LEGAL RESPONSES TO TERRORISM

Second Edition

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Chapter 1

INTRODUCTION

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Among the important issues of this subject are the extent to which terrorism poses a genuine threat to society, and the extent to which normal practices of law enforcement and civil liberties should yield to an unusual threat. Most of the arguments have taken place as appeals to history, philosophy, or plain emotion. One more calculating approach was taken by looking at risk assessment techniques developed in dealing with such matters as nuclear power plant licensing, domestic chemical use, and pollution emissions:

> Many people hold that terrorism poses an existential threat to the United States. But a look at the actual statistics suggests that it presents an acceptable risk – one so low that spending to further reduce its likelihood or consequences is scarcely justified.

John Mueller & Mark Stewart, *Hardly Existential: Thinking Rationally About Terrorism*, FOREIGN AFFAIRS (April 2, 2010).

Comments on the Foreign Affairs blog responded that it would be inappropriate to count the successes of counter-terrorism against its continued funding, and that we can never know what plots were foiled as a result of counter-terrorism efforts. These themes recur throughout our study, particularly in relation to the employment of extreme measures such as harsh interrogation techniques or domestic wiretapping, let alone employment of military force.

§ 1.02 INTERLOCKING GOVERNMENTAL CONTROLS

[A] Options – Force and Nonforce

add at page 9:

The question of whether the struggle against terrorism could be called a "war" or "armed conflict" has intensified with the realization of how many executive actions of the Bush administration turned on the "global war on terrorism" phrase.

> Within hours of the 9/11 attacks in the United States, President George W. Bush declared 'a global war on terrorism'. Experts around the world assumed this declaration was a rallying cry, a rhetorical device to galvanise the nation to serious action. By November 2001, however, the evidence began to mount that the President was ordering actions that could only be lawful in a de jure armed conflict: targeting to kill without warning, indefinite detention without trial, and search and seizure on the high seas without consent.

> The [Use of Force Committee of the International Law Association] has found evidence of at least two characteristics with respect to all armed conflict:
>
> 1. The existence of organised armed groups
>
> 2. Engaged in fighting of some intensity
>
> Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT AND SECURITY LAW 393 (2008).

[C] Security and Law Enforcement

add at page 13:

The law enforcement option involves acquisition of evidence pointed toward a criminal trial in a duly constituted court. The political emphasis on terrorism in the last few years has produced several demands for modification from that traditional approach, such as demands for a special terrorism court and demands for detention of dangerous persons without trial. These demands may proceed from the perception that convictions of shadow conspiracies are difficult, or that secret evidence may be necessary in some cases, or that some people are just too dangerous to be allowed a forum in which to plead their cause

The idea of a special terrorism court has been promoted by some observers. The idea is to have a special court that deals with all criminal prosecutions of terrorist activity. In at least one version of the proposal, the court would be allowed to hear classified information that was not disclosed to the defendant so long as there was sufficient disclosed evidence to sustain a conviction. The "confidential intelligence information . . . may only be used to support an existing body of evidence known to the defendant and his counsel and introduced in open court proceedings."Amos Guiora, *Creating a Domestic Terror Court*, 48 WASHBURN L.J. 617, 631 (2009).

Detention without trial has garnered some well-known supporters under the auspices of the Brookings Institution:

> If the Obama administration chooses to maintain a system of non-criminal military detention – and for reasons set forth below, I think it should – it will necessarily also choose to have a national security court. This is so because federal courts constituting a "national security court" must supervise non-criminal detention under the constitutional writ of habeas corpus and a likely statutory jurisdiction conferred by Congress. Viewed this way, we have had a centralized and thinly institutionalized national security court for years in the federal courts of the District of Columbia, which have been supervising Guantánamo Bay military detentions.

Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court* (2009), http://www.brookings.edu/papers/2009/0209_detention_goldsmith.aspx

> A consensus is beginning to emerge in the public and political spheres concerning the non-criminal detention of terrorist suspects. Over the past several years, non-criminal detention of Al Qaeda and Taliban captives at Guantánamo Bay, Cuba has sharply divided the American polity. Since the change in administration, however, it has become increasingly clear that the United States – even under a Democratic administration and with substantial Democratic majorities in both houses of Congress – is not going to abandon long-term detention of terror suspects and revert to a pure law enforcement model for incapacitating them, and it is not going to deal with the population of Guantánamo on the basis of freeing everyone whom it cannot prosecute.

Benjamin Wittes & Colleen Peppard, *Designing Detention: A Model Law for Terrorist Incapacitation* (2009), http://www.brookings.edu/papers/2009/0626_detention_wittes.aspx

Chapter 2

U.S. LAW AND GLOBALIZED TERRORISM

§ 2.02 EXTRATERRITORIAL JURISDICTION

[A] Abduction for Trial in the U.S.

add at p. 42, note 3 "Unconscionable Exception"

The *Toscanino* and *Noriega* cases raise the issue of whether a court would dismiss a prosecution based on the mistreatment of the prisoner in U.S. custody. That issue has arisen in cases following disclosure of "harsh interrogation" techniques employed by the C.I.A. It is most notably presented in the debate over whether and where to try Khalid Sheikh Muhammad (KSM), whom the C.I.A. admits to having waterboarded 183 times before taking him to Guantanamo.

UNITED STATES v. GHAILANI
2010 U.S. Dist. LEXIS 45371 (S.D.N.Y. May 10, 2010)

KAPLAN, District Judge:

Ahmed Khalfan Ghailani, an alleged member of Al Qaeda, was indicted in this Court in 1998 and charged with conspiring with Usama Bin Laden and others to kill Americans abroad by, among other means, bombing the United States Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, bombings in which 224 people reportedly were killed. Years later, he was captured abroad by a foreign state and subsequently turned over to the Central Intelligence Agency ("CIA"). He was held and interrogated by the CIA at one or more secret locations outside the United States for a substantial period. He then was shifted to a secure facility at the United States naval base at Guantanamo where he remained until June 2009, at which time he was produced in this Court for prosecution on the indictment. Ghailani now moves to dismiss the indictment on the ground that he was tortured by the CIA in violation of his rights under the Due Process Clause of the Constitution.

I

The Due Process Clause is "a historical product" the roots of which date at least to 1215, when King John pledged in the Magna Carta that "[n]o freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land." While it "would seem to refer solely and simply to procedure, to what the legislative branch enacted it to be," it has proved to be of broader scope. It "is a summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions

and conscience of our people as to be ranked as fundamental' . . . or are 'implicit in the concept of ordered liberty.'"

In this case, Ghailani has not identified explicitly the component of his due process rights that allegedly was violated. But he argues that both the CIA's use of "enhanced interrogation techniques" – in his word, torture – to question him and the fact that use of those techniques was authorized by "the highest levels of our government" are "'so fundamentally unfair', 'shocking to our traditional sense of justice', and 'outrageous'" that due process requires the indictment to be dismissed.

The government does not here respond to Ghailani's assertions as to what was done to him while in CIA custody. Nor does it join issue on the question whether those assertions, if true, violated Ghailani's right to due process of law. Rather, it argues that Ghailani's allegations of pretrial custodial abuse are immaterial to this motion because dismissal of the indictment would not be a proper remedy for the government's alleged misconduct. In other words, the government argues that there is no legally significant connection between the alleged torture and any deprivation of the defendant's liberty that might result from this criminal prosecution.

If the government is correct in contending that Ghailani would not be entitled to dismissal of this criminal prosecution on due process grounds even if he was tortured in violation of his constitutional rights, it would be unnecessary for this Court to address the details of Ghailani's alleged treatment while in CIA custody. Nor in that event would it be appropriate to express any opinion as to whether that treatment violated his right to due process of law.

II

The Due Process Clause, so far as is relevant here, protects against deprivations of liberty absent due process of law. The deprivation of liberty that Ghailani claims may occur if this case goes forward is his imprisonment in the event of conviction. In seeking dismissal of the indictment, however, he does not deny that he is being afforded every protection guaranteed to all in the defense of criminal prosecutions. Rather, Ghailani in effect argues that the case should be dismissed to punish the government for its mistreatment of him before he was presented in this Court to face the pending indictment.

For a due process violation to result in consequences adverse to the government in a criminal case -- for example, the suppression of evidence or the dismissal of an indictment -- there must be a causal connection between the violation and the deprivation of the defendant's life or liberty threatened by the prosecution. That is to say, relief against the government in a criminal case is appropriate if, and only if, a conviction otherwise would be a product of the government misconduct that violated the Due Process Clause.[12] For only in such

[12] *See, e.g., Rochin v. California*, 342 U.S. 165, 173, 72 S. Ct. 205, 96 L. Ed. 183 (1952) ("[C]onvictions cannot be brought about by methods that offend 'a sense of justice.'"); *see also Breithaupt v. Abram*, 352 U.S. 432, 435, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957) (recognizing that

circumstances may it be said that the deprivation of life or liberty that follows from a criminal conviction flows from the denial of due process. This conclusion thus rests directly on the text of the *Due Process Clause* itself.

This point finds support also in the Supreme Court's consistent holdings that illegality in arresting or obtaining custody of a defendant does not strip a court of jurisdiction to try that defendant. "An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction." [United States v. Crews, 445 U.S. 463, 474, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980).]

This doctrine, better known as the *Ker-Frisbie* rule, dates back well over a century and "rests on the sound basis that due process of law is satisfied when one present in court is convicted of a crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards." Moreover, the Court explicitly has refused to adopt an exclusionary rule that would operate on the defendant's person:

> Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."[17]

This case follows *a fortiori* from the rationale of the *Ker-Frisbie* rule. Ghailani is charged here with complicity in the murder of 224 people. The government here has stated that it will not use anything that Ghailani said while in CIA custody, or the fruits of any such statement,[20]in this prosecution. In consequence, any deprivation of liberty that Ghailani might suffer as a result of a conviction in this case would be entirely unconnected to the alleged due process violation. Even if Ghailani was mistreated while in CIA custody and even if that mistreatment violated the *Due Process Clause*, there would be no connection between such mistreatment and this prosecution. If, as *Ker-Frisbie* holds, the illegal arrest of a defendant is not sufficiently related to a prosecution to warrant its dismissal, it necessarily follows that mistreatment of a defendant is not sufficient to justify dismissal where, as here, the connection between the alleged misconduct and the prosecution is non-existent or, at least, even more remote. Certainly the government should not be deprived here "of the

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evidence obtained by government conduct that "shock[s] the conscience" may not be used to support a criminal conviction).

[17] United States v. Blue, 384 U.S. 251, 255, 86 S. Ct. 1416, 16 L. Ed. 2d 510 (1966).

[20] The government has identified one possible exception: a percipient witness whose identity remains classified and whose testimony may constitute fruit derived from statements made by the defendant in response to interrogations while in CIA custody. The government maintains that there is no basis for suppressing this potential witness's testimony, and the issue is *sub judice* before this Court.

opportunity to prove his guilt through the introduction of evidence wholly untainted by [any government] misconduct." Any remedy for any such violation must be found outside the confines of this criminal case.

United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), is not to the contrary. The defendant in that case allegedly was brought before the trial court as a result of being abducted and tortured by government agents, conduct that he claimed violated his right to due process of law. Upon conviction, he appealed on the ground that the agents' actions violated his right to due process and that the district court's jurisdiction over him was a product of that violation. The Second Circuit reversed the conviction and remanded to enable the defendant to attempt to prove that the agents' conduct was sufficiently outrageous to have violated the *Due Process Clause*. But *Toscanino* does not support Ghailani here.

As an initial matter, *Toscanino* was concerned with "denying the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part." To whatever extent it is authoritative, a subject discussed below, the case is limited to situations in which the alleged outrageous government conduct brought the defendant within the court's jurisdiction, and thus was a but-for cause of any resulting conviction, and compromised the fairness and integrity of the criminal proceedings. There is no similar connection between Ghailani's alleged mistreatment while in CIA custody and this prosecution. Hence, to whatever extent that *Toscanino* remains viable, it does not apply here.

Second, as suggested already, it is doubtful that *Toscanino* remains authoritative. Several circuits have expressed doubt as to its continued viability in light of subsequent Supreme Court decisions.[26] Moreover, the Second Circuit itself subsequently has relied heavily on the *Ker-Frisbie* rule in deciding a case very similar to the one currently before this Court.

In *Brown v. Doe*, [2 F.3d 1236 (2d Cir. 1993),] a defendant convicted of felony murder and robbery in state court sought federal habeas corpus relief on the ground, *inter alia*, that his substantive due process rights had been violated by repeated brutal beatings by police following his arrest. He alleged that this pretrial custodial abuse "was so outrageous and so offensive to due process of law that it bar[red] his prosecution and require[d] dismissal of the indictment."

In affirming the district court's denial of relief, the Second Circuit held that the Due Process Clause was the appropriate source of constitutional protection against the alleged pretrial abuse, but it concluded that the requested remedy was inappropriate. In light of the *Ker-Frisbie* line of cases, the court reasoned that "if there is no authority for barring the prosecution of a defendant who was illegally taken into custody, we are in no position to strip New York State of its power to try a defendant . . . who was lawfully arrested and convicted on untainted evidence." Moreover, "the wrong committed by the police has its own

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[26] *See, e.g., United States v. Best,* 304 F.3d 308, 312 (3d Cir. 2002); *United States v. Matta-Ballesteros,* 71 F.3d 754, 763 (9th Cir. 1995); *United States v. Mitchell,* 957 F.2d 465, 470 (7th Cir. 1992); *United States v. Darby,* 744 F.2d 1508, 1531 (11th Cir. 1984).

remedies. It is unnecessary to remedy that wrong by absolving [petitioner] of his own crime, and there is no interest of justice served by a result in which the community suffers two unpunished wrongs." The court concluded that "[t]he remedy of dismissal is not required to vindicate [petitioner's] due process rights. Other and more appropriate remedies are available," potentially including civil remedies under 42 U.S.C. § 1983 and criminal prosecution of the police who assaulted him.

Brown confirms this Court's view that *Toscanino*, if it retains any force, does so only where the defendant's presence before the trial court is procured by methods that offend the *Due Process Clause*. Dismissal of the indictment in the absence of a constitutional violation affecting the fairness of the criminal adjudication itself is unwarranted.

Conclusion

If, as Ghailani claims, he was tortured in violation of the Due Process Clause, he may have remedies. For the reasons set forth above, however, those remedies do not include dismissal of the indictment. The defendant's motion to dismiss the indictment on the grounds of allegedly outrageous government conduct in violation of his Fifth Amendment due process right is denied.[33]

United States v. Slough, 677 F. Supp.2d 112 (D.D.C. 2009). This case dealt with the prosecution of five "contractor security personnel" employed by the Blackwater security company who allegedly went on a shooting rampage at a Baghdad intersection during the tense days of September 2007. The defendants were charged with unjustified killing of 17 Iraqi civilians, to which they answered that they were responding to being fired upon by someone in the crowded intersection.

> The defendants have been charged with voluntary manslaughter and firearms violations arising out of a shooting that occurred in Baghdad, Iraq on September 16, 2007. They contend that in the course of this prosecution, the government violated their constitutional rights by utilizing statements they made to Department of State investigators, which were compelled under a threat of job loss. The government has acknowledged that many of these statements qualify as compelled statements under *Garrity v. New Jersey,* 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967), which held that the Fifth Amendment privilege against self-incrimination bars the government from using statements compelled under a threat of job loss in a subsequent criminal prosecution. The Fifth Amendment automatically confers use

[33] In light of its holding that dismissal is not warranted, the Court need not address the government's second legal argument that the Due Process Clause of the Fifth Amendment does not apply to the alleged government misconduct at issue.

> and derivative use immunity on statements compelled under *Garrity*; this means that in seeking an indictment from a grand jury or a conviction at trial, the government is prohibited from using such compelled statements or any evidence obtained as a result of those statements.
>
> The government has also acknowledged that its investigators, prosecutors and key witnesses were exposed to (and, indeed, aggressively sought out) many of the statements given by the defendants to State Department investigators. Under the binding precedent of the Supreme Court in *Kastigar v. United States,* 406 U.S. 441 (1971), the burden fell to the government to prove that it made no use whatsoever of these immunized statements or that any such use was harmless beyond any reasonable doubt.

Judge Urbina held three weeks of hearings and decided that the criminal investigation team had relied extensively on the compelled statements provided to the State Department and violated the defendants' fifth amendment rights in obtaining the indictments.

> When a judge, upon close examination of the procedures that bring a criminal matter before the court, concludes that the process aimed at bringing the accused to trial has compromised the constitutional rights of the accused, it behooves the court to grant relief in the fashion prescribed by law. Such is the case here.

These indictments were dismissed. But *Ghailani* and the cases on which it relies indicate that violation of rights in obtaining information simply means suppression of the information, not dismissal of the entire case.

If *Slough* means that dismissal is the appropriate remedy for violation of constitutional rights in bringing a case to trial, does that mean that KSM and others cannot be tried because of their mistreatment at the hands of U.S. agents? But the court implies that the prosecution could go forward with another indictment or even just a criminal complaint so long as the government does not use anything tainted by the compelled statements: "in seeking an indictment from a grand jury or a conviction at trial, the government is prohibited from using such compelled statements or any evidence obtained as a result of those statements." And *Ghailani* specifically says that we can torture defendants and still prosecute them, so no dismissal for KSM. Indeed, with KSM there was probably ample evidence against him prior to his opening his own mouth (hard to know exactly why he was waterboarded 183 times).

And where does the dignity of Article III courts fit into all this? Can a judge feel very good about sitting in judgment over someone who has been tortured by the agents of his or her own government? At least some judges answer that "there is no interest of justice served by a result in which the community suffers two unpunished wrongs." But this answer may be too simplistic. In the search or compelled statement scenarios, exclusion of evidence is a remedy that seems

germane and usually proportional to the violation. The problem with outrageous conduct that is unrelated to evidence is that the only thing suppressible is the prosecution itself. That is an extremely severe remedy, but the violation is also very severe and is apparently not going to be redressed by the other remedies to which these judges allude – the civil actions thus far have been dismissed on the basis of "state secrets" and Obama has made it clear there will be no prosecutions. So a proper policy analysis could consider which of the two societal harms is greater, not just assuming that we have one to prosecute and the other to forego.

With regard to remedies for constitutional violations, the federal courts have addressed the balancing of interests in only a handful of cases involving effective assistance of counsel. For example, in *United States v. Gouveia*, 704 F.2d 1116, 1124 (9th Cir. 1983), *rev'd*, 467 U.S. 180 (1984), the Ninth Circuit dealt with a situation in which two prisoners were accused of murdering a fellow prisoner but they were held in administrative segregation without counsel for many months before being charged. The court held that this violated their sixth amendment right to counsel and was incurable:

> In fashioning an appropriate remedy for appellants we are guided by the Supreme Court's recent decision in *United States v. Morrison*, 449 U.S. 361 (1981). There the Court stated that the remedy for Sixth Amendment deprivations "should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interest." The correct approach is to identify the taint and devise a remedy that neutralizes the prejudice suffered so that the defendant is assured the effective assistance of counsel and a fair trial.
>
> The "taint" in the present case is that lengthy preindictment isolation without the assistance of counsel handicapped appellants' ability to defend themselves at trial. Prison crimes present suspects with unique investigatory and evidentiary obstacles. And, to repeat, the passage of time greatly exacerbates these difficulties. The length of delay in appointing counsel for appellants who were likewise denied the opportunity to take measures to preserve their own defense means that the critical initial stage of investigation was forever lost to appellants.
>
> This case then is qualitatively different from the right to counsel cases in which the question is the right to counsel's presence at a pretrial confrontation between government and accused. When, for example, the government subjects a suspect to a custodial interrogation or a post-indictment lineup without the presence of counsel the prejudice suffered is both specific and curable. Suppression of the confession or evidence that is obtained or derived from the prohibited confrontation protects the right. Here, however, government conduct has rendered counsel's assistance to appellants ineffective and the resulting harm is not capable of after the fact remedy. With respect to remedies appellants are in a position similar to suspects who are

> denied a speedy trial. Here, as there, the only certain remedy is to dismiss the indictments against them.

