-ny.org/v2/legal/september_11th/docs/Turkmen_3rd_Amended_Complaint_9-13-04.pdf> (naming David Cole as "cooperating counsel").

[397] William Rivers Pitt, *supra* note 19 at 1-5.

[398] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent); X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, SESSION 2004-05 [2004] UKHL 56, on appeal from: [2002] EWCA Civ 1502, House of Lords, 16 December 2004, at para. 155 [*FC v. Home Department*] online: The United Kingdom Parliament <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm>, Para. 155 [*A (FC)*].

[399] *Rasul, supra* note 97; *Hamdi, supra* note 255.

access to U.S. courts.[400] As will be discussed in more detail in this Chapter, those Tribunals are already encountering constitutional challenges in the U.S. Courts.[401]

These ongoing, complex changes do not appear to be the temporary measures of a President acting in a national emergency. Rather, they are long-term, structural changes, in which the President is vesting unprecedented detention powers on the Executive Branch and is attempting to eliminate most court review of those new detention powers. That strategy violates the Constitution and flies in the face of over 200 years of constitutional precedent and of hundreds of years of common-law jurisprudence.

The question, based on the Government's apparent impunity in light of these actions, is whether the law in the U.S. is now such that a President can set aside the Constitution, simply by asserting that its long-cherished protections endanger the Nation. And does that power exist simply because the President says there is danger, with no additional burden of establishing a link between his actions and that alleged danger, and no review of the President's decision? And, if the President can so easily set aside fundamental constitutional protections, just because he says they pose a danger, the more serious, and more chilling, question is whether that ability now renders many constitutional safeguards obsolete. Michael Ignatieff, in a recent book, posed the problem as follows:

> Rights are not always trumps ... But neither is necessity. Even in times of real danger, political authorities have to prove the case that abridgments of rights are justified. Justifying them requires a government to submit them to the test of adversarial review by the legislature, the courts, and a free media.[402]

This thesis has focused on the immigration detentions to illustrate the dangers of general War on Terror detention policies. In order to explain just how problematic those detentions have been, it is necessary to untangle some of the rhetoric the Government uses in describing its actions, and to clarify the circumstances under which an immigrant can be constitutionally detained, and how the criminal-justice system and the immigration system differ in their allowable purposes and uses.

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[400] *DOD CSRT Statement*, *supra* note 241. The Combatant Status Review Tribunals are explained in Chapter 2, above. The Combatant Status Review Tribunals were recently found unconstitutional in a federal court ruling that the Government is currently appealing. See *In re Guantanamo Detainees*, *supra* note 238.

[401] *In re Guantanamo Detainees*, *supra* note 240.

[402] Ignatieff/Lewis, *supra* note 270.

3.2. The First Problem: Using the Immigration System for a Criminal Investigation

A fundamental premise behind the special-interest detentions is that it was legal, valid, and appropriate to round these people up under the auspices of the immigration system, because they were immigrants and thus subject to that system. It is, however, undisputed that these people were targeted to enable the Government to investigate them for terrorism connections.[403] The Government did not begin to investigate immigration issues until the detainees were cleared of terrorism connections.[404] There is therefore a question as to whether the Government acted legally in detaining them for a criminal investigation by using the immigration system.

3.2.A. "Suspected Terrorists," "Terrorists," or "Immigrants": Who Were the Special-Interest Detainees?

In defending his actions, Ashcroft repeatedly referred to the special-interest detainees as "terrorists."[405] The Patriot Act gives a bit more reverence to the inviolable presumption of innocence by at least calling such detainees "suspected terrorists."[406] Either tag, however, is misleading and tends to start the debate from the presumption that these people were criminals, who posed a danger to the Nation.

The debate, however, does not begin there. None of these people were successfully convicted of terrorism charges, so Ashcroft was being rather disingenuous when announcing to the world that he had rounded up "terrorists."[407] Even the claim that they were suspected terrorists is misleading, since the Government admittedly targeted these people, not because of a specific suspicion of any criminal activity, but because they supposedly shared immutable characteristics with the 9/11 hijackers.[408] The special-interest detainees were not "suspected terrorists." Rather, they were immigrants from primarily Muslim countries, whom the Government targeted, with no individualized

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[403] *Special OIG Report, supra* note 6.
[404] *Ibid.*
[405] *See e.g. ibid.* (quoting Ashcroft's warning "[l]et the terrorists among us be warned: If you overstay your visa - even by one day - we will arrest you.")
[406] USA Patriot Act, *supra* note 47.
[407] See e.g. *Ashcroft Mayors Speech* , supra note 44.
[408] For example, when targeting people for its "voluntary" questioning, the Department of Justice Regulations said people were targeted who shared "characteristics" with the hijackers. *GAO Report, supra* note 12. Ashcroft admitted, in announcing the NSEERS program, that it was based on the need to target immigrants from specified countries. *First NSEERS Regulations, supra* note 123.

suspicion, based on nothing more than their immigrant status, national origin, gender, age, and religion.[409] Moreover, the sketchy information that has been released on these detainees suggests that most of them faced immigration, but no criminal, proceedings, and that those immigration proceedings were not based on inadmissibility for terrorism-related activities.[410] Rather, they tended most often to involve routine visa violations.[411]

If, in fact, the Government actually targeted people whose national origin was the same as that of the hijackers, as it claims, it is rather curious that immigrants from Saudi Arabia and Egypt were not initially targeted. For the NSEERS program, for example, the people required to register were initially from five countries: Iran, Iraq, Syria, Libya, and Sudan.[412] When the program was expanded, Saudi Arabia was still not on the list.[413] It was not until the second expansion that Saudi Arabia was finally included.[414] Yet, 15 of the 19 hijackers were Saudi nationals, and Bin Laden is a former Saudi national.[415] If the Government wanted to justify its actions by saying it was seeking people with the same "characteristics" as the hijackers, it certainly could have come closer to that mark. Targeting Saudi nationals would, of course, raise the same objections as those raised in the targeting of the other detainees. But, the Government's apparent reluctance to target those nationals undermines even its own shaky attempt to justify its actions.

Although immigration proceedings are supposed to be civil in nature, U.S. history, like that of most countries, has a long and unhappy tradition of equating immigrants with criminals.[416] It is true that the 19 hijackers were all non-citizens from predominantly Muslim countries. They were, however, 19 among hundreds of thousands

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[409] One law review Comment explores this overlap between the immigration and criminal-justice systems since September 11th, arguing that immigration law has been reshaped to be a terrorism-fighting tool, to the great detriment of the immigrant population. *Tumlin, supra* note 99. Among other things, she argues that caselaw so far on the post-9/11 policies has threatened to erode individual liberties, much the same way they were eroded in past times of crisis. While containing much important and persuasive information, this article was written before the U.S. Supreme Court decisions, which may change that overall picture. Moreover, it assumes that the erosions of civil liberties are comparable to past erosions, while, in this thesis, it is argued that those erosions go well beyond any past actions (*ibid*).

[410] See e.g. *INS Custody List, supra* note 77.

[411] *Ibid.*

[412] See *First NSEERS Regulations, supra* note 123.

[413] *Second NSEERS Regulations, supra* note 131.

[414] *Third NSEERS Regulations, supra* note 136.

[415] *McCaleb, supra* note 25; *Murphy, supra* note 25.

[416] See Quinn H. Vandenberg, "Note: How Can the United States Rectify its Post-9/11 Stance on Noncitizens" Rights?" (2004) 18 ND J. L. Ethics & Pub Pol'y 605 at 611 (citing *Fong Tue Ting*, 149 U.S. at 730, which clarified that immigration proceedings are civil, not criminal, in nature).

of immigrants from these nations, and 19 among even more immigrants overall. To make the logical leap that, because these 19 people were immigrants, and that they came from specified countries, all immigrants from those countries are henceforth suspect, is patently ridiculous. Certainly, the Government's failure to secure a single successful conviction for terrorism from among the detainees speaks volumes. This analysis, therefore, will start with the presumption that the people targeted were immigrants, rather than terrorists, and will there begin to part ways with some of the Government's characterizations of its actions.