The Supreme Court reversed on the basis that sixth amendment right to counsel did not attach until charges were filed. That meant the Court did not need to address the remedy question.

Chapter 3

MATERIAL SUPPORT OF TERRORISM

§ 3.03 DESIGNATED FTO'S AND THE RIGHT OF ASSOCIATION

[A] PROHIBITING MATERIAL SUPPORT

add at p. 124

[at the instructor's discretion, the *Holder* opinion can be substituted for all the cases in existing § 3.03[A] except that the Notes after those cases should still be read in conjunction with this case]

HOLDER v. HUMANITARIAN LAW PROJECT
2010 U.S. LEXIS 5252 (2010)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Congress has prohibited the provision of "material support or resources" to certain foreign organizations that engage in terrorist activity. 18 U.S.C. § 2339B(a)(1). That prohibition is based on a finding that the specified organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose). The plaintiffs in this litigation seek to provide support to two such organizations. Plaintiffs claim that they seek to facilitate only the lawful, nonviolent purposes of those groups, and that applying the material-support law to prevent them from doing so violates the Constitution. In particular, they claim that the statute is too vague, in violation of the Fifth Amendment, and that it infringes their rights to freedom of speech and association, in violation of the First Amendment. We conclude that the material-support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue. We do not, however, address the resolution of more difficult cases that may arise under the statute in the future.

I

[If you have read the four Ninth Circuit opinions, this section can be skipped.]

This litigation concerns 18 U.S.C. § 2339B, which makes it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist

organization."[1] Congress has amended the definition of "material support or resources" periodically, but at present it is defined as follows:

> "[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."

In 1997, the Secretary of State designated 30 groups as foreign terrorist organizations. See 62 Fed. Reg. 52650. Two of those groups are the Kurdistan Workers' Party (also known as the Partiya Karkeran Kurdistan, or PKK) and the Liberation Tigers of Tamil Eelam (LTTE). The PKK is an organization founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey. The LTTE is an organization founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. The District Court in this action found that the PKK and the LTTE engage in political and humanitarian activities. The Government has presented evidence that both groups have also committed numerous terrorist attacks, some of which have harmed American citizens. The LTTE sought judicial review of its designation as a foreign terrorist organization; the D. C. Circuit upheld that designation. The PKK did not challenge its designation.

Plaintiffs in this litigation are two U.S. citizens and six domestic organizations: the Humanitarian Law Project (HLP) (a human rights organization with consultative status to the United Nations); Ralph Fertig (the HLP's president, and a retired administrative law judge); Nagalingam Jeyalingam (a Tamil physician, born in Sri Lanka and a naturalized U.S. citizen); and five nonprofit groups dedicated to the interests of persons of Tamil descent. In 1998, plaintiffs filed suit in federal court challenging the constitutionality of the material-support statute, § 2339B. Plaintiffs claimed that they wished to provide support for the humanitarian and political activities of the PKK and the LTTE in the form of monetary contributions, other tangible aid, legal training, and political advocacy, but that they could not do so for fear of prosecution under § 2339B.

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[1] In full, 18 U.S.C. § 2339B(a)(1) provides:

> UNLAWFUL CONDUCT. -- Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . ., that the organization has engaged or engages in terrorist activity . . ., or that the organization has engaged or engages in terrorism . . . .

The terms "terrorist activity" and "terrorism" are defined in 8 U.S.C. § 1182(a)(3)(B)(iii), and 22 U.S.C. § 2656f(d)(2), respectively.

As relevant here, plaintiffs claimed that the material-support statute was unconstitutional on two grounds: First, it violated their freedom of speech and freedom of association under the First Amendment, because it criminalized their provision of material support to the PKK and the LTTE, without requiring the Government to prove that plaintiffs had a specific intent to further the unlawful ends of those organizations. Second, plaintiffs argued that the statute was unconstitutionally vague.

Plaintiffs moved for a preliminary injunction, which the District Court granted in part. The District Court held that plaintiffs had not established a probability of success on their First Amendment speech and association claims. But the court held that plaintiffs had established a probability of success on their claim that, as applied to them, the statutory terms "personnel" and "training" in the definition of "material support" were impermissibly vague.

The Court of Appeals affirmed. 205 F.3d 1130, 1138 (CA9 2000). The court rejected plaintiffs' speech and association claims, including their claim that § 2339B violated the First Amendment in barring them from contributing money to the PKK and the LTTE. But the Court of Appeals agreed with the District Court that the terms "personnel" and "training" were vague because it was "easy to imagine protected expression that falls within the bounds" of those terms.

With the preliminary injunction issue decided, the action returned to the District Court, and the parties moved for summary judgment on the merits. The District Court entered a permanent injunction against applying to plaintiffs the bans on "personnel" and "training" support. The Court of Appeals affirmed. 352 F.3d 382 (CA9 2003).

Meanwhile, in 2001 [Patriot Act], Congress amended the definition of "material support or resources" to add the term "expert advice or assistance." In 2003, plaintiffs filed a second action challenging the constitutionality of that term as applied to them.

[T]he District Court held that the term "expert advice or assistance" was impermissibly vague. The District Court rejected, however, plaintiffs' First Amendment claims that the new term was substantially overbroad and criminalized associational speech.

The parties cross-appealed. While the cross-appeals were pending, the Ninth Circuit granted en banc rehearing of the panel's 2003 decision in plaintiffs' first action (involving the terms "personnel" and "training"). The en banc court heard reargument on December 14, 2004. Three days later, Congress again amended § 2339B and the definition of "material support or resources." Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA).

In IRTPA, Congress clarified the mental state necessary to violate § 2339B, requiring knowledge of the foreign group's designation as a terrorist organization or the group's commission of terrorist acts. Congress also added the term "service" to the definition of "material support or resources,"and defined "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." It also defined "expert advice or assistance" to

mean "advice or assistance derived from scientific, technical or other specialized knowledge." Finally, IRTPA clarified the scope of the term "personnel" by providing:

> No person may be prosecuted under [§ 2339B] in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control."

Shortly after Congress enacted IRTPA, the en banc Court of Appeals issued an order in plaintiffs' first action. The en banc court affirmed the rejection of plaintiffs' First Amendment claims for the reasons set out in the Ninth Circuit's panel decision in 2000. In light of IRTPA, however, the en banc court vacated the panel's 2003 judgment with respect to vagueness, and remanded to the District Court for further proceedings. The Ninth Circuit panel assigned to the cross-appeals in plaintiffs' second action (relating to "expert advice or assistance") also remanded in light of IRTPA.

The District Court consolidated the two actions on remand. The court also allowed plaintiffs to challenge the new term "service." The parties moved for summary judgment, and the District Court granted partial relief to plaintiffs on vagueness grounds.

The Court of Appeals affirmed once more. The court first rejected plaintiffs' claim that the material-support statute would violate due process unless it were read to require a specific intent to further the illegal ends of a foreign terrorist organization. The Ninth Circuit also held that the statute was not overbroad in violation of the First Amendment. As for vagueness, the Court of Appeals noted that plaintiffs had not raised a "facial vagueness challenge." The court held that, as applied to plaintiffs, the terms "training," "expert advice or assistance" (when derived from "other specialized knowledge"), and "service" were vague because they "continue[d] to cover constitutionally protected advocacy," but the term "personnel" was not vague because it "no longer criminalize[d] pure speech protected by the First Amendment."

II

Given the complicated 12-year history of this litigation, we pause to clarify the questions before us. Plaintiffs challenge § 2339B's prohibition on four types of material support – "training," "expert advice or assistance," "service," and "personnel." They raise three constitutional claims. First, plaintiffs claim that § 2339B violates the Due Process Clause of the Fifth Amendment because these four statutory terms are impermissibly vague. Second, plaintiffs claim that §

2339B violates their freedom of speech under the First Amendment. Third, plaintiffs claim that § 2339B violates their First Amendment freedom of association.

Plaintiffs do not challenge the above statutory terms in all their applications. Rather, plaintiffs claim that § 2339B is invalid to the extent it prohibits them from engaging in certain specified activities. With respect to the HLP and Judge Fertig, those activities are: (1) "train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes"; (2) "engag[ing] in political advocacy on behalf of Kurds who live in Turkey"; and (3) "teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief." With respect to the other plaintiffs, those activities are: (1) "train[ing] members of [the] LTTE to present claims for tsunami-related aid to mediators and international bodies"; (2) "offer[ing] their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government"; and (3) "engag[ing] in political advocacy on behalf of Tamils who live in Sri Lanka."

III

Plaintiffs claim, as a threshold matter, that we should affirm the Court of Appeals without reaching any issues of constitutional law. They contend that we should interpret the material-support statute, when applied to speech, to require proof that a defendant intended to further a foreign terrorist organization's illegal activities. That interpretation, they say, would end the litigation because plaintiffs' proposed activities consist of speech, but plaintiffs do not intend to further unlawful conduct by the PKK or the LTTE.

We reject plaintiffs' interpretation of § 2339B because it is inconsistent with the text of the statute. Section 2339B(a)(1) prohibits "knowingly" providing material support. It then specifically describes the type of knowledge that is required: "To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . ., that the organization has engaged or engages in terrorist activity . . ., or that the organization has engaged or engages in terrorism . . . ." Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities.

IV

We turn to the question whether the material-support statute, as applied to plaintiffs, is impermissibly vague under the Due Process Clause of the Fifth Amendment. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." We consider whether a statute is vague as applied to the particular facts at issue, for "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." We have said that when a statute "interferes with the right of free speech or of association, a more stringent vagueness test

should apply.""But 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'"

The Court of Appeals did not adhere to these principles. Instead, the lower court merged plaintiffs' vagueness challenge with their First Amendment claims, holding that portions of the material-support statute were unconstitutionally vague because they applied to protected speech – regardless of whether those applications were clear. The court stated that, even if persons of ordinary intelligence understood the scope of the term "training," that term would "remai[n] impermissibly vague" because it could "be read to encompass speech and advocacy protected by the First Amendment." It also found "service" and a portion of "expert advice or assistance" to be vague because those terms covered protected speech.

Under a proper analysis, plaintiffs' claims of vagueness lack merit. Plaintiffs do not argue that the material-support statute grants too much enforcement discretion to the Government. We therefore address only whether the statute "provide[s] a person of ordinary intelligence fair notice of what is prohibited."

As a general matter, the statutory terms at issue here are quite different from the sorts of terms that we have previously declared to be vague. We have in the past "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent' – wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." – [and another] ordinance that punished "vagrants," defined to include "rogues and vagabonds," "persons who use juggling," and "common night walkers". Applying the statutory terms in this action – "training," "expert advice or assistance," "service," and "personnel" – does not require similarly untethered, subjective judgments.

Plaintiffs also contend that they want to engage in "political advocacy" on behalf of Kurds living in Turkey and Tamils living in Sri Lanka. They are concerned that such advocacy might be regarded as "material support" in the form of providing "personnel" or "service[s]," and assert that the statute is unconstitutionally vague because they cannot tell.

As for "personnel," Congress enacted a limiting definition in IRTPA that answers plaintiffs' vagueness concerns. Providing material support that constitutes "personnel" is defined as knowingly providing a person "to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization." The statute makes clear that "personnel" does not cover independent advocacy: "Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control."

"[S]ervice" similarly refers to concerted activity, not independent advocacy. The statute prohibits providing a service "to a foreign terrorist organization." The use of the word "to" indicates a connection between the service and the foreign group. We think a person of ordinary intelligence would understand that

independently advocating for a cause is different from providing a service to a group that is advocating for that cause.

V

A

We next consider whether the material-support statute, as applied to plaintiffs, violates the freedom of speech guaranteed by the First Amendment. Both plaintiffs and the Government take extreme positions on this question. Plaintiffs claim that Congress has banned their "pure political speech." It has not. Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations. As the Government states: "The statute does not prohibit independent advocacy or expression of any kind." Section 2339B also "does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so." Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.

For its part, the Government takes the foregoing too far, claiming that the only thing truly at issue in this litigation is conduct, not speech. Section 2339B is directed at the fact of plaintiffs' interaction with the PKK and LTTE, the Government contends, and only incidentally burdens their expression. The Government argues that the proper standard of review is therefore the one set out in *United States v. O'Brien*, 391 U.S. 367 (1968). In that case, the Court rejected a First Amendment challenge to a conviction under a generally applicable prohibition on destroying draft cards, even though O'Brien had burned his card in protest against the draft. In so doing, we applied what we have since called "intermediate scrutiny," under which a "content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."

The Government is wrong that the only thing actually at issue in this litigation is conduct, and therefore wrong to argue that *O'Brien* provides the correct standard of review.[5] *O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech, *see R. A. V. v. St. Paul*, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989), and § 2339B regulates speech on the basis of its content. Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge" – for example, training on the use of international law or advice on petitioning the United Nations – then it is

barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

The Government argues that § 2339B should nonetheless receive intermediate scrutiny because it generally functions as a regulation of conduct. That argument runs headlong into a number of our precedents, most prominently *Cohen v. California*, 403 U.S. 15 (1971). *Cohen* also involved a generally applicable regulation of conduct, barring breaches of the peace. But when Cohen was convicted for wearing a jacket bearing an epithet, we did not apply *O'Brien*. Instead, we recognized that the generally applicable law was directed at Cohen because of what his speech communicated – he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied more rigorous scrutiny and reversed his conviction.

This suit falls into the same category. The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. As we explained in *Texas v. Johnson*: "If the [Government's] regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien's* test, and we must [apply] a more demanding standard."

B

The First Amendment issue before us is more refined than either plaintiffs or the Government would have it. It is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead whether the Government may prohibit what plaintiffs want to do – provide material support to the PKK and LTTE in the form of speech.

Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order. Plaintiffs' complaint is that the ban on material support, applied to what they wish to do, is not "necessary to further that interest." The objective of combating terrorism does not justify prohibiting their speech, plaintiffs argue, because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism.

Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. When it enacted § 2339B in 1996, Congress made specific findings regarding the serious threat posed by international terrorism. One of those findings explicitly rejects plaintiffs' contention that their support would not further the terrorist activities of the PKK and LTTE: "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."

Plaintiffsargue that the reference to "any contribution" in this finding meant only monetary support. There is no reason to read the finding to be so limited,

particularly because Congress expressly prohibited so much more than monetary support in § 2339B. Indeed, when Congress enacted § 2339B, Congress simultaneously removed an exception that had existed in § 2339A(a) (1994 ed.) for the provision of material support in the form of "humanitarian assistance to persons not directly involved in" terrorist activity. That repeal demonstrates that Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.

We are convinced that Congress was justified in rejecting that view. Material support meant to "promot[e] peaceable, lawful conduct" can further terrorism by foreign groups in multiple ways. "Material support" is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups – legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks. "Terrorist organizations do not maintain organizational 'firewalls' that would prevent or deter . . . sharing and commingling of support and benefits." "[I]nvestigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts." M. LEVITT, HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD 2-3 (2006). "Indeed, some designated foreign terrorist organizations use social and political components to recruit personnel to carry out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations."

Money is fungible, and "[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put."

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. We see no reason to question Congress's finding that "international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts, including hostage taking, murder of an internationally protected person, and aircraft piracy and sabotage." The material-support statute furthers this international effort by prohibiting aid for foreign terrorist groups that harm the United States' partners abroad:

For example, the Republic of Turkey – a fellow member of NATO – is defending itself against a violent insurgency waged by the PKK. That nation and our other allies would react sharply to Americans furnishing material support to foreign groups like the PKK, and would hardly be mollified by the explanation that the support was meant only to further those groups' "legitimate" activities. From Turkey's perspective, there likely are no such activities.

C

In analyzing whether it is possible in practice to distinguish material support for a foreign terrorist group's violent activities and its nonviolent

activities, we do not rely exclusively on our own inferences drawn from the record evidence. We have before us an affidavit stating the Executive Branch's conclusion on that question. The State Department informs us that "[t]he experience and analysis of the U.S. government agencies charged with combating terrorism strongly suppor[t]" Congress's finding that all contributions to foreign terrorist organizations further their terrorism.

That evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs. The PKK and the LTTE have committed terrorist acts against American citizens abroad, and the material-support statute addresses acute foreign policy concerns involving relationships with our Nation's allies. We have noted that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." Boumediene v. Bush, 553 U.S. 723, 797 (2008). It is vital in this context "not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch."

Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake. We are one with the dissent that the Government's "authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals." But when it comes to collecting evidence and drawing factual inferences in this area, "the lack of competence on the part of the courts is marked," and respect for the Government's conclusions is appropriate.

At bottom, plaintiffs simply disagree with the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization – even seemingly benign support – bolsters the terrorist activities of that organization. That judgment, however, is entitled to significant weight, and we have persuasive evidence before us to sustain it. Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups' nonviolent ends.

We turn to the particular speech plaintiffs propose to undertake. First, plaintiffs propose to "train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes." Congress can, consistent with the First Amendment, prohibit this direct training. It is wholly foreseeable that the PKK could use the "specific skill[s]" that plaintiffs propose to impart, § 2339A(b)(2), as part of a broader strategy to promote terrorism. The PKK could, for example, pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks. *See generally* A. MARCUS, BLOOD AND BELIEF: THE PKK AND THE KURDISH FIGHT FOR INDEPENDENCE 286-295 (2007) (describing the

PKK's suspension of armed struggle and subsequent return to violence). A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote.

Second, plaintiffs propose to "teach PKK members how to petition various representative bodies such as the United Nations for relief." The Government acts within First Amendment strictures in banning this proposed speech because it teaches the organization how to acquire "relief," which plaintiffs never define with any specificity, and which could readily include monetary aid. Indeed, earlier in this litigation, plaintiffs sought to teach the LTTE "to present claims for tsunami-related aid to mediators and international bodies," which naturally included monetary relief. Money is fungible, and Congress logically concluded that money a terrorist group such as the PKK obtains using the techniques plaintiffs propose to teach could be redirected to funding the group's violent activities.

In responding to the foregoing, the dissent fails to address the real dangers at stake. It instead considers only the possible benefits of plaintiffs' proposed activities in the abstract. The dissent seems unwilling to entertain the prospect that training and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities. In the dissent's world, such training is all to the good. Congress and the Executive, however, have concluded that we live in a different world: one in which the designated foreign terrorist organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."

If only good can come from training our adversaries in international dispute resolution, presumably it would have been unconstitutional to prevent American citizens from training the Japanese Government on using international organizations and mechanisms to resolve disputes during World War II. It would, under the dissent's reasoning, have been contrary to our commitment to resolving disputes through "deliberative forces" for Congress to conclude that assisting Japan on that front might facilitate its war effort more generally. That view is not one the First Amendment requires us to embrace.

All this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It is also not to say that any other statute relating to speech and terrorism would satisfy the First Amendment. In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.

VI

Plaintiffs' final claim is that the material-support statute violates their freedom of association under the First Amendment. Plaintiffs argue that the statute criminalizes the mere fact of their associating with the PKK and the LTTE, thereby running afoul of cases in which we have overturned sanctions for joining the Communist Party.