3.2.B. Criminal Due Process Protections Are Constitutionally Mandated for all Criminal Proceedings, Including Those for Aliens

The Constitution, as described in Chapter 2, contains clear directives for due-process protections in criminal proceedings.[417] Thus, if the special-interest detentions were criminal in nature, the Government was constitutionally obligated to provide certain baseline due-process protections. The Constitution allows for this to change in emergencies only if its own procedures are followed. Thus, the due-process structure could only change if Congress suspended *habeas corpus*, based on the emergency created by the attacks. It was never suspended for any time after September 11th. Nor should it have been, since at all times the Courts were "open," as described in the *Milligan* decision.[418] Moreover, criminal due-process protections apply equally to citizens and non-citizens within the U.S.[419]

The special-interest detainees did not receive that due process, however, because Ashcroft evidently concluded that he had found a constitutional loophole through the immigration system. The Government, however, cannot avoid its criminal due-process obligations simply by electing to pursue its criminal case under an administrative immigration system. If that were permissible, each and every immigrant in the U.S. would be vulnerable to having criminal due-process protections eliminated at the whim of the Government. The Government cannot render these criminal detentions non-criminal simply by calling them immigration matters. Even Justice Scalia noted in his dissenting

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[417] See *supra* notes 290-309 and accompanying discussion.
[418] *Milligan*, *supra* note 223 at 127.
[419] Unlike citizens, however, an immigrant can face subsequent deportation after a criminal conviction, but this is a separate proceeding, and takes place after the underlying criminal proceeding has been completed, not in place of that criminal proceeding. *Antiterrorism and Effective Death Penalty Act*, *supra* note 284.

opinion in *Hamdi*, "[i]t is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing."[420]

Strangely, however, many legal and political commentators, while generally criticizing the special-interest detentions, seem to concede the Government's claim that it can choose to use either the criminal or the immigration system in such cases.[421] This critique, however, incorrectly suggests that, where immigrants are concerned, the two are interchangeable systems, and that the Government can simply choose which system to use. Because the Government admitted that it was pursuing a criminal investigation, using the immigration system to do so was not a constitutionally permissible option.

Yet there is no factual dispute over whether the Government did make such use of the immigration system. Ashcroft, for example, openly and repeatedly said he was using the immigration system to target "terrorists." Perhaps his most telling remark was: "Let the terrorists among us be warned: If you overstay your visa - even by one day - we will arrest you."[422] This confusing mingling of the criminal and immigration systems, and apparent premise that "terrorist" and "immigrant" were equivalent terms, was highlighted by a comment posted on the Internet: "[e]ither he was saying all people visiting the U.S. should beware, because they will from this point forward be viewed with suspicion, or he was saying that terrorists with current visas have nothing to worry about."[423]

In 2002, Ashcroft compared his immigration detentions to the initiative of Robert F. Kennedy, the Attorney General under President John F. Kennedy, to capture alleged members of organized crime.[424] Robert Kennedy had said he would vigorously pursue members of organized crime, even if he had to arrest them for such minor crimes as "spitting on the sidewalk." In so comparing, Ashcroft promised to use any federal power available to him to target "terrorists" -- including arresting people for minor immigration

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[420] *Rasul, supra* note 97 at 2662 (Scalia, J., dissenting).
[421] *Ahmad, supra* note 319 (noting "[w]here noncitizens are involved, immigration law provides the government with far greater latitude to engage in preventive practices than does the criminal law.").
[422] *Special OIG Report, supra* note 6.
[423] Comment posted by letharjk, 29 November 2003, *TalkLeft*, online: <http://talkleft.com/new_archives/004506.html>.
[424] Tom Curry, "Ashcroft Backs Broad War Powers for President," *MSNBC.com* (4 June 2004), online: <http://msnbc.msn.com/id/5166272/>; *Special Report of the OIG, supra* note 6.

infractions.[425] Ashcroft did not address the fact that spitting on the sidewalk is, in fact, a criminal offense, making his comparison of that initiative to his use of the immigration system for criminal cases questionable.

The U.S. Department of Justice Office of the Inspector General concluded, in its special report, that the immigration system was being used in the criminal investigation, criticizing Ashcroft's department for first requiring that the detainees be affirmatively cleared of terrorism connections, then only after such clearance beginning to consider any potential immigration issues.[426] And Ashcroft even went so far as to admit that the legal requirements of the immigration system were lesser, thus attempting to justify his failure to provide detainees with due-process protections.[427] That the immigration system was being used to pursue a criminal matter was open and obvious. By his own admission, the top attorney in the land used the immigration system to avoid the constitutional safeguards that the criminal-justice system requires, even though he was admittedly acting in a criminal matter.

3.2.B.1. The USA Patriot Act

Although the special-interest detainees were not rounded up under the Patriot Act's immigration-detention provision, that provision further blurs the lines between criminal and immigration detentions, and thus it must be assessed in deciding the question of the validity of this genre of immigration detentions. Specifically, the Patriot Act allows the Attorney General the authority to detain "suspected terrorists" for up to seven days, before requiring him to either charge them criminally or to begin removal proceedings.[428] Thus, the Act suggests, detentions for either criminal or immigration charges can be conducted under the same circumstances, and it suggests they are

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[425] *Ibid.* Robert Kennedy's daughter, Kerry Kennedy Cuomo, took great exception to Ashcroft's comparison, responding "Ashcroft has cast aside my father's passionate commitment to human rights and individual liberties. If he were alive today, my father would be an outspoken critic of the assault on civil liberties that has been carried out in the last 20 months in the name of fighting terrorism. He would have opposed, as I do, the Patriot Act, which gives the federal government unprecedented powers to detain immigrants and to intrude on personal privacy." Kerry Kennedy Cuomo, "Misusing RFK's Human Rights Legacy," *Boston Globe* (2 June 2003), reprinted online: Common Dreams News Center, <http://www.commondreams.org/views03/0607-04.htm>.

[426] *Special OIG Report, supra* note 6.

[427] *Ashcroft Provides Total Number, supra* note 73. As discussed further later in this Chapter, this contention is problematic on several levels. Even if Ashcroft were correct in applying the immigration system to these people, even under that system, some due process is required.

[428] *USA Patriot Act, supra* note 47 (amending 8 U.S.C. 1226 (a)(5)).

interchangeable in terms of procedure.[429] It also allows for a detention, before criminal charges are filed, that is longer than that allowed for citizens.[430] In criminal matters, however, the Supreme Court has long held, and Government practice has long confirmed, that non-citizens are entitled to the same due-process protections as citizens.[431] Thus, to the extent that the Patriot Act allows for differing detention times in criminal cases than those for citizens, it is facially unconstitutional.

Even in the panic that followed the attacks, the immigration-detention provision tested the limits of how far Congress would go to support the President and to appear united. The Act initially allowed the Attorney General to simply detain people indefinitely, and it completely eliminated all court review for such detainees.[432] Congress did demand a revision before the Act was passed, although, as discussed in more detail in Chapter 1 and above, the new version is still quite draconian.[433]

The procedural posture of the immigration-detention provision, however, is rather odd. No Court has ruled on the constitutionality of this provision, although another section of the Patriot Act was declared unconstitutional, and other provisions are under challenge in various courts.[434] That is possibly because this provision is not known to have been used.[435] Instead, when he decided to detain people, Ashcroft simply detained them, for as long as he deemed necessary, without adhering even to the questionable time and review requirements of the Patriot Act.[436]

An interesting question does arise, however, particularly as to those special-interest detainees who were imprisoned after the Patriot Act was passed. They could, perhaps, challenge their detentions as not meeting the minimum standards set forth in that

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[429] *Ibid.*
[430] See David Cole, "Terrorizing Immigrants in the Name of Fighting Terrorism," (2002) 29 Human. Rts. J. 11, online: ABAnet <http://www.abanet.org/irr/hr/winter02/cole.html>.
[431] See e.g. *Beharry v. Reno*, 183 F. Supp. 2d 584, at 586 (E.D.N.Y. 2002)[*Beharry*].
[432] Kate Martin, "Secret Arrests and Preventive Detentions," in *Ashcroft: Lost Liberties*, *supra* note 16 at 76.
[433] *USA Patriot Act*, *supra* note 47 and accompanying text.
[434] *See* Associated Press, "Ashcroft Likely to Appeal Patriot Ruling," *FindlawNews* (30 September 2004), online: Findlaw.com < http://news.findlaw.com/ap_stories/a/w/1152/9-30-2004/20040930063008_44.html>.
[435] Kate Martin, "Secret Arrests and Preventive Detentions," in *Ashcroft: Lost Liberties*, *supra* note 16 at 76 (noting that the provision had never been used, as of early 2003). A search has found no other public examples of cases in which the provision has been used, although it is entirely possible that it has been used in secret proceedings, or that its use is otherwise not reported).
[436] *Ibid.*

Act. That, however, would require that they be given some access to counsel and a court to make even that challenge – and it would be an ironic challenge indeed, since they would basically have to argue that their detentions did not rise to the standards of the Act, which, in turn, fails to rise to the minimum standards of the Constitution.