The Court of Appeals correctly rejected this claim because the statute does not penalize mere association with a foreign terrorist organization. As the Ninth Circuit put it: "The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. . . . What [§ 2339B] prohibits is the act of giving material support . . . ."

Plaintiffs also argue that the material-support statute burdens their freedomof association because it prevents them from providing support to designated foreign terrorist organizations, but not to other groups. Any burden on plaintiffs' freedom of association in this regard is justified for the same reasons that we have denied plaintiffs' free speech challenge. It would be strange if the Constitution permitted Congress to prohibit certain forms of speech that constitute material support, but did not permit Congress to prohibit that support only to particularly dangerous and lawless foreign organizations. Congress is not required to ban material support to every group or none at all.

* * *

The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to "provide for the common defence." As Madison explained, "[s]ecurity against foreign danger is . . . an avowed and essential object of the American Union." The Federalist No. 41. We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.

The judgment of the United States Court of Appeals for the Ninth Circuit is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

JUSTICE BREYER, with whom JUSTICES GINSBURG and SOTOMAYOR join, dissenting.

Like the Court, and substantially for the reasons it gives, I do not think this statute is unconstitutionally vague. But I cannot agree with the Court's conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations' lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government's compelling interest in combating terrorism.

In my view, the Government has not made the strong showing necessary to justify under the First Amendment the criminal prosecution of those who engage in these activities. All the activities involve the communication and advocacy of political ideas and lawful means of achieving political ends. Even the subjects the plaintiffs wish to teach – using international law to resolve disputes peacefully or petitioning the United Nations, for instance – concern political speech. We cannot avoid the constitutional significance of these facts on the basis that some of this speech takes place outside the United States and is directed at foreign governments, for the activities also involve advocacy in this country directed to our government and its policies. The plaintiffs, for example, wish to write and distribute publications and to speak before the United States Congress.

Although in the Court's view the statute applies only where the PKK helps to coordinate a defendant's activities, the simple fact of "coordination" alone cannot readily remove protection that the First Amendment would otherwise grant. That amendment, after all, also protects the freedom of association. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911(1982) "Coordination" with a political group, like membership, involves association.

The Government does identify a compelling countervailing interest, namely, the interest in protecting the security of the United States and its nationals from the threats that foreign terrorist organizations pose by denying those organizations financial and other fungible resources. I do not dispute the importance of this interest. But I do dispute whether the interest can justify the statute's criminal prohibition. To put the matter more specifically, precisely how does application of the statute to the protected activities before us help achieve that important security-related end?

The Government makes two efforts to answer this question. First, the Government says that the plaintiffs' support for these organizations is "fungible" in the same sense as other forms of banned support. Being fungible, the plaintiffs' support could, for example, free up other resources, which the organization might put to terrorist ends.

The proposition that the two very different kinds of "support" are "fungible," however, is not obviously true. There is no obvious way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE, say, how to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible. It is far from obvious that these advocacy activities can themselves be redirected, or will free other resources that can be directed, towards terrorist ends. Thus, we must determine whether the Government has come forward with evidence to support its claim.

The Government has provided us with no empirical information that might convincingly support this claim. Instead, the Government cites only to evidence that Congress was concerned about the "fungible" nature in general of resources, predominately money and material goods. It points to a congressional finding

that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." The most one can say in the Government's favor about these statements is that they might be read as offering highly general support for its argument. The statutory statement and the House Report use broad terms like "contributions" and "services" that might be construed as encompassing the plaintiffs' activities. But in context, those terms are more naturally understood as referring to contributions of goods, money, or training and other services (say, computer programming) that could be diverted to, or free funding for, terrorist ends. Peaceful political advocacy does not obviously fall into these categories.

Second, the Government says that the plaintiffs' proposed activities will "bolste[r] a terrorist organization's efficacy and strength in a community" and "undermin[e] this nation's efforts to delegitimize and weaken those groups." In the Court's view, too, the Constitution permits application of the statute to activities of the kind at issue in part because those activities could provide a group that engages in terrorism with "legitimacy." The Court suggests that, armed with this greater "legitimacy," these organizations will more readily be able to obtain material support of the kinds Congress plainly intended to ban – money, arms, lodging, and the like.

But this "legitimacy" justification cannot by itself warrant suppression of political speech, advocacy, and association. Speech, association, and related activities on behalf of a group will often, perhaps always, help to legitimate that group. Thus, were the law to accept a "legitimating" effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First Amendment battle would be lost in untold instances where it should be won. Once one accepts this argument, there is no natural stopping place. The argument applies as strongly to "independent" as to "coordinated" advocacy.

What is one to say about these arguments – arguments that would deny First Amendment protection to the peaceful teaching of international human rights law on the ground that a little knowledge about "the international legal system" is too dangerous a thing; that an opponent's subsequent willingness to negotiate might be faked, so let's not teach him how to try? What might be said of these claims by those who live, as we do, in a Nation committed to the resolution of disputes through "deliberative forces"?

In my own view, the majority's arguments stretch the concept of "fungibility" beyond constitutional limits. Neither Congress nor the Government advanced these particular hypothetical claims. I am not aware of any case in this Court in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it, e.g., buy negotiating time for an opponent who would put that time to bad use.

The majority, as I have said, cannot limit the scope of its arguments through its claim that the plaintiffs remain free to engage in the protected activity as long as it is not "coordinated." That is because there is no practical way to organize classes for a group (say, wishing to learn about human rights law) without "coordination."

I concede that the Government's expertise in foreign affairs may warrant deference in respect to many matters, *e.g.*, our relations with Turkey. But it remains for this Court to decide whether the Government has shown that such an interest justifies criminalizing speech activity otherwise protected by the First Amendment. And the fact that other nations may like us less for granting that protection cannot in and of itself carry the day.

Finally, I would reemphasize that neither the Government nor the majority points to any specific facts that show that the speech-related activities before us are fungible in some special way or confer some special legitimacy upon the PKK. Rather, their arguments in this respect are general and speculative. Those arguments would apply to virtually all speech-related support for a dual-purpose group's peaceful activities (irrespective of whether the speech-related activity is coordinated).

In sum, these cases require us to consider how to apply the First Amendment where national security interests are at stake. When decidingsuch cases, courts are aware and must respect the fact that the Constitution entrusts to the Executive and Legislative Branches the power to provide for the national defense, and that it grants particular authority to the President in matters of foreign affairs. Nonetheless, this Court has also made clear that authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals. In these cases, for the reasons I have stated, I believe the Court has failed to examine the Government's justifications with sufficient care. It has failed to insist upon specific evidence, rather than general assertion. It has failed to require tailoring of means to fit compelling ends. And ultimately it deprives the individuals before us of the protection that the First Amendment demands.

That is why, with respect, I dissent.

§ 3.04 CONSPIRACY AND MATERIAL SUPPORT PROSECUTIONS

[This section first updates cases that are summarized in the main edition. Then there are descriptions of new cases brought or decided since 2007.]

Abujihaad (p. 163) – Abujihaad, a former member of the U.S. Navy, was convicted of providing material support to terrorists and delivering classified information on the movements of a U.S. Navy battle group to Azzam Publications, a London-based organization alleged to have provided material support to persons engaged in terrorism. The jury verdict on material support was set aside by the judge after trial.

Bly Training Camp (p. 162) – Oussama Kassir was convicted on two different sets of counts charging material support. One set of offenses had to do with setting up and beginning to operate the training camp in Oregon, all in conjunction with Abu Hamza al-Masri, the London cleric still awaiting extradition to the U.S. (see Abu Hamza below for the British conviction). The

other set of charges were based on Kassir's maintaining several websites collectively known as the"Islamic Media Center" ("IMC"), which distributed jihadi propaganda and instructions on how to build bombs and manufacture poisons. Kassir argued that the website charges made the statute void for vagueness, especially in light of the impact on freedom of expression. In the process of responding to that argument, the court offered this curt answer regarding the first amendment in a mere footnote:

> Although, as in the instant case, the statute can criminalize the distribution of certain written materials, this does not mean the statute reaches constitutionally protected speech. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 499 (1949) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."); *see also Rice v. Paladin Enters.*, 128 F.3d 233, 244 (4th Cir. 1997) (*citing* Laurence H. Tribe, American Constitutional Law 837 (2d ed. 1988) ("The law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of old Volkswagen parts.")).

Fort Dix Plot (p. 164) – Five of the six defendants were convicted of conspiracy. During the trial, the jury viewed secretly recorded videotapes of the defendants performing small-arms training at a shooting range in the Pocono Mountains in Pennsylvania and watching training videos amongst themselves that included depictions of American soldiers being killed and of known foreign Islamic radicals urging jihad against the United States.

al Marri (see § 8.05, p. 530) – After being held in executive detention for six years since June 2003, al Marri pleaded guilty to one count of conspiracy to provide material support to al Qaeda. He allegedly was sent to the U.S. as a personal contact of Khalid Sheikh Mohammed on September 10, 2001. He was arrested in December 2001 on a material witness warrant based on inquiries into his visa status and was later indicted on credit card fraud, false statements and identity fraud charges. Those charges were dismissed on June 23, 2003, when al Marri was designated an enemy combatant and transferred to the Naval Brig in South Carolina. In 2007, a panel of the Fourth Circuit ordered that he be released or remanded to civilian authorities for trial, but the full court en banc fractured into a compromise order remanding to the district court for hearings on whether he could be classified as an enemy combatant. The Supreme Court granted certiorari in 2008 and then in March 2009 approved the Justice Department's request to transfer him to civil authorities for trial.

Moussaoui (see § 5.03, p. 281) – Moussaoui was the subject of a long and torturous trial laden with difficulties of his attempt to obtain access to classified detainees. He eventually pleaded guilty in April 2005 to various violations, admitting that he conspired with al Qaeda to hijack and crash planes into prominent U.S. buildings as part of the 9/11 attacks.

Sattar & Stewart (p. 135) – The convictions of Lynne Stewart, Sheikh Rahman's lawyer, and her interpreter were affirmed by the Second Circuit. ***United States v. Stewart***, 590 F.3d 93 (2d Cir. 2009). The two were proved to have violated the terms of prison Special Administrative Measures (SAM) by using cell phones and other means to relay messages to the Sheikh's supporters. The court summarized that

> we reject both Stewart's argument that, as a lawyer, she was not bound by the SAMs, and her belated argument collaterally attacking their constitutionality. We affirm as to Sattar's conviction of conspiring to murder persons in a foreign country in violation of 18 U.S.C. § 956, and his conviction of soliciting persons to commit crimes of violence – viz., murder and conspiracy to commit murder – in violation of 18 U.S.C. § 373. We affirm as to Stewart's and Yousry's convictions of providing and concealing material support to the conspiracy to murder persons in a foreign country in violation of 18 U.S.C. § 2339A and 18 U.S.C. § 2, and of conspiring to provide and conceal such support in violation of 18 U.S.C. § 371. We conclude that the charges were valid – that 18 U.S.C. § 2339A is neither unconstitutionally vague as applied nor a "logical absurdity," as Stewart asserts – and that the evidence was sufficient to sustain the convictions. We also reject Stewart's claims that her purported attempt to serve as a "zealous advocate" for her client provides her with immunity from the convictions.

The court of appeals remanded for resentencing with terrorism enhancement, and on July 15, 2010, the district court resentenced Stewart to 10 years imprisonment.

Prosecutions since 2007, in alphabetical order:

Abdulmutallab (the "Christmas Day Bomber" aka "Underwear Bomber") – Umar Farouk Abdulmuttalab boarded a flight from Amsterdam to Detroit with explosives sewn into his underwear and attempted to detonate the explosives as the plane neared Detroit. He caught his clothing on fire, was subdued by passengers, and taken into custody. He was then charged with several counts of attempted murder, aircraft sabotage, and illegal use of explosives. Abdulmutallab is the youngest of 16 children of Alhaji Umaru Mutallab, a Nigerian banker reputed to be one of the wealthiest men in Africa, who reported to the U.S. embassy in November 2009 that he was concerned his son might be a threat to the U.S. after Umar had become increasingly radicalized and then went missing. Umar apparently had traveled to Yemen where he received training and explosives from al Qaeda recruiters, then traveled to Ethiopia, to Ghana where he paid for the Detroit ticket in cash on December 16, then to Nigeria where he boarded the flight to Amsterdam, and then finally the flight to Detroit.

Abdulmutallab has become the poster-child for the conflict over whether to treat suspected bombers as criminals – he was given Miranda warnings shortly

after his arrest and has been cooperating fully with authorities in identifying Yemeni training operations, including information about Anwar al-Awlaki.

Abu Ali – Ali was convicted of providing material support to al Qaeda based on his extensive involvement with an active cell in Medina, Saudi Arabia. He was arrested by Saudi authorities, interrogated, and handed over to the FBI. In Nov. 2005, Ali was convicted on all counts of an indictment charging him with, among other violations, providing material support to al Qaeda, conspiracy to assassinate the U.S. President, and conspiracy to commit air piracy and conspiracy to destroy aircraft. Ali was sentenced to 30 years in prison. The use of classified information at his trial in the U.S. is considered at p. * *infra*.

Ahmed & Sadequee – Sayed Ahmed and Ehsanul Islam Sadequee were convicted of violation of 2339A despite never having made direct contact with any known terrorist actor. Ahmed, a Georgia Tech engineering student, and Sadequee, a Fairfax native and Georgia resident who tried but failed to join the Taliban in 2001, engaged in online chats with others about their mutual interpretation of Islam and jihad, discussing "hypothetical scenarios" of attacks on the U.S. and Canada. When the Canadian correspondents were arrested, Ahmed was named as a co-conspirator but government informants indicated there was "no imminent danger." Ahmed and Sadequee made "casing videos" of several D.C. buildings, including the World Bank, which Sadequee sent to persons later convicted of involvement with LeT in Britain.

Amawi – Three Ohio men were convicted of material support in this case. In the words of the DOJ press release, the three conspired to "kill or maim persons outside the United States, including U.S. armed forces personnel in Iraq. As part of the conspiracy, the defendants conducted firearms training and accessed and copied instructions in the construction and use of explosives – including IEDs and suicide bomb vests. In addition, the defendants conspired to recruit others to participate in jihad training; researched and solicited funding sources for such training; and proposed sites for training in firearms, explosives and hand-to-hand combat to prospective recruits. The government also proved that all defendants conspired to provide material support and resources, including personnel, money, explosives and laptop computers, to terrorists, including a co-conspirator in the Middle East, who had requested such materials for use against U.S. and coalition forces in Iraq. For example, among other activities, Amawi communicated with a contact in the Middle East on chemical explosives and traveled to Jordan in August 2005 with laptop computers intended for delivery to mujahideen 'brothers.'"

California Prison Plot – Kevin James, who formed a radical Islamic organization while in California state prison, and two of his recruits, Levar Washington and Gregory Patterson, pleaded guilty to terrorism conspiracy charges, admitting they conspired to attack U.S. military facilities and Jewish facilities in Los Angeles.

Chicago "Wannabes" – This material support prosecution is unusual (and maybe problematic) in that the defendants appear to have had neither a concrete plan of action nor a specific group to whom they wanted to provide assistance.

In 2004 two cousins, Zubair Ahmed and Khaleel Ahmed, traveled to Egypt seeking to find access to terrorist training camps but came home a month later. They pleaded guilty to conspiracy to provide material support to unnamed terrorists. The January 2009 DOJ press release says that they "received instruction on firearms from another individual in Cleveland" and "sought training in counter-surveillance techniques and sniper rifles with this individual. Specifically, defendant Zubair Ahmed discussed his desire to learn how to use and move with a .50-caliber machine gun. As part of the conspiracy, the defendants also communicated with each other using code words and in a foreign language to disguise their preparations and plans to engage in acts abroad that would result in the murder or maiming of U.S. military forces in Iraq and Afghanistan. Furthermore, Zubair and Khaleel Ahmed researched the purchase of firearms, methods of obtaining firearms instruction (including at least one visit to a firing range) and methods of obtaining instruction in gunsmithing. In addition, the defendants collected and distributed videos of attacks on U.S. military forces overseas, manuals on military tactics and military manuals on weaponry."

Finton – In the same scenario as Smadi, on the same day (September 24, 2009), Michael Finton (who had taken the name Talib Islam) was arrested after triggering a cell phone to detonate what he thought was a vehicle of explosives that he had parked outside the federal building in Springfield, Illinois.

Ghazi – In a rather unusual instance of penetration into the Colombian drug cartels, al Ghazi was recorded over an extended period of negotiating to sell millions of dollars worth of weapons to the FARC, including thousands of machine guns, millions of rounds of ammunition, rocket-propelled grenade launchers ("RPGs"), and surface-to-air missile systems ("SAMs"). He was found guilty in March 2009 of (1) conspiracy to murder U.S. officers and employees; (2) conspiracy to acquire and export anti-aircraft missiles; and (3) conspiracy to provide material support and resources to the FARC, a designated foreign terrorist organization; and money laundering. He was found not guilty of conspiracy to murder U.S. nationals.

Headley – David Headley is accused of aiding the 2008 Mumbai hotel attacks as well as conspiring to attack the Danish newspaper which published the infamous cartoon of Mohammed. Headley was born in Washington, D.C., to a Pakistani father and American mother. He lived until age 17 in Pakistan with his father in a traditional Muslim household. Moving back to the U.S. to live with his mother, he worked a series of odd jobs and was convicted on heroin-smuggling charges in 1998; he shortened his prison term by working for the DEA for some period. He then allegedly received training from the Lashkar-e-Taiba (LeT) from February 2002 to December 2003 and returned to the U.S. to provide a base of assistance to its activities.

Hutaree – This "Christian militia" group was formed in 2008 and began preparing for apocalyptic battle with the forces of the Antichrist, which they defined to mean state and federal law enforcement personnel. In March 2010, nine Hutaree members were arrested in Michigan, Ohio, and Indiana for alleged involvement in a plot to attack police with illegal explosives and firearms. They

were indicted by a federal grand jury in Detroit on charges of seditious conspiracy, attempted use of weapons of mass destruction, teaching the use of explosive materials, and possessing a firearm during a crime of violence. The indictment alleges that they planned to kill one police officer and then attack the assembled law enforcement personnel at the funeral.

Masri – There are several persons with the adopted surname of al-Masri, which means "the Egyptian."

Abu Hamza al-Masri – This British-based radical was born Mustafa Kamel Mustafa in Egypt in 1958. He studied civil engineering in England on a student visa. In the early 1990s, he went to Bosnia to fight against the Serbs. Abu Hamza lost both his hands and the use of his left eye as a result of wounds sustained in Afghanistan. In 1997 he returned to England and became Imam of the Finsbury Park Mosque. The US has asked for his extradition to face charges stemming from the alleged attempt to establish a terrorist training camp in Bly, Oregon. His assistant at the mosque, Haroon Rashid Aswat, is wanted by both U.S. and British authorities for the Bly operation as well as for his alleged involvement in the London subway bombings of 7/7/2005. Several of the subway bombers frequented the mosque along with other attempted bombers.

On 7 February 2006, Abu Hamza was found guilty on eleven charges and not guilty on four:

1. Guilty of six charges of soliciting murder; not guilty on three further such charges
2. Guilty of three charges related to "using threatening, abusive or insulting words or behaviour with the intention of stirring up racial hatred" under the Public Order Act 1986, not guilty on one further such charge
3. Guilty of one further charge of owning recordings related to "stirring up racial hatred"
4. Guilty of one charge of possessing a "terrorist encyclopedia" under the Terrorism Act of 2006 (see Appendix)

Abu Khabab al-Masri (born Midhat Mursi al-Sayid Umar) was a chemist and explosives expert. He was thought to be part of Osama bin-Laden's inner circle. The United States had a $5 million bounty on his head. He was targeted in a missile attack in 2005 but survived and is believed to have been killed in a missile attack on 28 July 2008 by US drone-launched missiles.

Abu Obaidah al-Masri, an Egyptian-born militant described by both US and British counter-terrorism officials as head of external operations for al-Qaeda's core leadership in Pakistan and Afghanistan, apparently died in 2008, probably of hepatitis. He was the target of some of the missile attacks by NATO forces that have been criticized for causing civilian deaths.

Abu Zubair al-Masri, an Egyptian described as being "high up in the al-Qaeda pecking order" and another explosives expert, was apparently killed in another missile attack along the Afghanistan-Pakistan border.

Mohamed – Ahmed Abdellatif Sherif Mohamed and another defendant were arrested when police found bombmaking material in their vehicle during a traffic stop. Mohamed had posted a videoclip on YouTube providing instruction regarding remote-controlled detonation. According to the plea agreement, Mohamed admitted to investigators that his purpose in creating the video was to "support attempts by terrorists to murder employees of the United States, including members of the uniformed services, while such persons were engaged in or on account of the performance of their official duties." Murder of U.S. employees violates 18 U.S.C. 1114, and that statute in turn is one of the predicate offenses for a 2339A material support charge. The prosecution made no claim that Mohamed knew or could have known the identity of the persons who might download and make use of his video, let alone the specifics of any particular plan of attack that the video might facilitate. Unlike al Timimi, there was no showing that anyone had acted on his exhortations, but he himself had committed overt acts in assembling the explosive paraphernalia.

Paul – In June 2008, Christopher Paul pleaded guilty to conspiring with members of a German terrorist cell to use a weapon of mass destruction (explosive devices) against Americans vacationing at foreign tourist resorts, against Americans in the United States, as well against U.S. embassies, diplomatic premises and military bases in Europe.

Smadi – Hosam Maher Husein Smadi was indicted in Dallas after attempting to plant a vehicle-borne explosive in the parking garage of a downtown building. Unbeknownst to him, his "accomplices" were undercover FBI informants who had been monitoring him for several months while posing as al Qaeda operatives. They supplied him with an inert device, wired to appear authentic, and a cellphone by which he was to trigger the device after leaving it under the building. After he followed those steps, he was arrested.

Toledo Cell – Three men in Toledo were convicted of conspiracy to kill U.S. nationals overseas, explosives violations, and providing material support to terrorists. At trial, the government proved that all three defendants engaged in a conspiracy, beginning sometime prior to June 2004, to kill or maim persons outside the United States, including U.S. armed forces personnel in Iraq. As part of the conspiracy, the defendants conducted firearms training and accessed and copied instructions in the construction and use of explosives – including IEDs and suicide bomb vests. In addition, the defendants conspired to recruit others to participate in jihad training; researched and solicited funding sources for such training; and proposed sites for training in firearms, explosives and hand-to-hand combat to prospective recruits. The three were in communication with at least one active insurgent in the Middle East.

Zazi (NY subway plot) – Najibullah Zazi pleaded guilty to conspiracy to use weapons of mass destruction (explosive bombs) against persons or property in the United States, conspiracy to commit murder in a foreign country and providing material support to al-Qaeda. Zazi is an Afghan native who obtained permanent resident status while living in New York. In 2008, he and unidentified "others" traveled to Pakistan and then to Waziristan where they received training in the making and use of explosives. Zazi then moved to

Colorado, took a job as an airport shuttle-bus driver and began assembling bomb parts. In September 2009, he drove from Colorado to New York with TATP [Triacetone Triperoxide] explosives to attack the New York subway system. Upon learning that he was under investigation, he abandoned the TATP and fled to Colorado.Two other New York residents, Medunjanin and Ahmedzay, have been charged in the plot but have not come to trial.

Hashmi – Syed Hashmi pleaded guilty to one count of providing material support to al Qaeda. He was a Queens native who became radicalized in college, then went to London for graduate school. While there he hosted an al Qaeda operative, to whom he also allowed use of his cell phone and storage of waterproof clothing destined for camps in Waziristan.

Alishtari – Abdul Tawala Ibn Ali Alishtari, aka Michael Mixon, a New York businessman, was sentenced to 10 years in prison after pleading guilty to material support and money laundering by conspiring to transfer$152,500 to provide military equipment to "fighters" in Afghanistan and Pakistan. Unfortunately for Alishtari, the man with whom he was working to transfer the money was actually an undercover law enforcement officer.

Chapter 4

CIVIL ACTIONS

§ 4.01 CIVIL ACTIONS

add at page 177:

Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685 (7th Cir. 2008). On rehearing *en banc*, the Seventh Circuit modified the panel opinion in this case. Much of the reasoning of the panel remained intact, so only excerpts of the en banc opinion are offered here. The en banc majority departed from the panel by treating HLF as a primary actor rather than an aider and abettor and offered a more relaxed view of causation. The en banc court remanded for further proceedings against HLF because it agreed with the panel that there could be no collateral estoppel effect regarding its knowledge of Hamas' activities. The en banc court, however, disagreed with the panel regarding the reliability of the testimony of Dr. Paz and reinstated the judgments against American Muslim Society and the Quranic Literacy Institute.

In its causation analysis, the majority discussed cases in which one person provided materials (e.g., a weapon) that was then used by another in harming the plaintiff.

> [In a tort case from Oklahoma,] thirty to forty junior high school students showed up one day for their music class, but the instructor failed to show so the kids began throwing wooden erasers, chalk, and even a Coke bottle at each other. One of the students was struck in the eye by an eraser, and sued. One of the defendants, Keel, apparently had not thrown anything. But he had retrieved some of the erasers after they had been thrown and had handed them back to the throwers. There was no indication that Keel had handed the eraser to the kid who threw it at the plaintiff and injured her, but the court deemed that immaterial. It was enough that Keel had participated in the wrongful activity as a whole. He thus was liable even though there was no proven, or even likely, causal connection between anything he did and the injury. "'One who commands, directs, advises, encourages, procures, instigates, promotes, controls, aids, or abets a wrongful act by another has been regarded as being as responsible as the one who commits the act so as to impose liability upon the former to the same extent as if he had performed the act himself.'" The court did not use the term "material support," but in handing erasers to the throwers Keel was providing them with material support in a literal sense. It was enough to make him liable that he had helped to create a danger; it was immaterial that the effect of his help could not be determined – that his acts could not be found to be either a necessary or a sufficient condition of the injury.

The cases that we have discussed do not involve monetary contributions to a wrongdoer. But then criminals and other intentional tortfeasors do not usually solicit voluntary contributions. Terrorist organizations do. But this is just to say that terrorism is sui generis. So consider an organization solely involved in committing terrorist acts and a hundred people all of whom know the character of the organization and each of whom contributes $1,000 to it, for a total of $100,000. The organization has additional resources from other, unknown contributors of $200,000 and it uses its total resources of $300,000 to recruit, train, equip, and deploy terrorists who commit a variety of terrorist acts one of which kills an American citizen. His estate brings a suit under section 2333 against one of the knowing contributors of $1,000. The tort principles that we have reviewed would make the defendant jointly and severally liable with all those other contributors. The fact that the death could not be traced to any of the contributors ... and that some of them may have been ignorant of the mission of the organization (and therefore not liable under a statute requiring proof of intentional or reckless misconduct) would be irrelevant. The knowing contributors as a whole would have significantly enhanced the risk of terrorist acts and thus the probability that the plaintiff's decedent would be a victim, and this would be true even if Hamas had incurred a cost of more than $1,000 to kill the American, so that no defendant's contribution was a sufficient condition of his death.

This case is only a little more difficult because Hamas is (and was at the time of David Boim's death) engaged not only in terrorism but also in providing health, educational, and other social welfare services. The defendants other than Salah directed their support exclusively to those services. But if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook, as we noted in a related context in Hussain v. Mukasey, 518 F.3d 534, 538-39 (7th Cir.2008). The reasons are twofold. The first is the fungibility of money. If Hamas budgets $2 million for terrorism and $2 million for social services and receives a donation of $100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking $100,000 out of its social services "account" and depositing it in its terrorism "account." Second, Hamas's social welfare activities reinforce its terrorist activities both directly by providing economic assistance to the families of killed, wounded, and captured Hamas fighters and making it more costly for them to defect (they would lose the material benefits that Hamas provides them), and indirectly by enhancing Hamas's popularity among the Palestinian population and providing funds for indoctrinating schoolchildren. Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities. And that is the

> only knowledge that can reasonably be required as a premise for liability. To require proof that the donor intended that his contribution be used for terrorism – to make a benign intent a defense – would as a practical matter eliminate donor liability except in cases in which the donor was foolish enough to admit his true intent.

In response, Judge Rovner, the author of the panel opinion, had this to say:

> At this late stage in the litigation, we are now turning to a fundamental question: Are we going to evaluate claims for terrorism-inflicted injuries using traditional legal standards, or are we going to re-write tort law on the ground that "terrorism is sui generis"? My colleagues in the majority have opted to "relax[ ]" – I would say eliminate – the basic tort requirement that causation be proven, believing that "otherwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury." The choice is a false one. The panel took pains to identify a number of ways in which the plaintiffs might establish a causal link between the defendants' financial contributions to (and other support for) Hamas and the murder of David Boim. It is not the case that the plaintiffs were unable show causation, it is rather that they did not even make an attempt; and that was the purpose of the panel's decision to remand the case. But rather than requiring the plaintiffs to present evidence of causation and allowing the factfinder to determine whether causation has been shown, the majority simply deems it a given, declaring as a matter of law that any money knowingly given to a terrorist organization like Hamas is a cause of terrorist activity, period. This sweeping rule of liability leaves no role for the factfinder to distinguish between those individuals and organizations who directly and purposely finance terrorism from those who are many steps removed from terrorist activity and whose aid has, at most, an indirect, uncertain, and unintended effect on terrorist activity. The majority's approach treats all financial support provided to a terrorist organization and its affiliates as support for terrorism, regardless of whether the money is given to the terrorist organization itself, to a charitable entity controlled by that organization, or to an intermediary organization, and regardless of what the money is actually used to do.
>
> The majority's opinion is remarkable in two additional respects. By treating all those who provide money and other aid to Hamas as primarily rather than secondarily liable – along with those who actually commit terrorist acts – the majority eliminates any need for proof that the aid was given with the intent to further Hamas's terrorist agenda. Besides eliminating yet another way for the factfinder to distinguish between those who deliberately aid terrorism from those who do so inadvertently, this poses a genuine threat to First Amendment freedoms. Finally, the majority sustains the entry of summary judgment on a basic factual question – Did Hamas kill David

Boim? – based on an expert's affidavit that both relies upon and repeats multiple examples of hearsay. Rather than sustain the panel's unexceptional demand that the expert's sources be proven reliable, the majority gives its blessing to circumventing the rules of evidence altogether.

Thus, although I concur in the decision to remand for further proceedings as to HLF, I otherwise dissent from the court's decision.

add at page 193:

***In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008)**. The Second Circuit affirmed the district court in the particular aspects appealed by the plaintiffs:

We conclude that the FSIA protects the appellees – most obviously, the Kingdom itself. First, we hold that the FSIA applies to individual officials of foreign governments in their official capacities, and therefore to the Four Princes. Second, we affirm the district court's conclusion that the [Saudi High Commission for Relief to Bosnia and Herzegovina] is an "agency or instrumentality" of the Kingdom, to which the FSIA likewise applies.

Further, we conclude that none of the FSIA's exceptions applies. The plaintiffs' claims do not come within the statutory exception for state-sponsored terrorist acts, 28 U.S.C. § 1605A ("Terrorism Exception"), because the Kingdom has not been designated a state sponsor of terrorism by the United States. As to the exception for personal injury or death caused by a foreign sovereign's tortious act, § 1605(a)(5) ("Torts Exception"), we decline to characterize plaintiffs' claims – expressly predicated on a state-sponsored terrorist act – as sounding in tort. Nor do the plaintiffs' claims come within the statutory exception for a foreign sovereign's commercial activity, § 1605(a)(2) ("Commercial Activities Exception"), because the defendants' specific alleged conduct – supporting Muslim charities that promote and underwrite terrorism – is not conduct in trade, traffic or commerce.

Accordingly, we agree with the district court that it lacked subject matter jurisdiction over the claims against the Kingdom, the Four Princes in their official capacities, and the SHC. We likewise affirm the district court's dismissal of the claims against the Four Princes (in their personal capacities) and Mohamed for want of personal jurisdiction, and the denial of the plaintiffs' motions for jurisdictional discovery.

page 201, add new section

§ 4.02 ASSET SEIZURE AND FORFEITURE

AL HARAMAIN ISLAMIC FOUNDATION v. U.S. DEPT. OF TREASURY

2009 U.S. Dist. LEXIS 103373 (D. Ore. 2009)

KING, Judge:

Plaintiffs Al Haramain Islamic Foundation, Inc., an Oregon corporation ("AHIF-Oregon"[1]), and Multicultural Association of Southern Oregon ("MCASO") challenge the determination that AHIF-Oregon is a Specially Designated Global Terrorist ("SDGT"). They also challenge the blocking order freezing AHIF-Oregon's assets pending that determination, an order which was finalized with the designation. They have sued the Treasury Office of Foreign Assets Control ("OFAC') alleging violations of the Due Process Clause and the Fourth Amendment, and raising constitutional and statutory challenges to the asset seizure statute itself. I previously ruled on portions of the cross-motions for summary judgment, but deferred ruling on several issues and requested additional briefing. *Al Haramain Islamic Found., Inc. v. U.S. Dept. of the Treasury*, 585 F. Supp. 2d 1233 (D. Ore. 2008) ("*AHIF*").

BACKGROUND

OFAC concluded, pursuant to the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701, and its associated executive order, EO 13,224 (Sept. 23, 2001), that AHIF-Oregon is "owned or controlled" by SDGTs and that it provided financial, material, or other support to SDGTs as a branch office of the larger AHIF organization headquartered in Saudi Arabia.

I. Legal Framework

Pursuant to the IEEPA, the President may declare a national emergency to "deal with any unusual or extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States[.]" President George H.W. Bush issued an executive order declaring a national emergency on September 23, 2001 due to the events of September 11. He authorized the Secretary of the Treasury to block contributions of funds, goods or services "to or for the benefit of" the 27 individuals and entities he listed in an annex to the executive order. E.O. 13,224.

In that executive order, the President also delegated authority to the Secretary of Treasury to designate other foreign groups or individuals who have committed or who pose a risk of committing acts of terrorism, or who are "owned or controlled by, or . . . act for or on behalf of those" entities designated by the President or those subsequently designated by the Secretary of Treasury. E.O.

[1] I refer to plaintiff Al Haramain Islamic Foundation, Inc. as AHIF-Oregon throughout this opinion to distinguish it from the world-wide organization of the Al Haramain Islamic Foundation headquartered in Saudi Arabia, which I refer to as AHIF or AHIF-SA.

13,224 at §§ 1(b) and (c). Finally, the President delegated authority to the Secretary of Treasury to designate entities who "assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism" or provide support for "those persons" designated by the President or by the Secretary of Treasury, or for being "otherwise associated" with a designated entity. Id. at §§ 1(d)(i) and (ii). According to the order, the Secretary of Treasury may utilize his designation authority only after consulting with the Secretary of State and the Attorney General. The entities designated by the President or by the Secretary of Treasury are referred to as SDGTs.

Pursuant to the IEEPA, the President may

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States

Pursuant to regulations issued by OFAC, a designated entity may seek a license to engage in any transaction involving blocked property. Such an entity may seek "administrative reconsideration" of a designation. The IEEPA and regulations implementing the executive order specify criminal and civil penalties for violations of licenses, rulings, regulations, or orders.

II. Factual Background

OFAC froze AHIF-Oregon's assets and property on February 19, 2004, pending investigation. It was not until February 6, 2008, when OFAC "redesignated" AHIF-Oregon as an SDGT, thereby finalizing the blocking order, that AHIF-Oregon received a comprehensive explanation for the blocking order. OFAC redesignated AHIF-Oregon because it believed AHIF-Oregon is "owned or controlled" by Soliman H.S. Al-Buthe and Aqeel Al-Aqil, or acted on behalf of them. In addition, OFAC reported that, "As a branch of the Saudi charity Al-Haramain Islamic Foundation, [AHIF-Oregon] had acted for or on behalf of, or has assisted in, sponsored, or provided financial, material, or technological support for, or financial or other services to or in support of Al Qaida and other SDGTs."

Accordingly, AHIF-Oregon's relationship to the world-wide organization of the Al Haramain Islamic Foundation that was headquartered in Saudi Arabia ("AHIF" or "AHIF-SA") is central to the government's justification for designating AHIF-Oregon. AHIF-SA was a Saudi Arabian-based charity that at one point purportedly operated in fifty countries, with an annual budget of between $ 30 and $ 80 million. In addition to charitable activities, AHIF-SA was involved in terrorist operations. I specifically outlined many such activities in *AHIF*, including that it was involved in terrorist activities as far back as the attacks against the Kenyan and Tanzanian U.S. Embassies in 1998. In fact,

AHIF-SA was named in the 9-11 Commission's Staff Report on Terrorist Financing, published in 2004, as an organization that supported al Qaeda and related terrorist groups. AHIF-SA was not designated until June 19, 2008, near the end of the deadline for the briefing on the parties' cross-motions for summary judgment, but many of its branch offices were designated between 2002 and 2004.

Soliman H.S. Al-Buthe, a Saudi national, was an AHIF-SA official, primarily responsible for AHIF-SA's internet and charitable works in the United States. He helped found AHIF-Oregon. Aqeel Al-Aqil, also a Saudi national, was the Director of AHIF until he was purportedly removed in January of 2004. He was also one of the founders of AHIF-Oregon.

Just after freezing AHIF-Oregon's assets in February of 2004, OFAC issued a press release explaining it had blocked AHIF-Oregon's assets "to ensure the preservation of its assets pending further OFAC investigation." It described AHIF-Oregon's "parent" as being headquartered in Saudi Arabia, and described OFAC's other blocking actions against the AHIF branches in Bosnia, Somalia, Indonesia, Tanzania, Kenya, and Pakistan.

OFAC provided unclassified documents to AHIF-Oregon in April 2004, asserting that it was considering designating AHIF-Oregon as an SDGT on the basis of that information as well as classified documents it did not disclose. OFAC provided no further explanation at that time for its belief that AHIF-Oregon might qualify as an SDGT.

AHIF-Oregon responded to the documents OFAC provided, believing that, on the basis of these records, OFAC was targeting it for distributing the Koran to prisoners and others, and for raising funds for Chechen refugees.

OFAC mailed a supplemental record on July 23, 2004, which included documents about AHIF-SA and its branches, newspaper articles about jihad in Chechnya and Saudi financial support for Chechen fighters, as well as newspaper articles about terrorism in Africa, Asia and Europe. AHIF-Oregon objected to inclusion of documents related to AHIF-SA because it asserted it had no control over it and had no relationship with its branches. AHIF-Oregon also submitted documentation to show that Russia supported its efforts in Chechnya.

OFAC provided additional documents on August 20, 2004.

On September 9, 2004, OFAC designated AHIF-Oregon and its director Al-Buthe as SDGTs under the criteria of 1(c) – the "owned or controlled" provision – and (d) – the "support" provision – without giving any further reasoning in the designation letter. It issued a press release which reported "[t]he investigation shows direct links between the U.S. branch and Usama bin Laden," mentioned allegations of criminal violations of tax laws, and mentioned Al-Aqil and the fact that he had been previously designated, but did not state that Al-Aqil owns or controls AHIF-Oregon. AR 1872. The press release also noted suspected financing of Chechen mujahideen and the designations of other branches of AHIF.