3.2.B.1.a. Similar provisions: United Kingdom

Although U.S. Courts have not had the opportunity to review the appropriateness of this provision, similar provisions have been reviewed in other countries, which give some insight into possible interpretations of the Patriot Act provision. In December 2004, the Lords of Appeal issued a scathing indictment of similar alien/terrorism detention legislation in the U.K.[437] The U.K. Court does not have the authority to invalidate an act of Parliament, as the U.S. Supreme Court can do on constitutional grounds for Congressional acts, but the opinion in this case is still quite instructive.[438]

The case was brought on behalf of people who had been detained for roughly three years under the country's terrorism detention provisions, although the Court noted that some of the people certified under that provision had been allowed to leave the country at their wish.[439] The Court noted that the appellants shared certain traits, such as the fact that none were British nationals, and none had been charged in any criminal matter, nor did any of them have the potential for a criminal court case.[440] The action was brought as a challenge to the detentions under the European Convention on Human Rights ("EC"), which was incorporated into U.K. law through its Human Rights Act of 1998.[441] The U.K. Government, in passing its terrorism legislation after September 11th, had filed a notice of derogation with the EC.[442]

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[437] *A (FC)*, *supra* note 398.

[438] See *ibid.* at para. 90. Also, unlike the U.S. Courts, the House of Lords does not have the authority to review a Parliamentary suspension of the writ of *habeas corpus* (*ibid.*).

[439] *Ibid.*at para. 2. Because the Act expressly allows those detained to leave the country at any time, if another country is willing to take them, it is less restrictive than the Patriot Act, which does not provide for any such departure. Compare *Anti-terrorism, Security and Crime Act 2001* and *The USA Patriot Act*. Moreover, as discussed extensively in Chapter 1, the special-interest detainees were often held for terrorism investigations after agreeing to be deported. See generally *Turkmen Complaint*, *supra* note 10.

[440] *Ibid.* at para. 3. The Act actually does not allow these detention procedures to be applied to British citizens (*ibid*).

[441] *Ibid.*

[442] Harry Mitchell, QC, "Terrorist Case in the House of Lords" (29 December 2004), online: Migration Watch UK <http://www.migrationwatchuk.org/frameset.asp?menu=researchpapers&page=briefingpapers/legal/terrorist_case_inthe_houseoflords.asp> [*Migration Watch UK*].

The Lords noted the history of immigration detentions, under which it was only acceptable to detain somebody in an immigration proceeding for the amount of time it took to deport the person.[443] They found that this provision in the anti-terrorism legislation conflicted with the U.K.'s long history barring arbitrary detentions, dating back to the Magna Carta, and to the idea of *habeas corpus*, set forth in the Petition of Right Act 1628.[444] The basis for derogating from the EC, moreover, was not valid because the terrorism threat was not an emergency, requiring such derogation, and the Lords noted that other European countries, equally vulnerable to such attack, had not filed notice of any such derogations.[445] Specifically, the Lords noted that the indefinite detention provisions were not reasonable responses to the nature of the terrorist threat, and they pointed out the absurdity of only applying such draconian conditions to non-British citizens, when terrorists who were British citizens would be no less dangerous. Finally, the Lords found it lacked logic that the legislation allowed the suspected terrorists to leave, since this was not consistent with the "comity of nations."[446]

Lord Hoffman, in language strongly echoing that used by the U.S. Supreme Court Justices in the War on Terror cases, noted:

> This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom ... The question in this case is whether the United Kingdom should be a country in which the police can come to such a person's house and take him away to be detained indefinitely without trial.[447]

Lord Hoffman noted that the right to derogate from the prohibition on such detentions found its roots in the British common law, under which *habeas* had been suspended in certain perceived emergencies. These steps "were conferred with great misgiving and, in the sober light of retrospect after the emergency had passed, were often found to have been cruelly and unnecessarily exercised."[448] Lord Hoffman noted that, if a threat existed sufficient to justify suspending fundamental liberties, it was not the threat

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[443] *A (FC)*, *supra* note 398 at para. 8.
[444] *Migration Watch UK*, *supra* note 442.
[445] *Ibid.*
[446] *A (FC)*, *supra* note 398.
[447] *Ibid.* at paras. 86-87.
[448] *Ibid.* at para 89.

of terrorism, which, "serious as it is, does not threaten our institutions of government or our existence as a civil community."[449] Finally, he noted that the power of arbitrary detention without trial was not permissible either for citizens or for foreign nationals, concluding:

> In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.[450]

Lord Nicholls was equally scathing in his criticism of the UK's detention practices, noting the inconsistency in insisting on indefinite detentions for non-nationals suspected of terrorism, but not seeking the same measures for British citizens so suspected:

> Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford ... The principal weakness in the government's case lies in the different treatment accorded to nationals and non-nationals ... It is difficult to see how the extreme circumstances, which alone would justify such detention, can exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists ... A significant number of persons suspected of terrorist involvement in this country are British citizens. In the case of these nationals the government has, apparently, felt able to counter the threat they pose by other means. Although they too present a threat to national security, in their case the government has not found it necessary to resort to the extreme step of seeking an extended power of detention comparable to that contained in the 2001 Act ...[451]

Because the House of Lords ruling was not binding on the UK Government, it chose not to release the prisoners pursuant to the ruling.[452] Under appropriate procedure, the legislation returns to Parliament, which then has the authority to decide whether it would revise the legislation pursuant to the ruling. As of February 2005, Parliament had not made any decision relating thereto.[453] Charles Clarke, Home Secretary for the UK, said his office would be asking Parliament to renew the legislation in the coming year,

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[449] *Ibid.* at 96.
[450] *Ibid.* at 97.
[451] *Ibid.* at para. 74-78.
[452] Reuters, "UK Men Imprisoned For 3 Years Without Trial To Stay Locked Up" (16 December 2004), online: Migration Watch UK <http://www.migrationwatchuk.org/frameset.asp?menu=researchpapers&page=briefingpapers/legal/terrorist_case_inthe_houseoflords.asp> [*UK Men Imprisoned*].
[453] *Migration Watch UK*, *supra* note 442; Human Rights Watch, "U.K.: Law Lords Rule Indefinite Detention Breaches Human Rights" (16 December 2004), online: Human Rights Watch <http://hrw.org/english/docs/2004/12/16/uk9890.htm> [*Human Rights Watch: Law Lords Rule*].

but would re-assess it to see if it could be modified to address the House of Lords concerns.[454] Based on the "declaration of invalidity" that was issued by the House of Lords, if Parliament does not act to invalidate the legislation, the detainees would have recourse to the European Court of Human Rights.[455]

3.2.B.1.b. Similar provisions: Canada

Like the U.K. and the U.S., Canada has a certification and detention provision for immigrants it suspects of being terrorists.[456] Professor Irwin Cotler, currently Canada's Minister of Justice and Attorney General, has noted that, as originally proposed, the provision allowed detentions that were "unfettered, unreviewable and secret."[457] Like the Patriot Act, this provision was amended before being enacted. Professor Cotler commented that some of those abuses were rectified, and that concerns under the Canadian Charter of Rights and Freedoms had probably been addressed.[458]

In December 2004, the Canadian Federal Court of Appeal declared its own security certificate procedure to be consistent with the Canadian Charter of Rights and Freedoms in *Charkaoui v. Canada.*[459] Adil Charkaoui is a permanent resident of Canada who was arrested in May 2003 on a security certificate, a process under which an alien can be held if deemed a risk to national security, generally based on terrorism allegations. In explaining the allegations under which Charkaoui is being held, the Court of Appeal said "[s]paring the details, suffice it to say that the respondents have reasonable grounds to believe that the appellant is a member of the terrorist organization of Osama Bin Laden and that he has engaged, is engaging or will engage in terrorist activities."[460] In a ruling replete with references to national security, the Court essentially determined that national security trumped all Charter rights. For example, the Court rejected Charkaoui's reliance on a criminal case, which had said that an accused had a right to cross-examine a witness

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[454] *UK Men Imprisoned, supra* note 452.
[455] *Ibid.; Human Rights Watch: Law Lords Rule, supra* note 453.
[456] Prof. Irwin Cotler, O.C., M.P., "Symposium: 20 Years Under The Charter: Terrorism, Security & Rights in the Post-September 11th Universe" (2002) 21 Windsor Y.B. Access Just. 519 at 525 [Cotler].
[457] *Ibid.*
[458] *Ibid.*
[459] *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2060 2004 FCA 421 (Dec. 10, 2004), online: Quicklaw <http://ql.quicklaw.com/servlet/qlwbic.qlwbi?qlsid=C1dotgMiYwlaTYcg&qlcid=00004&qlvrb=QL002&RGET=1>.
[460] *Ibid.* at para. 12.