In November 2007, approximately three months after plaintiffs commenced this lawsuit, OFAC notified AHIF-Oregon and Al-Buthe that it was considering redesignating them. It provided unclassified documents, including translations of Russian and Arabic newspapers from 2000 to 2004, that it had not provided earlier.

It was not until February 2008 that OFAC finally gave AHIF-Oregon a comprehensive explanation for the designation and blocking order. OFAC redesignated AHIF-Oregon because it believed AHIF-Oregon is "owned or controlled" by Soliman H.S. Al-Buthe and Aqeel Al-Aqil, or acted on behalf of them. OFAC also concluded that because AHIF-Oregon was a branch of the AHIF-SA, "it had acted for or on behalf of, or has assisted in, sponsored, or provided financial, material, or technological support for, or financial or other services to or in support of Al Qaida and other SDGTs."

I found in *AHIF* that OFAC had insufficient evidence showing Al-Aqil retained ownership or control over AHIF-Oregon after he resigned from AHIF-Oregon's Board of Directors in 2003. In contrast, I found substantial evidence of Al-Buthe's ownership or control over AHIF-Oregon at the time of the designation and redesignation. I found that, unlike Al-Aqil, AHIF-Oregon and Al-Buthe never severed ties. Furthermore, I concluded that there is sufficient evidence in the classified and unclassified record demonstrating that AHIF-Oregon supported SDGTs as a branch of AHIF. AHIF-Oregon had not attempted to separate itself from the larger organization, and had not sought delisting under OFAC's regulations. On at least one occasion, AHIF-Oregon supported AHIF-SA financially. The combination of circumstances surrounding Al-Buthe's personal delivery of over $ 150,000 to AHIF-SA from AHIF-Oregon's bank account in March 2000 could reasonably be construed by OFAC as evidence of financial support for terrorist activities. The donator intended the money to be used for "our muslim brothers in Chychnia," and Al-Buthe personally transported the money in travelers' checks and a cashier's check rather than wiring the money and avoiding fees, at a time when AHIF-SA's website carried articles supportive of Chechen mujahideen and a link through which funding could be provided to the mujahideen. Indeed, photographs of mujahideen leaders were found at AHIF-Oregon's office in 2004, well after the donation, along with passports belonging to deceased Russian soldiers, a map noting the location of mujahideen military battles, videos showing violence against Russian soldiers by mujahideen in Chechnya, and photographs of deceased mujahideen and Russian soldiers.

Based on my review of the classified and unclassified record, I concluded that the government was entitled to summary judgment on [several of] AHIF-Oregon's Counts, finding that the designation and redesignation were supported by substantial evidence. I also dismissed [other claims related to vagueness and first amendment rights].

I deferred ruling on AHIF-Oregon's claim under the Due Process Clause [and] its claim under the Fourth Amendment.

DISCUSSION

The issues remaining in the case are: (1) whether the due process violation AHIF-Oregon suffered is harmless; (2) whether OFAC's seizure of assets falls within an exception to the Fourth Amendment's warrant and probable cause requirements; (3) whether AHIF-Oregon is entitled to attorneys' fees; and (4) whether the regulatory prohibition on providing "services" "on behalf of or for the benefit of" a designated entity is vague in violation of the MCASO's Fifth Amendment rights, an issue raised in MCASO's Request for Clarification.

I. The Violation of AHIF-Oregon's Due Process Rights was Harmless

Although I held in *AHIF* that AHIF-Oregon was properly redesignated as an SDGT for its relationship with Al-Buthe and AHIF, as I summarized above, I concluded that the government violated AHIF-Oregon's due process rights in delaying its notice to AHIF-Oregon about the reasons for contemplating a designation action. I held in *AHIF* that OFAC's September 9, 2004 designation represented the culmination of the investigation of AHIF-Oregon and finalization of the February 2004 blocking order. The notice to AHIF-Oregon contained in the September 2004 letter and press release came too late to constitute notice for purposes of the Due Process Clause. At that point, the administrative record had been closed and AHIF-Oregon had no further opportunity to persuade OFAC to come to a different decision, absent a request for reconsideration.[7] I concluded that AHIF-Oregon was entitled to post-deprivation notice, after the February 2004 blocking order, without "unreasonable delay," and certainly before the September 9, 2004 designation finalizing the blocking order.

Despite the government's unconstitutional notice, I concluded that the question is whether I can say "any due process violation was harmless beyond a reasonable doubt." I requested additional briefing from the parties on this question, instructing the parties to consider my conclusion that OFAC's redesignation was rational and supported by substantial evidence.

A. The Due Process Violation Was Not a Structural Error

AHIF-Oregon contends the due process violation was a structural error, along the lines of giving the jury an incorrect reasonable doubt instruction, excluding individuals from the jury on the basis of race, denying a public trial, denying the right to self-representation, denying assistance of counsel, admitting an improperly obtained confession, or having a biased judge preside over the trial. AHIF-Oregon likens its experience to a criminal trial without an indictment or a civil trial without a complaint.

A structural error is defined as "an error that permeate[s] the entire conduct of the trial from beginning to end or affect[s] the framework within which the trial proceeds." I do not view this due process violation as so serious that I could say it permeated and undermined the entire designation process. A structural error would perhaps exist in the situation where OFAC froze an organization's

[7] OFAC is under no obligation to consider a request for reconsideration in a timely manner. It took OFAC three years to evaluate AHIF-Oregon's request.

assets and failed to issue any press releases or provide any documents. Here, however, AHIF-Oregon was given some idea of the reasons for the government's blocking order, pending investigation, in February of 2004. OFAC provided unclassified documents to AHIF-Oregon in April 2004, asserting that it was considering designating AHIF-Oregon as an SDGT on the basis of that information, along with classified information it did not disclose. The fact that AHIF-Oregon was aware that providing funds to Chechnya might be of concern to the agency, and that AHIF-Oregon knew its relationship to the larger organization, which funded terrorism, was of concern, gave it at least some insight into the agency's rationale. Additionally, it was told it may be in violation of the IEEPA. In other words, it had some of the factual reasons and the general legal authority for the blocking order and the proposed designation. As a result, the error falls more in line with one that "may . . . be quantitatively assessed in the context of other evidence presented." Id. The court can consider whether what AHIF-Oregon contends it would have submitted could outweigh the evidence in the record supporting the designation.

B. The Due Process Violation Was Harmless

The government bears the burden of proving that the due process error is harmless beyond a reasonable doubt. The purpose of the "harmless error standard" is to "avoid setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial, because reversal would entail substantial social costs."

AHIF-Oregon asserts that it would have changed its strategy with regard to its investigation of the facts, the information it presented to OFAC, and how it and its board members behaved. AHIF-Oregon contends specifically that if it had known Al-Buthe's ownership and control were at issue, it would have challenged his designation and he would have resigned from the board. It also argues it would have provided evidence demonstrating it had never had any interactions with al Qaeda or other SDGTs, that its money never went to an SDGT, and that it had no control or involvement over AHIF-SA's activities. AHIF-Oregon argues that, because it had no knowledge of what was at issue, my decision to uphold the redesignation was based on an incomplete administrative record.

The government responds by suggesting that the redesignation corrected any due process violation. In *AHIF*, I described the redesignation notice as a "lengthy explanation" and questioned why OF AC could not have issued such an explanation as a proposed decision just after the blocking order. Such a comprehensive notice would have provided AHIF-Oregon with the facts and law and would have given it the opportunity to respond to OFAC's concerns in a knowing and intelligent way. I disagree with the government, however, that the redesignation cured the earlier deficient notice. The redesignation itself came too late to provide the requisite notice to AHIF-Oregon; the administrative record was closed upon issuance of the redesignation.

The question for me is whether AHIF-Oregon would have presented something different that would have changed OFAC's decision or would have made me find the redesignation to be arbitrary and capricious. After careful

review of the record and AHIF-Oregon's briefing, the answer is no. I find that any due process violation was harmless. As a result of the records OF AC provided to AHIF-Oregon, as well as the initial designation, the organization was aware that its provision of funds to Chechnya was of concern to the agency. It submitted a lengthy explanation for that conduct. Similarly, it knew that its relationship to the larger organization was at issue and in its responses to the agency it attempted to minimize that relationship.

AHIF-Oregon contends that had it known Al-Buthe's membership on the board was problematic, he would have resigned. Al-Buthe's resignation would not have changed the outcome, however. I upheld the organization's designation on the "owned or controlled" prong not just because Al-Buthe is on the board, but because other indicia of Al-Buthe's control is present such that the government could have a rational concern about Al-Buthe acting through AHIF-Oregon. He was more heavily involved with AHIF-Oregon than was Al-Aqil. Not only was Al-Buthe one of the founders, but he was its treasurer and was one of only two people with access to its bank account. He raised funds from Saudi Arabian sources and disbursed those funds to AHIF-Oregon and he was the individual who delivered the money to AHIF-SA for use in Chechnya. Additionally, he continues to be heavily involved with the organization. In fact, even now, he is the source, or the fundraiser, of much of the money the organization has used to pay its attorneys. Al-Aqil, in contrast, resigned from the board in March of 2003 and from AHIF-SA's board in January of 2004. The administrative record contains no evidence Al-Aqil was involved with AHIF-Oregon after his resignation or at the time of AHIF-Oregon's designation.

Given my acceptance of the government's argument that money is fungible, that even money used for charitable purposes frees up other money for violent activities, and that the law prohibits giving any financial support to or in support of terrorist acts, I am persuaded beyond a reasonable doubt that nothing AHIF-Oregon could have done would have changed the agency's decision, or would have changed my evaluation of the agency's decision.

II. OF AC Did Not Violate the Fourth Amendment

The government's blocking order pending investigation was based on its "reason to believe" that AHIF-Oregon "may be engaged in activities that violate" the IEEPA. I found such an order constitutes a "meaningful interference with an individual's possessory interests in that property" such that it is a "seizure" for purposes of the Fourth Amendment. Although the blocking is a seizure, such an action is constitutional if it is reasonable.

In analyzing whether the Fourth Amendment's warrant and probable cause requirements apply, courts look first to whether the seizure would have been unreasonable at the time the Fourth Amendment was framed. If historical practices provide no insight, "we have analyzed a search or seizure in light of traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."

A. The History of the Fourth Amendment is Not Revealing

Plaintiffs concede there is little legal guidance about seizures of property at the time of the Framers. They contend that forfeiture is the closest analogy. In the forfeiture context, the government must comply with the Fourth Amendment, and by federal statute, the government may only temporarily seize property after complying with the warrant and probable cause requirements. The government disagrees that forfeiture is analogous since forfeiture involves a permanent transfer of title. I, too, find the fit inapposite. Indeed, the purposes behind forfeiture are different from those under the asset seizure program in that forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." Here, as I examine more fully below, the purpose of asset seizure is not as much punishment as it is prevention.

The government reiterates its position that the Fourth Amendment does not apply because no court has ever considered whether seizures undertaken pursuant to the Trading With the Enemy Act ("TWEA") and IEEPA must comply with the Fourth Amendment. As the government explains, in almost one hundred years of blocking actions, no court has considered whether such seizures need comply with the Fourth Amendment. This precedent, combined with the fact that the President announced a national emergency pursuant to specific Congressional authorization, and the fact that the blocking action involves the interests of foreign nationals, are relevant considerations.

In short, as the government puts it,

> Requiring the Executive to obtain a warrant prior to imposing economic sanctions would be entirely inconsistent with the historical record and the long-established principle that the judiciary's role in foreign affairs is limited, as it would inject the judiciary into every executive decision to carry out financial sanctions involving assets in which foreign nationals have an interest.

Having found nothing in the historical practices suggesting the seizure would have been unreasonable at the time the Fourth Amendment was framed, and having concluded that the historical treatment of seizures under the TWEA and IEEPA informs the reasonableness of the government's actions, I now evaluate the exceptions posed by the government.

B. The Special Needs Exception Applies

According to the government, no probable cause or warrant requirement is necessary because the seizure of AHIF-Oregon's assets is per se reasonable. The government concludes that because AHIF-Oregon is a donor to international terrorist groups, its diminished expectation of privacy is outweighed by the government's strong interest in stopping terrorist financing. The government also compares the outcome of its balancing test to border searches, suggesting that, as in border searches, the interest of the "sovereign" outweighs any privacy interests.

Searches and seizures, however, are usually only "reasonable" when supported by probable cause and a warrant, except for "specifically established and well-delineated exceptions. Over and over again [the Supreme] Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without approval by judge or magistrate, are per se unreasonable under the Fourth Amendment[.]"

Aside from its argument that the blocking action is per se reasonable, which I am unwilling to accept, the government relies on the special needs exception. The special needs exception to the Fourth Amendment requirement for probable cause and a warrant was first articulated by Justice Blackmun in his concurring opinion in New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). He stated, "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." The special needs exception has been applied in a host of non-criminal searches such as searches of prisoners, parolees, and probationers, border searches, immigration stops and searches, airport security, administrative searches, and military searches.

Accordingly, the two factors that must be present for the special needs exception to apply are: (1) the primary purpose of the seizure must be beyond criminal law enforcement, and (2) a warrant and probable cause must be impracticable,

I find the first factor met. When analyzing the government's actions under this factor, courts undertake a "close review" to find whether the "purpose actually served ... is ultimately indistinguishable from the general interest in crime control." "The nature of the 'emergency,' which is simply another word for threat, takes the matter out of the realm of ordinary crime control." *In re: Sealed Case*, 310 F.3d 717, 745-46 (FISA Ct. Rev. 2002)[8]

Applying these cases, then, the primary focus of the asset seizure scheme used to freeze AHIF-Oregon's assets is not for criminal law enforcement purposes. Rather, the President declared a national emergency due to the terrorist attacks in New York, Pennsylvania and the Pentagon, and directed that assets and property in the hands of specified governments, entities and individuals be frozen to stop future attacks. The purpose of the asset seizure scheme is not to obtain information about whether the asset owner has committed an act of terrorism, but rather is to withhold assets to ensure future terrorist acts are not committed. Director Szubin also explains that blocking

[8] I respectfully disagree with *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*. In that case, the court considered the "method" and "modus operandi" of the asset seizure program, rather than the purpose behind the program, and concluded the blocking actions had "more in common with ordinary law enforcement activity." As is clear from the cases I cite above, the focus of the inquiry is on the programmatic purpose of the activity, not the method by which the activity is carried out.

assets preserves them for future legal judgments and allows the President to use the assets in negotiations with foreign governments.

My finding is consistent with cases in the context of searches of mass transit operations, like ferries and airplanes, in which courts have concluded that "[p]reventing or deterring large-scale terrorist attacks present problems that are distinct from standard law enforcement needs and go well beyond them."

As for the second factor, the government has persuasively explained why it is impracticable to obtain a warrant. First, the government must act quickly to prevent asset flight. I agree with plaintiffs that this reason alone would be insufficient to satisfy the impracticability requirement since the government could seize first and obtain a warrant later. The government has also explained, however, how impossible it would be to meet the specificity requirements in an application for a warrant, and how difficult it would be to track down assets belonging to the designated individual and apply for a warrant in each jurisdiction in which the asset is located.

Pursuant to the Fourth Amendment, a warrant requires a description of the "place to be searched and the persons or things to be seized." Here, however, as Szubin explains in his supplemental declaration, OFAC and the President have Congressional authority to seize a wide variety of property interests, ranging from money to mortgages, options to insurance policies, merchandise to accounts payable, located both in the United States and elsewhere, the existence of which are not always known to the agency at the time of the blocking order. As a result, it would be difficult to apply for a warrant for every asset in each jurisdiction in which the asset might be located. Such a requirement would interfere with the President's and OFAC's ability to act fast in blocking assets that are often very liquid and transferrable.

In sum, I find OFAC's seizure of AHIF-Oregon's assets was reasonable within the meaning of the Fourth Amendment because it was supported by the special needs of the government.

KINDHEARTS FOR CHARITABLE HUMANITARIAN DEVELOPMENT, INC. v. GEITHNER

U.S. Dist. LEXIS 45175 (N.D. Ohio 2010)

Carr, Chief Judge:

Plaintiff KindHearts for Charitable Humanitarian Development, Inc. (KindHearts) challenged defendants' block pending investigation (BPI) of KindHearts' assets and provisional determination, by the Office of Foreign Assets Control (OFAC) of the United States Treasury Department, that KindHearts is a Specially Designated Global Terrorist (SDGT).

OFAC's authority to designate SDGTs and block the assets of entities under investigation for supporting terrorism stems from the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-06, and Executive Order 13224 (E.O. 13224).

On August 18, 2009, I found that in blocking KindHearts' assets, the government violated KindHearts' constitutional and statutory rights. *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner* (KindHearts I), 647 F. Supp. 2d 857 (N.D. Ohio 2009). I found that, in blocking KindHearts' assets, the government: 1) violated KindHearts' Fourth Amendment rights by failing to obtain a warrant based on probable cause; 2) violated KindHearts' Fifth Amendment rights by relying on criteria for the BPI that are unconstitutionally vague as applied, and by failing to provide KindHearts with adequate notice and a meaningful opportunity to respond; and 3) acted arbitrarily and capriciously in limiting KindHearts' access to its own funds to pay counsel for its defense. I reserved ruling on the remedies for these violations.

The parties have now fully briefed me on the issue of remedy.

I. Fourth Amendment Violation

A. Reasonableness

The government first contends that the Fourth Amendment analysis in my August 18 Order was incomplete. This is so, it argues, because I concluded that OFAC violated KindHearts' Fourth Amendment rights without separately analyzing whether OFAC's seizure of KindHearts' assets was "reasonable."

The government argues that the core of the Fourth Amendment is "reasonableness," and that a seizure may be consistent with the Fourth Amendment if it is reasonable, even if it is not supported by a warrant and probable cause. The government urges me to conclude that under the "totality of the circumstances," the seizure here was reasonable.

In my August 18 Order, I first concluded that OFAC's actions amounted to a seizure of KindHearts' assets. I then determined that OFAC's blocking of KindHearts' assets violated the Fourth Amendment because OFAC did not obtain prior judicial review, and neither the special needs nor exigency exception applied.[9]

The government's reasonableness argument echoes its prior argument that the BPI falls within the special needs exception to the warrant requirement. The government contends specifically: 1) the government has a strong interest in acting quickly to protect national security; 2) KindHearts' interest is limited; 3) procedural safeguards built into the blocking program protect KindHearts' interests; and 4) the specific facts underlying the BPI support a finding of reasonableness.

Even assuming arguendo that the government is correct that a "reasonable" seizure may comply with the Fourth Amendment absent a warrant and probable cause, or exception thereto, I find the seizure here was not reasonable.

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[9] The government continues to argue the BPI was not a seizure and that the Fourth Amendment is not implicated here. The government also continues to assert that even if the BPI is a seizure, either the special needs or exigent circumstances exception excuses the warrantless seizure. I decline to revisit my previous ruling rejecting these arguments.

In assessing the reasonableness of a seizure, I must weigh the nature and extent of the government's intrusion on private interests, government's interest in effecting the seizure, and the existence of checks on arbitrary executive discretion. The government argues that its interests here – national security and foreign policy – are "at their zenith." This is so, the government contends, because BPIs carried out under E.O. 13224 "are by definition conducted to address 'an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States[,]' and are an exercise of the Executive's authority to act in the foreign policy and national security realm."

The government's interest in cutting off funds and other support to terrorism is unquestionably compelling. The other factors, however, demonstrate OFAC's BPI here was not reasonable.[10]

The government continues to argue that it "has a strong interest in being able to act rapidly, sometimes instantaneously, in this area to protect the national security." I do not doubt that these interests are strong. I have, however, already held that the government did not demonstrate a need to act rapidly in this case.

KindHearts' interest here is also strong, despite the government's contention that it is "limited." As KindHearts points out, I previously held that it "had a strong interest in accessing its funds, remaining in operation and disbursing its funds, to the extent it was doing so, lawfully." I remain convinced that KindHearts' interest is substantial.

The government also argues that this was a "regulatory action," not an action carried out "for regular law enforcement purposes." My prior finding that "OFAC's blocking power has more in common with ordinary law enforcement than with any of the activities considered in the special needs cases" refutes this argument, and I decline the invitation to revisit it.

Next, the government contends that the facts underlying the BPI require a finding of reasonableness. While these facts may speak to the level of governmental interest at stake – one which I agree is compelling – the seriousness of the actions OFAC attributes to KindHearts does not itself make a search reasonable.

OFAC froze all of KindHearts' assets in February, 2006, and they have remained frozen ever since. A block affects "all property" in the control of a target entity, presently, and in the future. A block can thus last indefinitely. The intrusion here – seizing all of KindHearts assets for an indefinite period of time

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[10] The government contends that I should draw on the recent decision of the District of Oregon (*Al Haramain*) to conclude that the seizure here was reasonable under the circumstances. I disagree.

First, the court in *Al Haramain* based its conclusion that no Fourth Amendment violation occurred on the special needs exception, not on a totality of the circumstances reasonableness analysis. I already concluded, and decline to revisit, my previous conclusion that the special needs exception is inapplicable here. Second, I find the Oregon court's balancing between the individual and governmental interests unpersuasive as applied to the facts of this case.

– is a far more substantial intrusion on private interests than those upheld as "reasonable" in [prior] cases.

OFAC need only claim that it is "investigating" a target entity to seize all of its assets. Neither IEEPA nor E.O. 13224 places any substantive limits on this power to seize. OFAC has broad power to block any and all assets of an entity subject to United States jurisdiction at any time, for any amount of time, and on virtually any level of suspicion.

Given the substantial intrusion on KindHearts' interest, the seizure here was not reasonable under the Fourth Amendment based on the totality of the circumstances.

B. Remedy for Fourth Amendment Violation

Having concluded that the BPI was not otherwise reasonable and thus violated the Fourth Amendment, I am left with the difficult task of constructing an appropriate remedy for that violation. In so doing, I am cognizant that I stand at the intersection of Article II, with its absolute delegation of authority to the President to conduct our foreign affairs and keep us secure from foreign-based dangers, and the judicial authority and duty under Article III to enforce constitutional rights and protect those rights from infringement.

KindHearts argues that the only available remedy is invalidation of the BPI and return of its funds. KindHearts argues this is so because: 1) the APA requires it; and 2) I lack authority to construct any other remedy.

The government argues that, should I conclude – as I have – that the BPI was not otherwise reasonable, I should conduct a post-seizure probable cause review.

I note at the outset that I recognize the Fourth Amendment's scope is more limited in the context of foreign relations and national security than in typical domestic criminal investigations and administrative actions. The Executive Branch has broad discretion in foreign affairs and national security. It is the role of the judiciary, however, to ensure the protection of individual rights. I "must be careful to balance" the Fourth Amendment "constitutional issues that could arise from deference to the agency's interpretation against those constitutional issues which may arise if insufficient latitude is given to the executive in the conduct of foreign affairs." Mindful of the need to attain such balance, I turn to the question of remedy.

Analogizing to exigent circumstances and forfeiture cases, the government argues that a post-hoc probable cause determination can cure the Fourth Amendment violation.

KindHearts argues such review is inappropriate because: 1) I do not have authority to issue a warrant; 2) a warrant cannot issue after a seizure; 3) post-seizure review in the Fourth Amendment context is limited to situations where an exception to the warrant requirement applies; and 4) neither I nor Congress have formulated an appropriate probable cause standard for BPIs.

I agree with the government that, under the unique circumstances of this case, I can and should implement post-hoc probable cause review.

As discussed below, in ordering a probable cause showing, I am not issuing a "retroactive warrant" as KindHearts contends. Rather, I am ordering a probable cause showing as a remedy for the warrantless seizure and prolonged and continuing retention of KindHearts' assets.

I find the analogy the government draws to forfeiture law instructive. Civil forfeiture implicates both the Fourth and Fifth Amendments. Courts have held that in forfeiture proceedings due process requires the government to provide notice and a hearing prior to seizing real property absent exigent circumstances.

If, however, the government fails to provide such pre-deprivation process, it is not required to release the forfeited property if, following the seizure, it can show probable cause that the seized assets are subject to forfeiture. U.S. v. Bowman, 341 F.3d 1228, 1235-36 (11th Cir. 2003) ("It would not be appropriate to return real property to the property owner if the Government can establish at the post-seizure adversarial hearing (as it has in this case) that there is probable cause to believe that the property is connected to criminal activity. The effect of returning the property to the property owner under these circumstances would be to allow the continuation of illegal activity, an outcome Congress surely did not intend.")

While KindHearts is correct that these cases address remedies for Fifth Amendment – not Fourth Amendment – violations, and that these cases involve prior warrants, the parallels to the seizure here are apparent. As with civil forfeiture, the action challenged here is a seizure of KindHearts' assets authorized by a particular statute. Both are civil in nature, but both serve law-enforcement-like purposes and implicate intertwined Fourth and Fifth Amendment concerns.

Although the forfeiture analogy is imperfect, it does demonstrate the potential inappropriateness of returning seized assets when the government can show post-seizure probable cause for the seizure. I thus find that ordering return of KindHearts' assets would be similarly inappropriate if the government can show probable cause. This is especially true in this situation, where whatever I do intrudes – or risks intruding – into the zone of authority secured to the Executive under Article II.

Probable Cause Standard

In the administrative search context, the Supreme Court has explained that "where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." Camara v. Municipal Court, 387 U.S. 523, 538, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

The court in Camara examined the level of probable cause necessary to issue a warrant for building inspections by municipal health and safety officials. It concluded that there is "probable cause" to issue a warrant "if reasonable

legislative or administrative standards for conducting an area inspection are satisfied

Under the Foreign Intelligence Surveillance Act (FISA), a federal officer must have "probable cause to believe that . . . the target of the electronic surveillance is a foreign power or agent of a foreign power," and that "each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or agent of a foreign power." Courts have upheld this modified probable cause standard under the Fourth Amendment. [see § 5.01 of the main volume]

I conclude that the government need not show probable cause to believe that evidence of a crime will be found. The government must instead show that, at the time of the original seizure, it had probable cause – that is, a reasonable ground – to believe that KindHearts, specifically, was subject to designation under E.O. 13224 § 1. I further find that if the government can show probable cause for the original seizure, even at this very late date, the post-hoc judicial finding of such cause remedies the Fourth Amendment violation.[8]

While it would have been easier for all involved if OFAC had obtained independent judicial review and a warrant prior to seizing KindHearts' assets, or if it had provided KindHearts with a prompt and meaningful way to challenge the seizure, I find that this post-hoc probable cause determination, though not typical, provides a necessary check on otherwise unrestrained executive discretion. This is particularly so in these specific circumstances, where that discretion has been used in a way that violates the Constitution.

II. Fifth Amendment Violations

In my August 18 Order, I held that the government's "blocking order failed to provide [KindHearts with] the two fundamental requirements of due process: meaningful notice and [an] opportunity to be heard." I do not here revisit that determination, but I must decide what remedy flows from these violations of the Fifth Amendment's Due Process Clause.

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[8] The October, 2001, Patriot Act amended IEEPA. The amendment permitted the Treasury Secretary to impose on an entity all the blocking effects of a designation, including freezing an organization's assets indefinitely, without designating the organization as an SGDT. 50 U.S.C. § 1702(a)(1)(B). The amendment also provided, inter alia:

> (c) **Classified information**.–In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex parte and in camera. This subsection does not confer or imply any right to judicial review.

It is thus appropriate – should the government request my review of classified information in making its probable cause showing – for me to hold this probable cause hearing *ex parte* and *in camera*.

For now I do not consider, much less try to spell out, what further remedy would be appropriate and necessary if the government fails to show probable cause as provided herein.

Here, KindHearts still does not know what facts to rebut, or what other grounds the government has for its action. As KindHearts points out, "OFAC has yet to afford KindHearts constitutionally adequate notice of the charges against it that would allow KindHearts to know what to look for" in its documents.[16]

I agree with the government that, notwithstanding the APA's dictate that we set aside unconstitutional agency action, the proper remedy for a notice violation in the context of designation proceedings is to remand to OFAC, without vacatur of the BPI, with instructions as to what additional notice is required.

This leaves me with the difficult question of precisely what the government must disclose to KindHearts to provide KindHearts with adequate notice. On this issue, the government notes:

> The Court has thus far expressed no opinion on what specific process must be provided beyond that which has to date been provided. OFAC has at this time given a complete statement of the unclassified, non-privileged reasons for the blocking and has provided KindHearts with all of the unclassified, non-privileged evidence being considered by the agency. There is possibly nothing else that can be done.

KindHearts responds: "If the only evidence that would provide KindHearts adequate notice is classified, OFAC is constitutionally obligated to devise a reasonable alternative that affords KindHearts a meaningful opportunity to respond."

I appreciate the government's interest in national security and foreign policy implicated here. Courts have found that their duty to protect individual rights extends to requiring disclosure of classified information to give a party an ability to respond to allegations made against it. See American-Arab Anti-Discrimination Comm. v. Reno (ADC), 70 F.3d 1045, 1070-71 (9th Cir. 1995). In *ADC*, the Ninth Circuit faced this issue in the context of immigration: aliens challenged the use of classified information in adjudicating their applications for legalization. The court held that the government's use of classified information violated an individual's right to due process. In so holding, the court noted that the government's reliance on classified evidence undermined the adversarial system and created an enormous risk of error. The court further explained:

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[16] [My] conclusion that the notice provided KindHearts remains inadequate distinguishes this case from *Al Haramain*, to which the government points in arguing its due process violations were harmless. In *Al Haramain*, the district court found that "the redesignation notice" included "a lengthy explanation" of the grounds for the government's designation decision, and that "[s]uch a comprehensive notice would have provided AHIF-Oregon [the plaintiff] with the facts and law and would have given it the opportunity to respond to OFAC's concerns in a knowing and intelligent way." The reason for the district court's determination that the due process violation was harmless, therefore, rested upon the delay in providing constitutionally acceptable notice, not in the continued absence of such notice. By contrast, here I found OFAC's notice to KindHearts failed constitutionally both in delay and in substance. The court in *Al Haramain's* determination on this issue, therefore, is inapposite to the situation here.

> Only the most extraordinary circumstances could support one-sided process. We cannot in good conscience find that the President's broad generalization regarding a distant foreign policy concern and a related national security threat suffices to support a process that is inherently unfair because of the enormous risk of error and the substantial personal interests involved.

Drawing on those cases, I propose, subject to giving the parties an opportunity to comment and be heard, that:

1. I convene, under 8 U.S.C. § 1189(b)(2), an ex parte, in camera meeting with the government to determine what classified evidence will give KindHearts adequate notice, and whether that evidence is capable of further declassification or adequate summarization;

2. If so, the government will expeditiously declassify and/or summarize whatever classified information I find will give KindHearts constitutionally adequate notice;

3. If declassification or summarization of classified information is insufficient or impossible, then KindHearts' counsel will obtain an adequate security clearance to view the necessary documents, and will then view these documents in camera, under protective order, and without disclosing the contents to KindHearts; and

4. The government will then provide KindHearts' counsel with an opportunity to respond to these documents (through a closed, classified hearing if KindHearts' counsel views classified information).

Chapter 5

INVESTIGATION, PROSECUTION & SECRETS

§ 5.02 PATRIOT AND PRIVACY

[B] Access to Third-Party Records

add at page 247:

DOE v. MUKASEY
549 F.3d 861 (2d Cir. 2008)

[On this second appeal, the Second Circuit decided that it would best serve the public interest by construing the statutes to avoid the constitutional issues decided by the district court.]

We construe § 2709(c) to mean that the enumerated harms must be related to "an authorized investigation to protect against international terrorism or clandestine intelligence activities," and construe § 3511 to place on the Government the burden to persuade a district court that there is a good reason to believe that disclosure may result in one of the enumerated harms, and to mean that a district court, in order to modify or set aside a nondisclosure order, must find that such a good reason exists.

The Government advances several arguments why the third *Freedman* safeguard should not apply to judicial review of the nondisclosure requirement. First, the Government contends that it would be unduly burdened if it had to initiate a lawsuit to enforce the nondisclosure requirement in the more than 40,000 NSL requests that were issued in 2005 alone, according to the 2007 report of the Inspector General of the Department of Justice ("OIG Report"). Instead of determining whether, as the Government contends, a burden of initiating litigation can prevent application of the third *Freedman* procedural safeguard, we consider an available means of minimizing that burden, use of which would substantially avoid the Government's argument. The Government could inform each NSL recipient that it should give the Government prompt notice, perhaps within ten days, in the event that the recipient wishes to contest the nondisclosure requirement. Upon receipt of such notice, the Government could be accorded a limited time, perhaps 30 days, to initiate a judicial review proceeding to maintain the nondisclosure requirement, and the proceeding would have to be concluded within a prescribed time, perhaps 60 days. In accordance with the first and second *Freedman* safeguards, the NSL could inform the recipient that the nondisclosure requirement would remain in effect during the entire interval of the recipient's decision whether to contest the nondisclosure requirement, the Government's prompt application to a court, and the court's prompt adjudication on the merits. The NSL could also inform the recipient that the nondisclosure requirement would remain in effect if the recipient declines to give the Government notice of an intent to challenge the requirement or, upon a challenge, if the Government prevails in court. If the Government is correct that very few NSL recipients have any interest in challenging the nondisclosure

requirement (perhaps no more than three have done so thus far), this "reciprocal notice procedure" would nearly eliminate the Government's burden to initiate litigation (with a corresponding minimal burden on NSL recipients to defend numerous lawsuits). Thus, the Government's litigating burden can be substantially minimized, and the resulting slight burden is not a reason for precluding application of the third *Freedman* safeguard.

Assessing the Government's showing of a good reason to believe that an enumerated harm may result will present a district court with a delicate task. While the court will normally defer to the Government's considered assessment of *why* disclosure in a particular case may result in an enumerated harm related to such grave matters as international terrorism or clandestine intelligence activities, it cannot, consistent with strict scrutiny standards, uphold a nondisclosure requirement on a conclusory assurance that such a likelihood exists. In this case, the director of the FBI certified that "the disclosure of the NSL itself or its contents may endanger the national security of the United States." To accept that conclusion without requiring some elaboration would "cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct."

In showing why disclosure would risk an enumerated harm, the Government must at least indicate the nature of the apprehended harm and provide a court with some basis to assure itself (based on *in camera* presentations where appropriate) that the link between disclosure and risk of harm is substantial.

We deem it beyond the authority of a court to "interpret" or "revise" the NSL statutes to create the constitutionally required obligation of the Government to initiate judicial review of a nondisclosure requirement. However, the Government might be able to assume such an obligation without additional legislation. If the Government uses the suggested reciprocal notice procedure as a means of initiating judicial review, there appears to be no impediment to the Government's including notice of a recipient's opportunity to contest the nondisclosure requirement in an NSL.

[C] The NSA Surveillance Program

add at page 268 in the Notes

3. In re NSA Telcomm. Records Litigation, 595 F. Supp. 2d 1077 (N.D. Cal. 2009). In proceedings on remand from the Ninth Circuit's opinion in *Al Haramain*, the district court issued the following order.

> [T]his court [earlier] issued a ruling that: (1) FISA preempts the state secrets privilege in connection with electronic surveillance for intelligence purposes and would appear to displace the state secrets privilege for purposes of plaintiffs' claims; and (2) FISA did not appear to provide plaintiffs with a viable remedy unless they could show that they were "aggrieved persons" within the meaning of FISA. 564 F Supp 2d 1109 (N D Cal 2008). The court dismissed the complaint with leave

to amend. Plaintiffs timely filed an amended pleading and defendants, for the third time, moved to dismiss.

[The plaintiffs' allegations regarding their aggrieved party status were]:

> (i) the [TSP] targeted communications with individuals reasonably believed to be associated with al Qaeda; (ii) in February 2004, the Government blocked the assets of AHIF-Oregon based on its association with terrorist organizations; (iii) in March and April of 2004, plaintiffs Belew and Ghafoor talked on the phone with an officer of AHIF-Oregon in Saudi Arabia about, inter alia, persons linked to bin-Laden; (iv) in the September 2004 designation of AHIF-Oregon, [OFAC] cited the organization's direct links to bin-Laden as a basis for the designation; (v) the OFAC designation was based in part on classified evidence; and (vi) the FBI stated it had used surveillance in an investigation of the Al-Haramain Islamic Foundation. Plaintiffs specifically allege that interception of their conversations in March and April 2004 formed the basis of the September 2004 designation, and that any such interception was electronic surveillance as defined by the FISA conducted without a warrant under the TSP.

Without a doubt, plaintiffs have alleged enough to plead "aggrieved person" status so as to proceed to the next step in proceedings under FISA.

The court has carefully considered the logistical problems and process concerns that attend considering classified evidence and issuing rulings based thereon. Measures necessary to limit the disclosure of classified or other secret evidence must in some manner restrict the participation of parties who do not control the secret evidence and of the press and the public at large. The court's next steps will prioritize two interests: protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action. Unfortunately, the important interests of the press and the public in this case cannot be given equal priority without compromising the other interests.

To be more specific, the court will review the Sealed Document *ex parte* and *in camera*. The court will then issue an order regarding whether plaintiffs may proceed – that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA. As the court understands its obligation with regard to classified materials, only by placing and maintaining some or all of its future orders in this case under seal may the court avoid indirectly disclosing some aspect of the Sealed Document's contents. Unless counsel for plaintiffs are granted access to the court's rulings and, possibly, to at least some of defendants' classified filings, however, the entire remaining course of this litigation will be *ex parte*. This outcome would deprive plaintiffs of due process to an extent inconsistent with Congress's purpose in enacting FISA's sections 1806(f) and 1810. Accordingly, this order provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to

litigate the case, including, but not limited to, reading and responding to the court's future orders.

Given the difficulties attendant to the use of classified material in litigation, it is timely at this juncture for defendants to review their classified submissions to date in this litigation and to determine whether the Sealed Document and/or any of defendants' classified submissions may now be declassified. Accordingly, the court now directs defendants to undertake such a review.

The next steps in this case will be as follows:

1. Within fourteen (14) days of the date of this order, defendants shall arrange for the court security officer/security specialist assigned to this case in the Litigation Security Section of the United States Department of Justice to make the Sealed Document available for the court's in camera review. If the Sealed Document has been included in any previous classified filing in this matter, defendants shall so indicate in a letter to the court.

2. Defendants shall arrange for Jon B Eisenberg, lead attorney for plaintiffs herein and up to two additional members of plaintiffs' litigation team to apply for TS/SCI clearance and shall expedite the processing of such clearances so as to complete them no later than Friday, February 13, 2009. Defendants shall authorize the court security officer/security specialist referred to in paragraph 1 to keep the court apprised of the status of these clearances. Failure to comply fully and in good faith with the requirements of this paragraph will result in an order to show cause re: sanctions.