at trial, by saying that this criminal right could be excluded "when national security is at issue."[461] The Court refused to find the security certificates unconstitutional, saying

> if we were to accept ... that national security cannot justify any derogations from the rules governing adversarial proceedings we would be reading into the Constitution of Canada an abandonment by the community as a whole of its right to survival in the name of a blind absolutism of the individual rights enshrined in that Constitution.[462]

In so deciding, the Court made it clear that individual constitutional rights would have no meaning if the structure of the Government were destroyed through terrorism.[463]

This decision is one of several disturbing rulings from Canadian Courts, which have increasingly cited national security to suggest that fundamental individual protections can be discarded. Perhaps the most famous of such decisions is the *Suresh* decision, in which the Supreme Court of Canada suggested the possibility that it could one day even be acceptable to deport somebody to a country where that person faces the risk of torture, if national security demanded it, although it claimed that would require an "exceptional case."[464]

In terms of constitutional validity, and the notion of the rule of law, it is apparent that the UK Court pursued the more sound approach, and that the approach followed in Canada, which would likely be applauded by the U.S. Government, is fundamentally flawed. For example, the Canadian Court notes that preserving individual liberties would be useless if the infrastructure of the Government were destroyed by terrorism.[465] One might just as easily say that there is no value in protecting the Government's existence, if, in order to do so, one destroys the individual liberties that make that Government so valuable in the first place.[466] Moreover, as one of the Lords pointed out in the UK case, it is unlikely that terrorism is presenting such an overwhelming threat, such that personal liberties must be suspended to save the very life of the Government.[467]

The *Charkaoui* case again raises the question of how due-process has suddenly changed from an inviolable liberty to something governments perceive to be a threat –

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[461] *Ibid.* at para. 99 (referring *to R. v. Lyttle*, [2004] 1 S.C.R. 193)(the Court provided no authority for this assertion).
[462] *Ibid.* at para. 100.
[463] *Ibid.*
[464] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. at para. 129.
[465] *Charkaoui, supra* note 459, at para. 100.
[466] *Feingold Statement, supra* note 48.
[467] *A (FC), supra* note 398.

and it is astonishing that this view has changed simply because Government executives said it should. For such a wide-reaching change, one would think the Government would be required, on a very heavy burden of proof, to show the nexus between due process and national danger. Instead, in some places, the Government only has to say that a person poses a danger, and all debate ends, as do all due-process protections for that person.[468] That is a frightening scenario.

Finally, the *Charkaoui* decision makes the key error of mixing immigration and criminal processes. This is apparently not a case in which the Government is determining to deport an immigrant based on suspicion of terrorism – arguably a valid use of the immigration system.[469] If Canada wishes to accuse Charkaoui of terrorism, it should criminally charge him. If it wishes to find him inadmissible based on alleged past terrorist activity, it should deport him. Indefinite detention without charges or process is not an acceptable alternative in a constitutional Democracy.

3.2.B.2. Criminal aliens

Perhaps some of the confusion over the relationship between the two systems in the U.S. comes from the provision in its immigration law, which allows for so-called "criminal aliens" to be deported. As discussed in Chapter 2, after the bombing in Oklahoma City, Congress passed laws making it easier to deport people designated as "criminal aliens." Those aliens are people who are in the U.S. legally, but who, during their time in the U.S. have committed a crime, or who have been discovered to have committed a crime before arrival that was not reported.[470] Terrorism is one of the crimes that could cause an alien to be classified as a "criminal alien."[471]

It is important to note the intention of such provisions in the immigration law, however. Such aliens are detained, and ultimately deported, because they are deemed,

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[468] See *Charkaoui*, *supra* note 459 at para. 100.

[469] Much controversy, however, has arisen when that deportation on suspicion of terrorism is based on a plan to deport somebody to a country known to use torture. One of the five men presently being held on Canada's Security Certificates is Mahmoud Jaballah, who had been arrested and tortured in Egypt, and subsequently filed a refugee claim in Canada. In Canada, however, he was arrested, first in 1999, then after a court ordered his release, again in August 2001. He is presently fighting an extradition order to deport him to Egypt, based on his fear of torture. Mr. Jaballah has been detained for approximately three and a half years, with no criminal charges ever having been filed. See e.g, *Le Ministre de la Citoyenneté et de l'immigration et le Solliciteur Général du Canada et Mahmoud Jaballah*, 2004 CAF 257.

[470] *Antiterrorism and Effective Death Penalty Act*, *supra* note 284.

[471] *Ibid.*

essentially, undesirable to live in the U.S., or somehow a risk to the U.S. The immigration proceeding that results in their possible deportation, however, is not, in itself, a criminal proceeding, to determine guilt or innocence, and it is not intended to result in a punishment for the crime committed. It is simply intended to determine suitability to continue living in the U.S., and, in many cases, those at the heart of such proceedings have already been convicted and served their prison time.[472] Thus, this provision does not provide any authority for the U.S. Government to arrest and detain an alien while it investigates whether it will pursue possible future criminal proceedings against that alien.[473] If the Government has credible evidence that the alien is a "criminal alien," it must initiate deportation proceedings, with appropriate due-process safeguards, and deport the alien if so ordered at the conclusion of the proceeding. If, instead, the Government has evidence that the person has committed some crime, and seeks to punish that person for that crime, it must proceed under the criminal-justice system.

3.3. The Second Problem: Even if Use of the Immigration System Had Been Appropriate, the Government Failed to Meet Its Due-Process and Detention Mandates

It is a primary contention of this thesis that, because the special-interest detainees were really detained as part of a criminal investigation, they were constitutionally entitled to all procedural protections required in a criminal case. There is, however, a potential for confusion over the fact that some forms of detention are allowed under the immigration system. Even if, however, the special-interest cases could properly have been classified as immigration cases, the Government still had a constitutional duty to meet certain minimum due-process requirements, and it failed to do so.

As discussed in Chapter 2, due-process protections are generally weaker for immigration matters than for criminal matters, since the policy behind immigration proceedings is to determine the appropriateness of remaining in the country.[474] Whether an immigrant receives due process protections, however, depends on the immigrant's

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[472] *Ibid.*

[473] See *ibid.* Moreover, as discussed further in the next section, such detention scenarios are not even permissible under cases appropriately brought under the immigration system.

[474] See Alison Parker and Jamie Fellner, Human Rights Watch, *World Report 2004*, "Above the Law: Executive Power after September 11 in the United States" (2004), online: Human Rights Watch <http://www.hrw.org/wr2k4/8.htm#_ftnref30>.

status, and the stage of the proceeding, not on the whim of the Attorney General. Immigrants held in detention are undeniably entitled to some due process, certainly, if nothing else, to challenge the legality of their detentions.

Generally, Courts have held that general immigration-policy decisions, such as determining what aliens to admit, rest with the Executive and Legislative branches.[475] When, however, the Government's actions relating to an individual cross into traditional, individual constitutional liberty safeguards, the Judiciary's power of review is greatest.[476]

The U.S. Government's policies affected aliens in various stages of immigration proceedings, including aliens already ordered deported, aliens facing immigration proceedings, aliens never admitted to the U.S. but still detained, those seeking asylum, aliens required to register or submit to questioning who were never detained, and aliens seeking admission who were denied but not detained.[477] At each of these stages, allowable detention and due-process rules vary. This thesis does not suggest that every action taken by the Government was constitutionally impermissible. It does suggest, however, that in implementing the special-interest policies, the Government not only improperly used the immigration process for criminal cases, but, even if its use of the immigration system had been proper, it frequently failed to meet the minimal standards of such proceedings. Some examples of those shortcomings follow.