3. Defendants shall review the Sealed Document and their classified submissions to date in this litigation and determine whether the Sealed Document and/or any of defendants' classified submissions may be declassified, take all necessary steps to declassify those that they have determined may be declassified and, no later than forty-five (45) days from the date of this order, serve and file a report of the outcome of that review.

In Re: National Security Agency Telecomm. Litigation [AL-HARAMAIN v. OBAMA]

2010 U.S. Dist. LEXIS 31287 (N.D. Cal. 2010)

WALKER, United States District Chief Judge:

SUMMARY OF DECISION

Plaintiffs seek an order finding defendants civilly liable to them under section 1810 of the Foreign Intelligence Surveillance Act ("FISA") for eavesdropping on their telephone conversations without a FISA warrant. In the course of lengthy proceedings in this court and the court of appeals, this court determined that: FISA affords civil remedies to "aggrieved persons" who can show they were subjected to warrantless domestic national security surveillance; FISA takes precedence over the state secrets privilege in this case; and plaintiffs have met their burden of establishing their "aggrieved person" status using non-

classified evidence. Because defendants denied plaintiffs' counsel access to any classified filings in the litigation, even after top secret clearances were obtained for plaintiffs' counsel and protective orders suitable for top secret documents proposed, the court directed the parties to conduct this phase of the litigation without classified evidence. Both plaintiffs' motion for summary judgment of liability and defendants' cross-motions for dismissal and for summary judgment were, therefore, based entirely on non-classified evidence.

The court now determines that plaintiffs have submitted, consistent with FRCP 56(d), sufficient non-classified evidence to establish standing on their FISA claim and to establish the absence of any genuine issue of material fact regarding their allegation of unlawful electronic surveillance; plaintiffs are therefore entitled to summary judgment in their favor on those matters. Defendants' various legal arguments for dismissal and in opposition to plaintiffs' summary judgment motion lack merit: defendants have failed to meet their burden to come forward, in response to plaintiffs' prima facie case of electronic surveillance, with evidence that a FISA warrant was obtained, that plaintiffs were not surveilled or that the surveillance was otherwise lawful.

In the absence of a genuine issue of material fact whether plaintiffs were subjected to unlawful electronic surveillance within the purview of FISA and for the reasons fully set forth in the decision that follows, plaintiffs' motion for summary judgment on the issue of defendants' liability under FISA is GRANTED. Defendants' motion to dismiss the amended complaint for lack of jurisdiction is DENIED and defendants' cross-motion for summary judgment is DENIED.

DECISION

I

[T]he court of appeals declined to decide whether FISA preempts the SSP. Instead, writing that "the FISA issue remains central to Al-Haramain's ability to proceed with this lawsuit," it remanded the case to this court to consider that question "and for any proceedings collateral to that determination." The court of appeals did not comment either on the likely consequences of a determination by this court that FISA preempted the SSP for this litigation in general or for the Sealed Document's role in this litigation in particular.

By order dated July 2, 2008, [this] court held that FISA's legislative history unequivocally established Congress's intent that FISA preempt or displace the SSP in cases within the reach of its provisions. 564 F Supp 2d 1109, 1124 (N D Cal 2008). The court noted, however, the substantial obstacles facing any litigant hoping to bring an action for damages under FISA's section 1810, which the court described as "not user-friendly."

Specifically, the court noted, unlike the electronic surveillance carried out by federal law enforcement agencies under the general wiretap statute, much of the electronic surveillance undertaken for national security purposes does not result in criminal proceedings in which the existence of the surveillance evidence would be disclosed as a matter of course. Moreover, unlike Title III, FISA does not

require that the target of an electronic surveillance ever be informed of its occurrence. The July 2 order detailed FISA's provisions requiring certain agencies to report periodically to Congress on the number of warrants applied for and other actions taken under FISA. The July 2 order, meanwhile, underscored the absence of any regular legal mechanism by which an individual who had been subject to electronic surveillance within FISA's purview could learn of the surveillance.

[Plaintiffs' submissions regarding surveillance] may be briefly summarized in the following two paragraphs:

> Various government officials admitted the existence of a program of warrantless surveillance under which the NSA was authorized by the President to intercept certain international communications in which one party was outside the United States and one party was reasonably believed to be a member or agent of international terrorist network al-Qaeda or an affiliated terrorist organization. Al-Haramain's assets were blocked by the Treasury Department in February 2004 pending an investigation of "possible crimes relating to currency reporting and tax laws," but neither OFAC's press release nor March 2004 congressional testimony of a FBI official about the investigation suggested that Al-Haramain had links to al-Qaeda. In June 2004, an OFAC official testified in Congress that in investigating terrorist financing, OFAC used classified information sources.
>
> Between March and June 2004, several phone conversations took place between plaintiffs Belew and Ghafoor in the United States on the one hand and Soliman al-Buthi, a director of Al-Haramain located in Saudi Arabia, on the other; in these conversations, the participants made reference to various individuals associated with Osama bin-Laden, the founder of al-Qaeda. In September 2004, OFAC formally designated Al-Haramain as a SDGT organization and, in a press release, specifically cited "direct links between the US branch [of Al-Haramain]" and Osama bin-Laden; this was the first public claim of purported links between Al-Haramain and bin-Laden. The FBI and the Treasury Department have stated publicly that they relied on classified information, including "surveillance" information, to designate Al-Haramain as a terrorist organization associated with al-Qaeda and bin-Laden. In testimony before Congress in 2006 and 2007, top intelligence officials including defendant Keith B Alexander stated that a FISA warrant is required before certain wire communications in the United States can be intercepted. In a separate criminal proceeding against Ali al-Timimi in 2005, the government disclosed that it had intercepted communications between al-Timimi and Al-Haramain's director al-Buthi.

In its order of January 5, 2009, [excerpted above] the court ruled that plaintiffs had made out a prima facie case that they are "aggrieved persons" who had been subjected to "electronic surveillance" within the meaning of section 1810. The court announced its intention to review the Sealed Document *ex parte*

and *in camera*, then to issue an order stating whether plaintiffs could proceed – specifically, whether the Sealed Document established that plaintiffs were subject to electronic surveillance not authorized by FISA. The order directed the government to begin processing security clearances for members of plaintiffs' litigation team so that they would be able to read and respond to sealed portions of the court's future orders and, if necessary, some portion of defendants' classified filings.

What followed were several months of which the defining feature was defendants' refusal to cooperate with the court's orders punctuated by their unsuccessful attempts to obtain untimely appellate review. Next, after the United States completed suitability determinations for two of plaintiffs' attorneys and found them suitable for top secret/secure compartmented information ("TS/SCI") clearances, government officials in one or more defendant agencies refused to cooperate with the court's orders, asserting that plaintiffs' attorneys did not "need to know" the information that the court had determined plaintiffs' attorneys would need in order to participate in the litigation. Moreover, according to the parties' joint submission regarding a protective order, defendants refused to agree to any terms of the protective order proposed by plaintiffs and refused to propose one of their own..

The court ordered defendants to show cause why, as a sanction for failing to obey the court's orders: (1) defendants should not be prohibited, under FRCP 37(b)(2)(A)(ii), from opposing the liability component of plaintiffs' claim under 50 USC § 1810 – that is, from denying that plaintiffs are "aggrieved persons" who had been subjected to electronic surveillance; and (2) the court should not deem liability under 50 USC § 1810 established and proceed to determine the amount of damages to be awarded to plaintiffs.

After hearing argument on the order to show cause, the court directed plaintiffs to move for summary judgment on their FISA claim relying only on non-classified evidence. It further ordered that if and only if defendants were to rely upon the Sealed Document or other classified evidence in response, the court would enter a protective order and produce such classified evidence to plaintiffs' counsel who have obtained security clearances.

The instant cross-motions ensued.

II

[The Government asserted that the injunctive claims were moot, but the court disagreed.]

III

The parties' cross-motions for summary judgment present more substantial questions. Plaintiffs' motion seeks summary adjudication of two issues: (1) plaintiffs' Article III standing and (2) defendants' liability under FISA's civil liability provision. Defendants cross-move for summary judgment on plaintiffs' FISA claim and "any remaining claim," arguing that: (1) the Ninth Circuit's mandate in this case "forecloses" plaintiffs' motion; (2) plaintiffs' evidence is too conjectural or circumstantial to establish that plaintiffs are "aggrieved persons"

for FISA purposes; and (3) all other potentially relevant evidence – including whether the government possessed a FISA warrant authorizing surveillance of plaintiffs – is barred from disclosure by operation of the State Secrets Privilege (SSP).

A

Plaintiffs have submitted twenty-eight public documents and two declarations as evidence in support of their motion. The court has already determined, based on the body of evidence submitted with plaintiffs' motion under section 1806(f), that plaintiffs have made out a prima facie case of electronic surveillance. Defendants declined to avail themselves of section 1806(f)'s *in camera* review procedures and have otherwise declined to submit anything to the court squarely addressing plaintiffs' prima facie case of electronic surveillance.

Instead, defendants have interposed three arguments intended to undermine plaintiffs' claim for relief. All three arguments lack merit.

1

First, defendants contend that "the mandate of the Court of Appeals in this case forecloses plaintiffs' motion. The Ninth Circuit expressly held that the information necessary for plaintiffs to establish their standing has been excluded from this case pursuant to the [SSP],"

Simply put, to deem plaintiffs "foreclosed" by the court of appeals' 2007 opinion from building their case with later-disclosed, publicly-available evidence – especially in light of defendants' intransigence following the court's January 5, 2009 order and the limited progress made to date along the normal arc of civil litigation – would violate basic concepts of due process in our system of justice. Defendants' reading of the court of appeals' opinion fails to account for these circumstances and would lead to a crabbed result the court of appeals could not have contemplated or intended.

2

Defendants' second major contention in opposition to plaintiffs' motion is that defendants cannot – and therefore should not be required to – respond to plaintiffs' prima facie case by showing that "plaintiffs' alleged electronic surveillance was authorized by a FISA warrant, or * * * plaintiffs were not in fact electronically surveilled.""[T]his," defendants argue, "is precisely what was precluded by the Ninth Circuit when it squarely held that 'information as to whether the government surveilled [plaintiffs]' is protected by the [SSP] and is categorically barred from use in this litigation." Defendants' reading of the court of appeals' opinion would require the court to impose a result contrary to the intent of Congress in enacting FISA and, indeed, contrary to the court of appeals' interpretation of FISA in *Al-Haramain*.

Under defendants' theory, executive branch officials may treat FISA as optional and freely employ the SSP to evade FISA, a statute enacted specifically to rein in and create a judicial check for executive-branch abuses of surveillance

authority. For example, the House Report on FISA noted: "In the past several years, abuses of domestic national security surveillances have been disclosed. This evidence alone should demonstrate the inappropriateness of relying solely on [E]xecutive branch discretion to safeguard civil liberties."

Perhaps sensitive to the obvious potential for governmental abuse and overreaching inherent in defendants' theory of unfettered executive-branch discretion, defendants protest that "the Government does not rely on an assertion of the [SSP] to cover-up alleged unlawful conduct." Rather, they assert, it does so because "[d]isclosure of whether or not communications related to al Qaeda have been intercepted, when, how, of who [sic], and under what authority would reveal methods by which the government has or has not monitored certain communications related to that organization." By "under what authority," presumably, defendants mean "whether or not pursuant to a FISA warrant" – the very heart of the cause of action under 50 USC § 1810. This fact – the presence or absence of a FISA warrant – is something defendants assert may be cloaked by the SSP, notwithstanding this court's July 2008 determination, pursuant to the court of appeals' remand instructions, that FISA displaces the SSP in cases within the reach of its provisions and that "this is such a case."

In an impressive display of argumentative acrobatics, defendants contend, in essence, that the court's orders of June 3 and June 5, 2009 setting the rules for these cross-motions make FISA inapplicable and that "the Ninth Circuit's rulings on the privilege assertion therefore control the summary judgment motions now before the Court." In other words, defendants contend, this is not a FISA case and defendants are therefore free to hide behind the SSP all facts that could help plaintiffs' case. In so contending, defendants take a flying leap and miss by a wide margin. Defendants forewent the opportunity to invoke the section 1806(f) procedures Congress created in order for executive branch agencies to establish "the legality of the surveillance," including whether a FISA warrant for the surveillance existed.

Similarly, defendants could readily have availed themselves of the court's processes to present a single, case-dispositive item of evidence at one of a number of stages of this multi-year litigation: a FISA warrant. They never did so, and now illogically assert that the existence of a FISA warrant is a fact within the province of the SSP, not FISA.

But the court of appeals' opinion contemplated that the case would move forward under FISA if FISA were deemed to displace the SSP. The court of appeals did not contemplate that the judicial process should be intentionally stymied by defendants' tactical avoidance of FISA:

> Under FISA, if an "aggrieved person" requests discovery of materials relating to electronic surveillance, and the Attorney General files an affidavit stating that the disclosure of such information would harm the national security of the United States, a district court may review *in camera* and *ex parte* the materials "as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." The statute further provides that

> the court may disclose to the aggrieved person, using protective orders, portions of the materials "where such disclosure is necessary to make an accurate determination of the legality of the surveillance." The statute, unlike the common law [SSP], provides a detailed regime to determine whether surveillance "was lawfully authorized and conducted."

507 F3d at 1205-06.

At oral argument, plaintiffs' counsel argued that the burden was on defendants to show that they had a warrant because, given that the TSP was in place "in order to evade FISA, why on earth would [defendants] get a FISA warrant to perform surveillance that they believed they had no need to get a FISA warrant for?" and because knowledge of the existence or nonexistence of a FISA warrant was "within [defendants'] exclusive knowledge." The court finds merit in these arguments.

In summary, because FISA displaces the SSP in cases within its purview, the existence of a FISA warrant is a fact that cannot be concealed through the device of the SSP in FISA litigation for the reasons stated in the court's July 8, 2008 order. Plaintiffs have made out a prima facie case and defendants have foregone multiple opportunities to show that a warrant existed, including specifically rejecting the method created by Congress for this very purpose. Defendants' possession of the exclusive knowledge whether or not a FISA warrant was obtained, moreover, creates such grave equitable concerns that defendants must be deemed estopped from arguing that a warrant might have existed or, conversely, must be deemed to have admitted that no warrant existed. The court now determines, in light of all the aforementioned points and the procedural history of this case, that there is no genuine issue of material fact whether a warrant was obtained for the electronic surveillance of plaintiffs. For purposes of this litigation, there was no such warrant for the electronic surveillance of any of plaintiffs.

3

Defendants' third argument is essentially to quarrel with the court's finding that plaintiffs have made out a prima facie case of electronic surveillance, asserting that plaintiffs' "evidence falls far short of establishing that the Government conducted warrantless electronic surveillance under the TSP of plaintiffs' conversations in March and April 2004."

Plaintiffs must – and have – put forward enough evidence to establish a prima facie case that they were subjected to warrantless electronic surveillance.

[For example, as] to the al-Buthi/al-Timimi intercepts, defendants write: "That Mr Al-Timimi was the target of interception and was overheard speaking with Mr Al-Buthe does not indicate that any of the named plaintiffs in this case were the target of or subject to surveillance, or where or how any such surveillance had occurred, including whether or not it was warrantless surveillance on a wire in the United States or authorized under FISA."

This argument ignores that one need not be a target of electronic surveillance to be an "aggrieved person" under FISA's section 1801(k) but may be "any other person whose communications or activities were subject to electronic surveillance." It also ignores that Al-Haramain is the primary plaintiff in this action and surveillance of one of its officers or directors amounts to surveillance of Al-Haramain. And there is the further point that, even assuming arguendo that al-Timimi was the original target of surveillance, a productive wiretap of al-Timimi's conversations with al-Buthi would have led to separate electronic surveillance of al-Buthi beginning in early 2003. This inference lends credence to the allegations of Belew and Ghafoor that their conversations with al-Buthi in 2004 were wiretapped.

Defendants' nit-picking of each item of plaintiffs' evidence, their remarkable insinuation (unsupported by any evidence of their own) that the al-Buthi/al-Timimi intercepts might have been pursuant to a FISA warrant and their insistence that they need proffer nothing in response to plaintiffs' prima facie case do not amount to an effective opposition to plaintiffs' motion for summary judgment.

. . . .

Because defendants have failed to establish the existence of a genuine issue of material fact warranting denialof plaintiffs' motion for summary judgment on the issue of defendants' liability under FISA, plaintiffs' motion must be, and hereby is, GRANTED. Defendants' motion for summary judgment is DENIED.

§ 5.03 CLASSIFIED INFORMATION PROCEDURES ACT

add at page 281, before *Moussaoui*:

UNITED STATES v. ABU ALI
528 F.3d 210 (4th Cir. 2008), *cert. denied* 129 S. Ct. 1312 (2009).

Ahmed Omar Abu Ali was convicted by a jury of nine criminal counts arising from his affiliation with an al-Qaeda terrorist cell located in Medina, Saudi Arabia, and its plans to carry out a number of terrorist acts in this country.

Unlike some others suspected of terrorist acts and designs upon the United States, Abu Ali was formally charged and tried according to the customary processes of the criminal justice system. Persons of good will may disagree over the precise extent to which the formal criminal justice process must be utilized when those suspected of participation in terrorist cells and networks are involved. There should be no disagreement, however, that the criminal justice system does retain an important place in the ongoing effort to deter and punish terrorist acts without the sacrifice of American constitutional norms and bedrock values. As will be apparent herein, the criminal justice system is not without those attributes of adaptation that will permit it to function in the post-9/11 world. These adaptations, however, need not and must not come at the expense of the requirement that an accused receive a fundamentally fair trial. In this case, we are satisfied that Abu Ali received a fair trial, though not a perfect one,

and that the criminal justice system performed those functions which the Constitution envisioned for it. The three of us unanimously express our conviction that this is so in this opinion, which we have jointly authored.

Abu Ali is an American citizen. He was born in Texas and raised in Falls Church, Virginia by his mother and father, the latter of whom was employed at the Royal Embassy of Saudi Arabia in Washington, D.C. After graduating from the Saudi Islamic Academy in Virginia, Abu Ali studied for one semester at the University of Maryland and then enrolled in the Institute in Virginia to study Islamic Sciences.

In September 2002, at the age of 21, Abu Ali left his home in Falls Church, Virginia and traveled to Saudi Arabia to study at the Islamic University in Medina. Within a few months of his arrival in Medina, Abu Ali [was introduced to a sequence of individuals leading to] Al-Faq'asi, the "brother in charge" of the al-Qaeda terrorist cell in Medina

Abu Ali went with al-Faq'asi to live in a villa in the al-Iskan neighborhood in Medina for training. Using the name "Ashraf," Abu Ali was trained by a man called "Ahmad" on how to assemble and disassemble the Kalashnikov machine gun, five of which were located in the villa along with ammunition. Abu Ali informed Ahmad that he was tasked with killing the United States President. In addition to training, the al-Faq'asi Medina cell provided Abu Ali with finances and equipment. He was given money to buy a laptop computer, a cell phone, and books, as well as written materials on security and methods of concealment. He was also given a USB memory chip that included a clip taken during the bombing of Afghanistan which contained the voices of American pilots, and tasked with translating the recording into Arabic.

On May 6, 2003, Saudi authorities discovered a large stash of weapons and explosives in Riyadh, Saudi Arabia, which was suspected to be intended for use in terrorist activities within that country. The following day, the Saudi government published a list of the 19 most wanted individuals in connection with terrorist activity. The list included al-Faq'asi and Sultan Jubran. According to Abu Ali, after the list was published, al-Faq'asi told him that the villa location would be changed and Abu Ali was taken to a farm where he stayed for several days.