3.3.A. Detentions are only narrowly allowed in Immigration Proceedings

3.3.A.1. The cases of aliens ordered removed

The strongest detention power for the Government lies where deportation has already been ordered, as a federal statute requires the Government to detain aliens in such cases, but only for specified timeframes, and subject to specific review procedures.[478] Generally, detentions are allowed in post-deportation-order cases only for as long as necessary to secure deportation of a person from the U.S.[479] Detentions are justified by a

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[475] See *INS v. St. Cyr, supra* note 282 at 364.
[476] *Ibid.*
[477] See generally Section 3.3.
[478] See generally *Immigration and Nationality Act*, 8 U.S.C.S. § 1231(a)(2); 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V)), analyzed by the U.S. Supreme Court in *Zadvydas v. Davis, supra* note 282; see also *Demore, supra* note 289 (holding that detentions of those found to meet the "criminal alien" standard did not violate due process when restrained only to the time needed to effectuate removal from the country).
[479] *Zadvydas, ibid.* at 701.

perception of extremely high flight risk after a deportation order.[480] Coincidentally, in the *Zadvydas* ruling, issued shortly before the terrorist attacks, the Supreme Court considered the issue of indefinite detentions of immigrants under this statutory provision, and it made it clear, first, that such aliens had access to the Courts to challenge their detentions, and second, that indefinite detentions were barred by the Constitution.[481] The Court clarified that immigration detentions are civil, not criminal, matters, and that such detentions are "nonpunitive in purpose and effect."[482] Once the allowable removal period has passed, the Government may only continue to hold the alien if that alien poses a flight risk, or is a danger to the community, and the Government has the burden of establishing such grounds.[483] The detention must terminate once deportation can be accomplished.[484]

In *Zadvydas*, the Supreme Court rejected the Government's claim that the detentions were needed to protect public safety, saying the Constitution allowed detentions "based on dangerousness only when limited to specially (sic) dangerous individuals and subject to strong procedural protections."[485] The Court added that, where a preventive detention can be "indefinite," the Constitution requires something even more to justify it, such as proof of mental illness.[486] The Court also rejected the Government's argument that the statute should be interpreted to allow for potentially indefinite detentions, subject to no court review at all, but, rather, subject solely to the Attorney General's discretion:

> A statute permitting indefinite detention of an alien would raise a serious constitutional problem ... And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections ... or, in certain special and "narrow" non-punitive "circumstances,"... where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint."[487]

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[480] *Ibid.*
[481] *Ibid.* at 689, 701-02.
[482] *Ibid.* at 691.
[483] *Ibid.*; see also *Reno v. Flores*, 507 U.S. 292 at 294 (1993)(noting that aliens should only be detained if a threat to national security, or a flight risk).
[484] *Zadvydas*, *supra* note 282 at 691.
[485] *Ibid.* at 690-91.
[486] *Ibid.* at 691.
[487] *Ibid.* at 688, 690 (citations omitted)(emphasis in original)(the Court was addressing a "post-removal detention statute," which authorized detentions of "certain categories of aliens who have been ordered removed, namely inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any

Immigration authorities do not have the authority to detain somebody for "punitive purposes."[488] The *Zadvydas* case notwithstanding, however, the Department of Justice has implemented a regulation, allowing it to detain "terrorist aliens" indefinitely, creating a potential conflict with the Supreme Court's pronouncement.[489]

If the allegations in the *Turkmen* class-action lawsuit are proven, it appears that many of the special-interest detainees were held long past the time needed to effectuate their deportations.[490] In those cases, the Plaintiffs had agreed to be deported. The Government nonetheless continued, according to the allegations of that complaint, to hold them for extended periods of time while it investigated them for terrorism, and in spite of the Government having no individual basis for suspecting them of terrorism.[491] Moreover, the special-interest detainee who had so concerned Senator Leahy, Mr. Butt, had also agreed to be deported, and Pakistan was ready to take him. The Government, however, held him for approximately another month, during which time he died of a heart attack, possibly induced by stress, and during which time it failed to ever notify the Pakistan Embassy that he was being held.[492] And Mr. Abdel-Muhti, a Palestinian national, had been held indefinitely after his deportation order, because Palestine is not a State, so he had no State to which he could be deported. Like Mr. Butt, he died of a heart attack, although, in his case, it was shortly after a federal court ordered his release.[493]

As noted extensively in Chapter 2, and as reaffirmed by the *Zadvydas* Court, *habeas* relief, under the federal *habeas* statute, is available to such aliens claiming to be held in "violation of the Constitution or laws of the United States."[494] The Court noted its prior rulings, which held that "the Constitution may well preclude granting 'an

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alien 'who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal'" 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V)).

[488] *Cole, In Aid of Removal*, *supra* note 325.

[489] *Cole, Enemy Aliens*, *supra* note 4 at 70 (citing 8 C.F.R. § 241.4 (g)(5)(i)(2002)); see also *Clark*, *supra* note 283 at 744-45 (reiterating that aliens cannot be detained indefinitely).

[490] The details of the *Turkmen* lawsuit are discussed extensively in Chapter 1, above.

[491] *Turkmen Complaint*, *supra* note 10.

[492] *Congressional Letter 2*, *supra* note 69.

[493] *Abdel-Muhti*, *supra* note 104.

[494] *Zadvydas*, *supra* note 282 at 688.

administrative body the unreviewable authority to make determinations implicating fundamental rights.'"[495]

Although it has been subject to some criticism in other federal judicial districts, one federal-court ruling clarified the parameters of due process that must be provided to an alien ordered deported. In *Beharry v. Reno*, a federal court in New York ruled that an alien ordered deported as a "criminal alien" had a right to a hearing to assess the impact of his deportation on his family before removal.[496] In so deciding, the Court referred to the Due Process and Equal Protection Clauses of the U.S. Constitution.[497] The Court pointed out that due process was mandated, under the Constitution, to be applied to any "person," rather than solely to "citizens."[498] It also noted that the Equal Protection Clause has been held to apply to the federal government, as well as to the states, and that, as a non-citizen, the alien was entitled to equal protection under the law, as compared with citizens.[499] The Court quoted the *Zadvydas* Court as saying "[t]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[500]

Finally, as to the deportation itself, another deeply disturbing due-process issue has been raised. Although it should be obvious that an alien cannot be deported to a country in which he or she is at risk of being tortured, it has been alleged that exactly this happened in many of the special-interest cases.[501] There have even been allegations that torture was an intended part of the proceedings.[502] In either case, deporting an alien to a place where he or she is at risk of torture, or actually causing a detainee to be tortured, egregiously violates the international Convention Against Torture, which the U.S. has ratified.[503] That Convention is incorporated into U.S. federal law.[504]

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[495] *Ibid.* at 692 (quoting *Superintendent, Mass. Correctional Institution at Walpole v. Hill*, 472 U.S. 445, 450, 86 L. Ed. 2d 356, 105 S. Ct. 2768 (1985) (O'Connor, J.); also citing to *Crowell,* 285 U.S. at 87 (Brandeis, J., dissenting)).
[496] *Beharry, supra* note 431.
[497] *Ibid.* at 587 (discussing U.S. Const. amend. V and XIV).
[498] *Ibid.*
[499] *Ibid.* at 585.
[500] *Ibid.* at 587.
[501] See e.g. *Crewdson, supra* note 11; *Krawchuk, supra* note 11.
[502] *Crewdson, ibid.*
[503] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, art. 1 & 3, S. Treaty Doc. No. 100-20 (1998), 1465 U.N.T.S. 85.
[504] *United States Code: Crimes and Criminal Procedure*, 18 U.S.C. §2340A.

Yet, the notion of "torture" seems pervasive in the War on Terror. The *Washington Post* carried an allegation in early 2003 that the U.S. was regularly deporting people to countries in which it knew they would be tortured, in a process called "irregular rendition."[505] The case of Maher Arar, the Canadian-Syrian citizen who was deported to Syria, where he faced torture, is an example of such allegations in the context of the immigration policies.[506] Alberto Gonzales, the former White House Counsel, was confirmed in the Senate to succeed Ashcroft as the Attorney General, in spite of a memo he apparently approved in 2002, which suggests that the President is constitutionally exempt from the prohibition of torture under U.S. statutory law.[507]

Although the Government publicly disavowed the conduct of its soldiers at Abu Ghraib prison, the graphic photos of the abuse there make it clear that those detainees were, in fact, tortured.[508] In spite of the Government's statements condemning that torture, a Government attorney told a federal court, in 2004, that the Government saw no due-process obstacle to presenting evidence in its Military Commission and Combatant Status Review Tribunal proceedings that had been obtained through the use of torture.[509] And in June 2004, the American Civil Liberties Union released an FBI memo, obtained through a Freedom of Information Request, detailing a witness report that, in Iraq, he had seen "strangulation, beatings, placement of lit cigarettes into the detainees (sic) ear

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[505] *Priest, U.S. Decries Abuse, supra* note 161.

[506] *Krawchuk, supra* note 11 (describing the Arar case).

[507] "Memorandum for Alberto R Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§2340 -2340A" (1 August 2002), online: The Washington Post <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [*Memorandum for Gonzales*]; On December 30, 2004, shortly before Gonzales' confirmation hearing in the Senate, the Department of Justice issued a second memo, which omitted the controversial, torture-related statements from the 2002 memo. United States Department of Justice, "Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A" (30 December 2004)(noting "this memorandum supersedes the August 2002 Memorandum in its entirety"), online: United States Department of Justice <http://www.usdoj.gov/olc/dagmemo.pdf>.

[508] Seymour M. Hersh, "Torture at Abu Ghraib," *The New Yorker* (30 April 2004), online: The New Yorker <http://www.newyorker.com/fact/content/?040510fa_fact>.

[509] See generally Mark Danner, "Torture and Truth: America, Abu Ghraib, and the War on Terror," *The New York Review of Books* (15 October 2004), online: The New York Review of Books <http://www.nybooks.com/shop/product?usca_p=t&product_id=4211>; Human Rights Watch, "The Road to Abu Ghraib" (2004), online: Human Rights Watch http://www.hrw.org/reports/2004/usa0604/1.htm> [*The Road to Abu Ghraib*]; "Evidence Gained By Torture Allowed," *The Washington Post* (3 December 2004) online: Washingtonpost.com <http://www.washingtonpost.com/wp-dyn/articles/A29738-2004Dec2.html> (describing statement in federal court by Principal Deputy Associate Attorney General Brian Boyle).

openings, and unauthorized interrogations."[510] Similar allegations have been made in U.S. detention facilities around the world.[511] The Federal District Judge hearing some of the Guantanamo *habeas* petitions described some of the allegations of torture there:

> Additionally the petitioner contends that he would be locked in a room that would gradually be filled with water to a level just below his chin as he stood for hours on the tips of his toes ... He further claims that he was suspended from a wall with his feet resting on the side of a large electrified cylindrical drum, which forced him either to suffer pain from hanging from his arms or pain from electric shocks to his feet ... [512]

The Judge pointed out that the Combatant Status Review Tribunal had referred that case to the Criminal Investigation Task Force to investigate the torture claims.[513] The Judge also quoted from a first-person account from a person "affiliated with the Federal Bureau of Investigation but whose identify has been redacted,"

> On a couple of occassions[sic] I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated or defacated [sic] on themselves, and had been left there for 18-24 hours or more. On one occassion [sic], the air-conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion [sic], the A/C had been turned off, making the temperature in the unventilated room probably around 100 degrees. The detainee was almost unconcious [sic] on the floor, with a pile of hair around him. He had apparently literally been pulling his own hair out throughout the night ...[514]

The Judge noted that the allegations had to be further verified, and that it was not clear that they even applied to the detainees before her, but she concluded that, for the purpose of a motion to dismiss, the detainees had carried the burden on the inference that the Combatant Status Review Tribunal personnel had not done enough to determine whether information presented to them was obtained through torture.[515]

Calling torture a due-process issue seems strangely inadequate. Such conduct meets international criteria for both war crimes, in certain situations, and for crimes

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[510] Sacramento Division, Federal Bureau of Investigation, "Urgent Report" (25 June 2004), American Civil Liberties Union, online: American Civil Liberties Union <http://www.aclu.org/torturefoia/released/FBI.121504.4910_4912.pdf>.
[511] See *The Road to Abu Ghraib*, *supra* note 509.
[512] *In re Guantanamo Detainees*, *supra* note 240 at 57.
[513] *Ibid.* at 57-58.
[514] *Ibid.* at 59 (misspellings and use of "[sic]" appear in the original opinion).
[515] *Ibid.*at 56-59.

against humanity.[516] Domestically, those subjected to such a horror have potential criminal recourse against their tormentors, which should extend to members of the Bush Administration if they were responsible.[517] For example, one federal law states:

> § 2340A. Torture
> (a) Offense.— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
> (b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if—
> (1) the alleged offender is a national of the United States; or
> (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
> (c) Conspiracy.— A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.[518]

Furthermore, the Constitution provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[519] If, in fact, high-ranking members of the Government were aware of torture and allowed it, or even went further in instituting such policies, one could very reasonably argue that this would rise to the level of "high crimes" sufficient to justify impeachment and removal from office.[520] The Memorandum written to Gonzales in 2002, and not repudiated until more than two years later, after a firestorm of controversy, provides chilling evidence that, in fact, torture was approved at the highest levels of Government:

> Even if an interrogation method arguably were to violate [the criminal statute barring torture], the statue would be unconstitutional if it impermissibly encroached on the President's constitutional powers to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.[521]

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[516] See *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 17 July 1998, in force 1 July 2002, at Article 7 (1)(f), & 8 (2)(a)(ii).
[517] 18 U.S.C. §2340A, *supra* note 504.
[518] *Ibid.*
[519] U.S. Const. Art. II, Section 4.
[520] *Ibid.*
[521] *Memorandum for Gonzales*, *supra* note 507.

3.3.A.2. Aliens facing removal proceedings

Before September 11, 2001, the Supreme Court had also considered due process protections required for aliens facing deportation proceedings.[522] Relating to detention, the *Zadvydas* Court commented that "[w]hile alien removal proceedings are in progress, most aliens may be released on bond or paroled, again unless the Government specifically demonstrates that the person is a flight risk, or a risk to the community.[523] The Government has great discretion, however, in detaining people during deportation proceedings.[524] Again, however, such detentions are limited to the time necessary to effectuate deportation.[525] Arguably, holding people incommunicado, for extensive periods of time to investigate them for terrorism, then, once they are cleared, holding them to investigate immigration charges, would not meet this timeframe limitation.

Generally, a person already admitted into the country has a right to some proceeding, and to certain levels of due process, before being deported.[526] The Supreme Court specifically considered the degree of appropriate due process in the removal proceedings themselves, again shortly before the terrorist attacks, in *INS v. St. Cyr*.[527] The Court again noted that *habeas* relief was available for people facing deportation proceedings, who were being detained, noting that "at its historical core, the writ of *habeas corpus* has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest."[528]

3.3.A.3. Non-Admitted Aliens

The Arar case raises questions about the extent of U.S. authority to detain people, under the immigration system, who have been denied admission. Generally speaking, there is a clear dividing rule in U.S. immigration law between those who have been admitted and those who have not. Those who have not been admitted are, generally

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[522] See Myrna Pages, "Note: Indefinite Detention: Tipping the Scale Toward the Liberty Interest of Freedom after Zadvydas v. Davis," (2003) 66 Alb. L. Rev. 1213, at 1222-37 (describing the Due Process parameters laid out by the U.S. Supreme Court in two cases involving aliens ordered deported, but being held indefinitely because of an inability to find a country willing to accept them).
[523] *Zadvydas*, *supra* note 280 (citing 8 U.S.C.S § 1226(a)(2)(c)).
[524] *Demore*, *supra* note 289 at 327 (suggesting that there was a strong policy for detaining people during deportation proceedings, and seemingly rejecting idea of a need for individualized showings).
[525] *Ibid* (discussing a deportable criminal alien).
[526] See generally, David Cole, "The New McCarthyism: Repeating History in the War on Terrorism," (Winter 2003) 38 Harv. C.R.-C.L. L. Rev. 1, at 15.
[527] *INS v. St. Cyr*, *supra* note 282.
[528] *Ibid.* at 360-61.

speaking, not entitled to due-process protections relating specifically to the decision to deny them entry into the U.S.[529] The reasoning is that they have no right to enter the U.S., so there are no constitutional protections to consider. The idea is that, denied admission, they can simply turn back and return to the place from which they came.[530]

What happens, however, when, instead of being allowed to turn back, that person is instead detained?[531] Under U.S. law, any alien present in the U.S. who has not been admitted is deemed an applicant for admission.[532] Professor Cole wrote an article, in which he discussed, quite persuasively, the distinction between an alien who is simply denied admission, and an alien who is denied admission, then detained by the Government, arguing that the due-process protections in those cases are not identical.[533]

Cole is sharply critical of a U.S. Supreme Court ruling, which has often been used to support the argument that a non-admitted alien can be detained indefinitely. In *Shaughnessy v. United States ex rel. Mezei*, the Supreme Court found that an alien denied admission, who could not be sent to any other country, and was subsequently held for two years at Ellis Island, had no due-process protections under the Constitution.[534] Cole argues that the Court incorrectly cited the earlier *Knauff* case, which related solely to whether an alien had due-process rights to contest an admission decision.[535] He quotes a dissenting Justice in the *Mezei* case, who said "realistically, this man is incarcerated by a combination of forces which keep him as effectually as a prison, the dominant and proximate of these forces being the United States immigration authority. It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound."[536]

This argument is powerful and persuasive. While an alien does not have a right to enter the U.S., such that the right requires due-process protection, an alien does have a right to individual liberty, and, whenever the U.S. Government attempts to take that

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[529] *Zadvydas, supra* note 282 at 693.
[530] *David Cole, Enemy Aliens, supra* note 4.
[531] See David Cole, "Enemy Aliens" (2002) 54 Stan. L. Rev. 953 at 983 (arguing that detention implicates Due Process protections that might not otherwise exist for an alien denied entry into the U.S.).
[532] 8 U.S.C. 1225 (a)(1)(2003).
[533] *Cole, In Aid of Removal, supra* note 325 at 1032-33.
[534] *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953)[*Shaughnessy*].
[535] *Cole, In Aid of Removal, supra* note 325 at 1032-33.
[536] *Ibid.* (citing *Mezei*, 345 U.S. at 220 (Jackson, J., dissenting)).

away, the Constitution requires that the person be accorded appropriate due process. To the extent that the *Mezei* decision suggests otherwise, it should be revisited in light of cases like the Arar detention and deportation. To suggest that the U.S. may detain people who are merely passing through its airports, and that, having detained these people, the Government has unfettered power over them, with no potential for recourse, is patently ridiculous.[537]

A parallel argument certainly did not withstand Supreme Court scrutiny with regard, for example, to the Guantanamo detainees, even though they were not U.S. citizens, had never set foot in the U.S., and had never sought to enter the country.[538] Indeed, Justice Stevens, in that opinion, quoted with approval, not the majority decision in *Mezei*, but the dissent, in which Justice Jackson wrote of the long-standing requirement to allow *habeas* as a means of contesting executive detentions.[539] As Justice Black noted in his own dissent to the *Mezei* decision,

> No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial ... Our Bill of Rights was written to prevent such oppressive practices. Under it this Nation has fostered and protected individual freedom. The Founders abhorred arbitrary one-man imprisonments. Their belief was -- our constitutional principles are -- that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken "without due process of law." This means to me that neither the federal police nor federal prosecutors nor any other governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice. It means that individual liberty is too highly prized in this country to allow executive officials to imprison and hold people on the basis of information kept secret from courts. It means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor.[540]

In January 2005, the U.S. Supreme Court added further support to the notion that an alien deemed "inadmissible" has certain rights to challenge his or her detention.[541] In the *Clark v. Martinez* decision, the Court made it clear that time limitations on detention of aliens ordered removed included those aliens deemed inadmissible as "criminal

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[537] See *In re Guantanamo Detainees, Petitioners' Memorandum in Opposition to Respondents' Motion to Dismiss*, case numbers omitted, (D.D.C.), at p. 8, online: Center for Constitutional Rights <http://www.ccr-ny.org/v2/legal/september_11th/docs/OppositionRasulDismiss.pdf>.
[538] See generally *Rasul, supra* note 97.
[539] *Rasul, supra* note 97 at 2692 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218-219, 97 L. Ed. 956, 73 S. Ct. 625 (1953) (Jackson, J., dissenting)).
[540] *Shaughnessy, supra* note 534 at 217-18.
[541] *Clark, supra* note 283 at 722.

aliens."[542] In so deciding, the Court ruled that the aliens' petitions for *habeas* relief should have been granted, and that their status as "inadmissible" aliens did not change their substantive rights, and that they could not be detained indefinitely.[543]

Although the issue has not been raised in any known prior decision, there is also an issue relating to Arar, based on the fact that he was not merely deported, but was deported to a third country, where he had not lived in years, and where he feared being sent because he was in danger there. His original destination was Canada, where he was a citizen and resident. The U.S. did not allow him to pass through to Canada, nor did it send him back to the country from which his flight originated. Instead, it sent him, against his will, to a third country, based purportedly on his status as a dual citizen. Arar may have technically been seeking admission to the U.S. to be allowed to pass through, but he was, in reality, seeking to leave the U.S. and return to Canada. Because the U.S. did not simply turn him back at the Border, but, instead, detained, interrogated, and ultimately sent him to a third country against his will, its actions did not fall under the umbrella of those immigration decisions for which no due-process protections were necessary. Forcibly sending somebody to a third country is quite different from simply turning him away at the Border, and it implicates liberty interests that certainly require judicial intervention.

3.4. Conclusion

Having clarified in Chapter 2 that the U.S. Government must act within specific legal parameters, even in times of emergency, this Chapter has undertaken to establish that, relating to the special-interest detainees, the Government stepped outside of those parameters. Although its top attorney admitted, repeatedly and on the public record, that the special-interest detainees were detained on suspicion of terrorism – a criminal matter – the Government proceeded against the detainees under the immigration system, with none of the due-process protections constitutionally required for criminal cases. Because it admittedly targeted the special-interest detainees based on immutable characteristics, primarily that of national origin, rather than on an individualized suspicion of criminal

[542] *Ibid.*
[543] *Ibid.* at 719.

activity, the immediate inference is that the Government did not proceed under the criminal-justice system because it had no legal basis for doing so. The Government's attempt to circumvent this problem by using an administrative immigration system for what were admittedly criminal cases is unsupported by any principle of American law and undermines the constitutional protections that the founding fathers, and more than 200 years of legislative enactments, have crafted for those facing criminal accusation. The laws in this respect are not optional, but, rather, were designed to prevent the exact types of arbitrary Executive detentions that seem to have occurred in these cases.

Even if the Government could establish that it acted properly in proceeding through the immigration system rather than the criminal-justice system, it still failed to meet even the lesser due-process mandates of that administrative system. As explained extensively in this Chapter, the mere fact that an alien is facing some form of immigration proceeding does not mean that he or she is unilaterally stripped of any rights of due process. On the contrary, the law establishes that aliens facing certain immigration actions, especially those within the U.S. or those detained by the U.S., have specified due process protections, which the Government has no authority to suspend. Civil liberties form the foundation for the U.S. system of Government, and their abridgement in these cases was outside of the law and will likely have long-term, negative repercussions for that rule of law.

Conclusion: "A Chill Wind Blows"[544]

> *We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country.* [545]

Although this thesis has focused extensively on the parameters faced by a U.S. President, under its rule of law, when an emergency situation arises, the real question that it raises is what it means when a President acts outside of those legal parameters – and especially when such actions are not isolated in nature, but consist of systematic, long-term changes to legal institutions within the nation. One possibility is that the rule of law, thus discarded, could be said to have ceased to exist. Another, equally disturbing, possibility is that, while that rule of law exists in terms of token recognition, it has become a meaningless concept, which can be discarded as soon as any Executive deems it necessary to do so.[546] If the Executive Branch of Government truly is no longer constrained by long-standing constitutional mandates, then something fundamental has changed in the U.S. system of Government, and the Constitution, as a legal instrument, seems to be less viable. While the events of September 11th and thereafter vividly raise these questions in the American context, these are general issues that are now being faced by other nations as well – such as the UK and Canada – as this War on Terror proceeds.[547] These issues will invariably be faced by any nation that purports to follow a valid rule of law, and the way that a nation responds to these challenges will define its character. The question now is whether fear or the rule of law will prevail. In the U.S., the signs suggest that fear is winning.

This question is especially relevant in terms of the specific nature of the U.S. responses to the terrorist attacks. While, as described in Chapter 2, it is not unprecedented for a U.S. President to act outside of constitutional authority in a time of perceived crisis,

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[544] *Webster v. Reproductive Health Services*, 492 U.S. 490 at 560 (1989)(Blackmun, JJ, dissenting)(referring to the fear that women's reproductive rights would be curtailed in the future, based on indicators of such a trend. The full quotation is "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.") [*Webster*].

[545] *Bourgeois v. Peters*, 387 F.3d 1303, at 1312 (11th Cir. 2004)(finding that Government search procedures of protestors legally gathered violated the Constitution).

[546] The framing of this issue is based on a conversation with my supervisor, Professor Patrick Healy, on 2 February 2005.

[547] See Section 3.2.B.1., above.

past actions have tended to be temporary in nature, applying to narrowly tailored circumstances, and have been specifically designed to last for a finite timeframe, presumably until the emergency passes. In the long run, the Constitution has proven sufficiently strong to withstand the battering of such derogations from its provisions, and the rule of law, thus interrupted, has returned to dominance. Thus, whether those actions were valid or not – and often they were not – the long-term repercussions of a President having taken them were somewhat finite in nature.

The initiatives pursued by the Executive Branch as part of the War on Terror, however, are facially different than past actions described in this thesis. The problem lies not just in their questionable legality, but, rather, in their multi-faceted, and potentially permanent, nature. Many of the changes brought about after September 11th were clearly not designed to be temporary responses to an emergency. In the context of immigration detentions, there is nothing to suggest that the practices described in this thesis will cease to be followed, and the portion of the USA Patriot Act dealing with immigration detentions is not a temporary, "sunset" provision.[548] Moreover, the complex nature of structures such as the Military Commissions have nothing of the temporary about them. Other signs of permanence include the Government's investigation of the possibility of creating "permanent" detention facilities for those detainees it cannot try for terrorism, due to lack of evidence.[549] And as quickly as another branch of government intervenes in these actions, the Executive Branch simply finds a new way to do the same thing. Perhaps the most vivid illustration of this tendency is in the creation of the Combatant Status Review Tribunals nine days after the Supreme Court ordered the Executive Branch to allow Guantanamo detainees access to U.S. Courts.[550]

As disturbing as these trends are, there are signs that they are not the end of the changes envisioned by the Government. While the War on Terror initiatives have been aimed primarily at non-citizens, the Government has contemplated expanding certain civil-liberties abridgements to citizens as well. It is perhaps because non-citizens have been the primary targets that many American citizens have seemed muted in their

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[548] See discussion of the USA Patriot Act, *supra* note 47 and accompanying text.
[549] *Priest, Long-Term Plan Sought, supra* note 183.
[550] See Section 2.3.A.2.a.1., above.

protests of these policies. It is easier to accept deprivations when it is clear that somebody else will bear the primary burden of those deprivations.[551]

American citizens should not feel complete confidence that their civil liberties are secure, however. For instance, following on the heels of its success in getting the Patriot Act passed, the Government prepared a second draft of legislation, nicknamed "Patriot Act II."[552] This draft was meant to be disclosed much later, but a copy of it leaked out to the public.[553] Among its other provisions, the proposed legislation heavily penalizes people for assisting organizations the Government deems "terrorist." For instance, those who support such organizations, even if they do not support any illegal activity, could be "presumed" to have renounced their U.S. citizenship.[554] This renunciation would apply equally to U.S.-born and naturalized citizens. Arguably, a native-born citizen, stripped of citizenship, might then have no country to which he or she could be deported, unless that person happened to hold dual citizenship.[555] The Act then allows such people to be detained indefinitely as non-deportable aliens.[556] The Attorney General would also have the discretion to deport a person to any country, regardless of whether there is even a functioning government in that country.[557] Given the facts outlined in this thesis, one can

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[551] David Cole, "An Ounce of Detention," *The American Prospect* (9 September 2003), online: AlterNet, <http://www.alternet.org/story/16715/> ("[w]e want prevention, it appears, only when the costs are borne by someone else."). That many Americans do not apparently object to the War on Terror initiatives was vividly illustrated by the election held on November 2, 2004, in which George W. Bush was re-elected with a popular vote of approximately 60 million people. Clearly, however, many Americans do object to some aspect of the Bush initiatives, since Bush's opponent, John Kerry, received approximately 57.1 million votes – more than any sitting President had ever received before that election. CNN, "Election Results" (3 November 2004), online: CNN.com <http://www.cnn.com/ELECTION/2004/pages/results/president/>. Bush won by the smallest margin, in terms of popular vote, of any re-elected incumbent President in U.S. history. "U.S. Presidential Election, 2004," *Wikipedia*, online: Wikipedia *<http://en.wikipedia.org/wiki/U.S._presidential_election%2C_2004#Overview>*.

[552] A full copy of this draft legislation is available online at <http://www.incunabula.org/DSEA/INDEX.HTM>.

[553] *Cole, Enemy Aliens, supra* note 4 at 69-70 (discussing the Domestic Security Enhancement Act, or Patriot Act II).

[554] *Ibid.*

[555] *Ibid.*

[556] *Ibid.*; American Civil Liberties Union, "Interested Persons Memo: Section-by-Section Analysis of Justice Department draft "Domestic Security Enhancement Act of 2003," also known as "PATRIOT Act II" (12 February 2003), online: American Civil Liberties Union <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11835&c=206>.

[557] *Cole, Enemy Aliens, ibid.*

only imagine what would happen to such people.[558] An outcry followed the leak of Patriot Act II, so it has not been further discussed or presented in public.[559]

The traditional hope, of course, against such unprecedented seizure of power by an Executive lies with the constitutional system of checks and balances. Congress, however, passed the Patriot Act, with many of its members not even reading it, which does not bode well for its role within this framework. And Congress has not more recently shown an improved inclination to stand up to its constitutional duties. A strong example is found in the confirmation of Gonzales as the top attorney in the land, even after he apparently approved some highly questionable detainee interrogation tactics, and even after he described valid international law as "quaint" and "obsolete."[560] For the moment at least, it does not appear that Congress will provide a strong check or balance to the Executive's actions.

Gonzales, interestingly, provides an example of possible problems with the Supreme Court carrying out its own system of checks and balances. The Supreme Court, at this time, is almost evenly divided in terms of ideology, and the War on Terror rulings were by no means unanimous decisions.[561] Again, changing ideologies on the Court do not, in themselves, mean the Court will not stand up for its constitutional duties. It certainly did so in at least two of the War on Terror cases. Given age and health issues among current members of the Court, it is likely that President Bush will appoint Justices to the Supreme Court. And Gonzales's name has been rumored to be at the top of the list.[562] This is a chilling prospect for the future of the Court's rulings on Executive detentions, and in terms of its potential role in the system of checks and balances as well.

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[558] See *Cole, Enemy Aliens*, *supra* note 4 at 69.

[559] Tom Troy, "Patriot Act Produces Wave of Opposition Across Nation," *The Toledo Blade* (26 December 2003), online: Common Dreams News Center <http://www.commondreams.org/headlines03/1226-05.htm>.

[560] Editorial, "Mr. Gonzales Speaks," *The New York Times*, (7 January 2005)(applauding some members of Congress for sharply questioning Gonzales, and concluding that "[t]he nation deserves an attorney general who is not the public face for inhumane, illegal and clearly un-American policies."); Associated Press, "Senate Confirms Gonzales for Attorney General" (3 February 2005) /> (noting that Gonzales was confirmed by a vote of 60-36. The only other attorney general ever to face as much opposition in the Senate was Ashcroft, who was confirmed by a vote of 58-42) *MSNBC.com*, online: MSNBC News <http://www.msnbc.msn.com/id/6895355/>.

[561] See *Rasul*, *supra* note 97; *Hamdi*, *supra* note 255.

[562] See Bob Herbert, "Promoting Torture's Promoter," Editorial, *The New York Times* (7 January 2005), online: The New York Times <http://www.nytimes.com/2005/01/07/opinion/07herbert.html?n=Top%2fOpinion%2fEditorials%20and%20Op%2dEd%2fOp%2dEd%2fColumnists>.

Perhaps this pessimistic view of the Court's future is unwarranted, given surprises like Justice Scalia's dissent in the *Hamdi* decision. But the signs are not encouraging.

In writing an outraged editorial concerning the Gonzales nomination, Bob Herbert, of *The New York Times*, said:

> Americans have tended to view the U.S. as the guardian of the highest ideals of justice and fairness. But that is a belief that's getting more and more difficult to sustain. If the Justice Department can be the fiefdom of John Ashcroft or Alberto Gonzales, those in search of the highest standards of justice have no choice but to look elsewhere.[563]

A major concern, therefore, in the current state of things is that the U.S. faces a potential situation in which all of the elements of checks and balances may fail at the same time. As discussed in Chapter 2, that seems to have been the case when the Supreme Court decided the infamous *Korematsu* case.[564] Unless the other branches of Government step in now, the opportunity may be lost forever. The Nation is facing a crisis in its constitutional structure that may prove to be as serious as that faced during the Civil War, and which could potentially damage the rule of law in the U.S. in a way not even approached during the Civil War. As the structure of the Government continues to change, and to push traditional Congressional or Judicial authority towards the President, the Executive's ability to limit the other branches from checking his actions, or providing a balance of power, is likely to continue to grow, perhaps to the point where the power of the other branches becomes entirely obsolete. As Justice Blackmun said in another context, "the signs are evident and very ominous, and a chill wind blows."[565]

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[563] *Ibid.*
[564] See *Korematsu, supra* note 378 and accompanying discussion.
[565] *Webster, supra* note 544.

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