Six days later, on May 12, 2003, al-Qaeda carried out a number of suicide bombings in Riyadh, killing approximately 34 people including 9 Americans. That night, Abu Ali and the other cell members performed guard duty at the cell's safehouses. After the bombings, Abu Ali and a number of the others moved to a second villa in an al-Iskan neighborhood where they stayed for three days, although Abu Ali did not spend the night in the villa with the others. According to Abu Ali, the villa contained "a dimly-lit room that contained wires and cell phones, . . . machine guns, ammunition, a pistol and a hand grenade." Later, the group moved back to the farm, where Abu Ali continued his training in explosives and forgery.

On May 26 and 27, 2003, authorities with the Saudi Mabahith received orders to raid several suspected terrorist safe houses in Medina, including the safe house in the Al-Azhari villa where Abu Ali had received training.

Among the evidence retrieved during the search of one safe house was an English translation of an American pilot's radio transmission and a paper with Abu Ali's additional alias names of "Hani" and "Hanimohawk" written on it. The authorities also recovered a number of automatic rifles and guns, ammunition, fertilizer, hand grenades, cell phones which were being converted to explosives, as well as computers, cameras, walkie-talkies, and laminating equipment for identification cards. A number of members of the al-Faq'asi terrorist cell were arrested during the raids, including al-Ghamdi, who had trained Abu Ali, and Sheikh Nasser, who had given Abu Ali the blessing for the presidential assassination. Al-Faq'asi and Sultan Jubran, disguised in women's clothing, escaped.

During subsequent questioning by the Saudi authorities, al-Ghamdi informed the Mabahith that one of their members was a student at the University of Medina of either American or European background who went by the alias "Reda" or "Ashraf." Further investigative efforts resulted in the photo identification of Abu Ali as the American or European member of the cell.

On June 8, 2003, Abu Ali was arrested by the Mabahith at the Islamic University in Medina and his dormitory room was searched. Among the items found there were a GPS device, jihad literature, a walkie talkie, a United States passport, a Jordanian passport and identification card, a Nokia cellular telephone, a telephone notebook containing al-Qahtani's name, and literature on jihad. Abu Ali was then flown from Medina to Riyadh, where he was interrogated by the Mabahith. Although he initially denied involvement with the al-Faq'asi cell, he confessed when the Mabahith officers addressed him with his alias names of "Reda" and "Ashraf." Specifically, Abu Ali confessed to his affiliation with al-Qaeda and, in particular, the Medina cell headed by al-Faq'asi. According to Abu Ali, he joined the al-Qaeda cell "to prepare and train for an operation inside the [United States]," including an "intention to prepare and train to kill the [United States] President." In addition to written confessions, the Mabahith obtained a videotaped confession in which Abu Ali admitted his affiliation with the Medina cell and its plans to conduct terrorist operations within the United States, including the plan to assassinate President Bush and to destroy airliners destined to this country.

Following Abu Ali's arrest by the Saudi authorities, the FBI was notified of his suspected involvement in the al-Qaeda cell in Saudi Arabia and advised that the cell was planning on conducting terrorism operations in the United States. Although the FBI requested access to Abu Ali, the Mabahith denied the request. On June 15, 2003, the Mabahith allowed the FBI to supply proposed questions, but later rejected the list and the breadth of the inquiry sought. Ultimately, the Mabahith only agreed to ask Abu Ali six of those questions and to allow the FBI officers to observe his responses through a one-way mirror. Abu Ali was asked whether he was tasked to assassinate the President (as had been reported by the Mabahith to the FBI), when he arrived in Saudi Arabia, whether he knew of any

planned terrorist attacks against American, Saudi, or Western interests, whether he was recruited by any terrorist organization, whether he had used false passports, and the nature of his father's position in the Embassy. Other than consular contact, the United States was denied all access to Abu Ali until September of 2003.

[After disposing of defense arguments related to *Miranda* and the Saudi interrogation, the court turned to CIPA issues related to some classified documents.]

After Abu Ali was indicted, Attorney Khurrum Wahid and Attorney Ashraf Nubani appeared to represent him. However, because one failed to apply for security clearance and the other was not approved by the Department of Justice, neither attorney was authorized to view the classified documents. On September 8, 2005, the district court, informed that the case would involve national security interests and CIPA proceedings and anticipating Abu Ali's need for an attorney with the proper security clearance, appointed Attorney Nina J. Ginsberg to act as CIPA-cleared counsel for Abu Ali.

On October 14, 2005, the government first produced unredacted copies of the classified documents to Ms. Ginsberg and informed her that it intended to introduce the documents as evidence at trial. However, the government advised Ms. Ginsberg that it would proceed under CIPA to seek "certain limitations on public disclosure that will be necessary to prevent the revelation of extremely sensitive national security information."

Three days later, the government provided Abu Ali's uncleared defense counsel with slightly redacted copies of the classified documents, which it described as "newly declassified communications between the defendant and Sultan Jubran Sultan al-Qahtani occurring on May 27, 2003, and June 6, 2003," in their Arabic versions and with English translations, and advised counsel of the government's "inten[t] to offer these communications into evidence at trial as proof that the defendant provided material support to al-Qaeda."

A comparison of the classified and unclassified documents reveals that the declassified versions provided the dates, the opening salutations, the entire substance of the communications, and the closings, and had only been lightly redacted to omit certain identifying and forensic information.

On October 19, 2005, the government filed an in camera, ex parte motion pursuant to § 4 of CIPA, seeking a protective order prohibiting testimony and lines of questioning that would lead to the disclosure of the classified information during the trial. The government advised that the classified portions of the communications could not be provided to Abu Ali and his uncleared counsel because they contained highly sensitive information which, if confirmed in a public setting, would divulge information detrimental to national security interests. The district court granted the government's motion by in camera, ex parte, sealed order. However, the district court ruled that the United States

could use the "silent witness rule" to disclose the classified information to the jury at trial.[18]

Abu Ali immediately responded with a motion that the government declassify the documents in their entirety or be ordered to provide the dates on which the communications were obtained by the government and the manner in which they were obtained. [The documents were contents of phone conversations obtained from the service provider under FISA.] The stated purpose of the request, however, was not to contest that Abu Ali was a party to the communications, but to enable Abu Ali to ascertain whether the government had discovered the existence of the communications prior to Abu Ali's arrest by the Saudi officials. If so, Abu Ali sought to rely upon this fact to demonstrate that each confession he made to the Saudi officials was the product of a joint venture with American law enforcement and, therefore, inadmissible.

The district court denied Abu Ali's motion "because CIPA prohibits revealing such classified information to the public" and "uncleared defense counsel is barred under CIPA from receiving, or eliciting testimony that will likely reveal, classified information." In doing so, the district court also noted that "the defense's attempt to force the government to unnecessarily disclose the means and methods the government used to gather this classified information may amount to 'greymail,' which CIPA was intended to prevent."

In support of this claim of alleged prejudice, uncleared counsel argued to the district court that "[i]t is very evident what the material is just by reading the evidence that has already been turned over to the defense," ACA 140, and that it "takes really, quite frankly, someone who is of less than regular intelligence to not figure out what the document is," ACA 141. In short, counsel was of the view that the classification designation was "a bit of a show that we're putting on" that "den[ied] my client his Sixth Amendment right to confront the evidence, his choice of attorney and to have his attorney conduct a proceeding in a manner that that attorney sees fit." ACA 140. In other words, uncleared counsel complained not that he and his client were in the dark about the redacted evidence, but rather that the government should declassify the documents because the redacted portions were not really a "secret" at all.

Noting that it was not at liberty under CIPA "to second guess the government's judgment to classify the information," the district court overruled the objection. The jury was instructed regarding the upcoming presentation of classified evidence, Ms. Ginsberg was introduced to the jury as "an attorney

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[18] The "silent witness" rule was described in *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987), as follows:

> [T]he witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel and the jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury.

hired by Mr. Abu Ali to handle this aspect of the case," and the unredacted, classified versions of the documents were presented to the jury via the "silent witness" procedure.

We begin with the district court's exclusion of Abu Ali and his uncleared counsel from the CIPA proceedings. The district court was presented with a § 4 motion by the government to protect the classified information and a § 5 motion, made at a later date, by Abu Ali that he be allowed to disclose that information. Initially, the district court found the redacted, unclassified version of the communications to be adequate to meet the defendant's need for information. CIPA expressly provides for such redactions of classified information from documents sought or required to be produced to the defendant, and the determination may be based upon an ex parte showing that the disclosure would jeopardize national security interests. The district court appropriately balanced the interests and made a reasonable determination that disclosure of the redacted information was not necessary to a fair trial.

There was likewise no abuse of discretion in the district court's decision to preclude Abu Ali's uncleared counsel from cross-examining the government's witnesses about the redacted information, which would have effectively disclosed the classified information that the court had already ruled need not be disclosed. A defendant and his counsel, if lacking in the requisite security clearance, must be excluded from hearings that determine what classified information is material and whether substitutions crafted by the government suffice to provide the defendant adequate means of presenting a defense and obtaining a fair trial. Thus, the mere exclusion of Abu Ali and his uncleared counsel from the CIPA hearings did not run afoul of CIPA or Abu Ali's Confrontation Clause rights.

We also conclude that the district court struck an appropriate balance between the government's national security interests and the defendant's right to explore the manner in which the communications were obtained and handled. Abu Ali and his uncleared counsel were provided with the substance of the communications, the dates, and the parties involved, and CIPA-cleared defense counsel was provided with the classified versions and afforded unfettered opportunity to cross-examine the government's witnesses concerning these matters. At the conclusion of the examinations, defense counsel pointed to no specific problem with the issues explored. The district court also expressly considered Abu Ali's rights under the Confrontation Clause and determined that public examination of these witnesses was not necessary to prevent infringement of them. Having fully considered the record and the classified information ourselves, we agree. Uncleared defense counsel were not entitled to disclose the classified information via their questioning of the witnesses about their roles in extracting, sharing, transferring, and handling the communications, and Abu Ali, who was ably represented by counsel at the hearing on this issue, was not deprived of his right to confrontation or to a fair trial merely because he and his uncleared counsel were not also allowed to attend.

The error in the case, which appears to have originated in the October 2005 CIPA proceeding, was that CIPA was taken one step too far. The district court did not abuse its discretion in protecting the classified information from

disclosure to Abu Ali and his uncleared counsel, in approving a suitable substitute, or in determining that Abu Ali would receive a fair trial in the absence of such disclosure. But, for reasons that remain somewhat unclear to us, the district court granted the government's request that the complete, unredacted classified document could be presented to the jury via the "silent witness" procedure. The end result, therefore, was that the jury was privy to the information that was withheld from Abu Ali.

As noted above, CIPA contemplates and authorizes district courts to prevent the disclosure of classified information, as was done in this case, so long as it does not deprive the defendant of a fair trial.CIPA also authorizes restrictions upon the questioning of the witnesses to ensure that classified information remains classified. Indeed, even the "silent witness" procedure contemplates situations in which the jury is provided classified information that is withheld from the public, but not from the defendant. *See United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987). In addition, CIPA provides district courts wide discretion to evaluate and approve suitable substitutions to be presented to the jury. CIPA does not, however, authorize courts to provide classified documents to the jury when only such substitutions are provided to the defendant. Nor could it. There is a stark difference between ex parte submissions from prosecutors which protect the disclosure of irrelevant, nonexculpatory, or privileged information, and situations in which the government seeks to use ex parte information in court as evidence to obtain a conviction. And, the notion that such "safeguards against wide-ranging discovery . . . would be sufficient to justify a conviction on secret evidence is patently absurd." See also United States v. Innamorati, 996 F.2d 456, 488 (1st Cir. 1993) (finding no error in prosecutor's ex parte submission of information for consideration as to whether it must be disclosed to the defendant, but noting that "there [was] no question . . . of convictions based upon secret evidence furnished to the factfinder but withheld from the defendants").

The same can be said for the evidence here. If classified information is to be relied upon as evidence of guilt, the district court may consider steps to protect some or all of the information from unnecessary public disclosure in the interest of national security and in accordance with CIPA, which specifically contemplates such methods as redactions and substitutions so long as these alternatives do not deprive the defendant of a fair trial. However, the government must at a minimum provide the same version of the evidence to the defendant that is submitted to the jury. We do not balance a criminal defendant's right to see the evidence which will be used to convict him against the government's interest in protecting that evidence from public disclosure. If the government does not want the defendant to be privy to information that is classified, it may either declassify the document, seek approval of an effective substitute, or forego its use altogether. What the government cannot do is hide the evidence from the defendant, but give it to the jury. Such plainly violates the Confrontation Clause.

Having determined that submission of the classified documents to the jury ran afoul of Abu Ali's Confrontation Clause rights, we turn now to consider whether that error was harmless. We conclude that it was.

add new section at p. 296:

[B] The UK Special Advocate and Closed Materials Procedures

In *Charkaoui v. Minister of Citizenship*, p. 600 in the main volume, the Canadian Supreme Court discussed a procedure by which certain lawyers could be cleared to serve as surrogates for counsel in cases involving what the U.S. calls classified information. That system was created in response to a decision of the European Court of Human Rights holding that a predecessor system in the U.K. did not satisfy the ECHR. Chahal v. United Kingdom (1996), 23 E.H.R.R. 413. The current system allows for the appointment of a Special Advocate who sees the classified evidence (in the U.K. nomenclature: "closed material") and then makes arguments on behalf of the other party without disclosing any information to that party.

[U.K. nomenclature includes "Public Interest Immunity" (PII) rather than "State Secrets Privilege" (SSP), "closed material" rather than "classified evidence," and "Special Advocate" (SA). The concept of "gisting" corresponds to the summarizing of classified information contemplated in CIPA.]

The U.K. procedure is further described and refined in the following two cases. Compare these cases to the occasional call for a special court to handle terrorism or national security cases in the United States.

AL RAWI v. SECURITY SERVICE
[2010] EWCA Civ 482 (UK Ct. Appeals)

LORD NEUBERGER:

This is the judgment of the court, to which all members have contributed.

THE ISSUE TO BE RESOLVED

[1] The issue on this appeal is whether Silber J was right to conclude, as the Defendants contend, that it is open to a court in England and Wales, in the absence of statutory authority, to order a closed material procedure for part (or, conceivably, even the whole) of the trial of a civil claim for damages in tort and breach of statutory duty.

[2] A closed material procedure has been defined by agreement between the parties, at least for present purposes, as being:

> "A procedure in which: (a) a party is permitted: (i) to comply with his obligations for disclosure of documents, and (ii) to rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as 'closed material'); and (b) disclosure of such closed material

> is made to special advocates and, where appropriate, the court; and (c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest. For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."

[3] The "party" referred to in that definition will almost always be the Crown or some arm or emanation of the Government. A special advocate is a lawyer with rights of audience, who has been cleared by the Government to see closed material, and who is appointed by the Attorney General in a case where closed material is involved. The special advocate's role was succinctly described by Sedley LJ in *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015, para 17, as being "to test by cross-examination, evidence and argument the strength of the case for non-disclosure", and, if the case for non-disclosure is made out, "to do what he or she can to protect the interests of [the other party], a task which has to be carried out without taking any instructions [from the other party or his lawyers] on any aspect of the closed material". Thus, although the special advocate is engaged to protect the interests of the other party in the litigation, he or she does not actually act for, and cannot normally take instructions from, that other party.

[4] The issue is raised as one of general principle. However, perhaps unsurprisingly, Ms Rose QC and Mr Fordham QC, for the Claimants, and Mr Crow QC for the Defendants, have relied in the course of their submissions on the facts of the instant case as an example of why the issue should be resolved in the way that they respectively contend. A very brief summary of the factual background to this appeal is therefore appropriate.

THE FACTUAL BACKGROUND

[5] The six Claimants are individuals who were detained at various locations, including the United States detention facility in Guantanamo Bay. Although their claims are, of course, not identical, it is sufficient for present purposes to say that they each contend that, as a result of their respective detention and alleged mistreatment while detained, they have valid claims under at least some of the following heads, namely, false imprisonment, trespass to the person, conspiracy to injure, torture, breach of contract, negligence, misfeasance in public office, and breach of the Human Rights Act 1998. The Claimants brought their claims by issuing claim forms, together with fully pleaded Particulars of Claim, in the Queen's Bench Division of the High Court. The Defendants to the claims are the Security Service, the Secret Intelligence Service, the Foreign and Commonwealth Office, the Home Office, and (in a representative capacity) the Attorney General ("the Defendants"). The claims are based on the contention that, to put it in broad terms, each of the Defendants caused or contributed towards the alleged detention, rendition and ill treatment of each of the Claimants.

[6] The Defendants then filed an "Open Defence", in which, while admitting that each of the Claimants was detained and transferred, the Defendants put in issue any mistreatment which the Claimants allege, and, in any event, denied any liability in respect of any of the Claimants' detention or alleged mistreatment. Paragraph 1 of the Open Defence explains that "there is material not pleaded in this Open Defence which [the Defendants] wish to contend that the court should consider but which cannot be included without causing real harm to the public interest". In para 3, it is stated that there is a "Defence", which "pleads more fully to the Particulars of Claim and includes material the disclosure of which the Defendants consider would cause real harm to the public interest". Paragraph 3 goes on to explain that "[w]here a paragraph of the Particulars of Claim is not pleaded to in this Open Defence, it will have been the subject of pleading in the Defence" and that "some of the pleadings in this Open Defence are more fully pleaded to [sic] or qualified by statements in the Defence".

[7] The Open Defence makes it clear that the Defendants wish the case to proceed throughout on the basis that it includes what may be characterised as a closed element. Thus, at least on the face of it, during the period prior to trial, there would be parallel open and closed pleadings, parallel open and closed disclosure and inspection, parallel open and closed witness statements, and parallel open and closed directions hearings. Similarly, at the trial, the hearing would be in part open and in part closed, no doubt with some documents and witnesses being seen and heard in the open hearing and others in the closed hearing (and some witnesses conceivably giving evidence at both hearings). After trial, there would be a closed judgment and an open judgment, which would be in substantially the same terms save that those passages in the closed judgment which referred to or relied on closed material would be excluded from the open judgment. In relation to the open elements of the proceedings, the Claimants would be represented by their solicitors and counsel in the normal way; however, in relation to the closed elements, their interests would, in effect, be protected by special advocates.

[8] The Claimants object to the course proposed by the Defendants, contending for the normal approach in cases where the Crown or Government emanations are parties and consider that they have relevant documents in respect of which public interest immunity ("PII") might be claimed, and where the Defendants could call relevant oral evidence which might not be able to be given on public interest grounds.

[9] The Defendants accept that the PII procedure is well established, but they contend that the course which they favour is permissible in any civil case, at least before a judge sitting without a jury, and that it may well be appropriate in this case, where there is a very substantial amount of potentially relevant material which may be subject to PII. The evidence filed on behalf of the Defendants suggests that there may be as many as 250,000 potentially relevant documents, and that PII may have to be at least considered in respect of as many as 140,000 of them. It is also said by the Defendants that the PII exercise may take three years before the relevant Ministers can conscientiously decide in

respect of which documents PII can properly be claimed. The effort, cost, and delay involved in such an exercise, argue the Defendants, may well justify a different approach, such as that presaged by the Open Defence.

[10] The issue came before Silber J, and he decided that, as a matter of principle, it was open to the court to order a closed material procedure in relation to a civil claim for damages – [2009] EWHC 2959 (QB).

SUMMARY OF CONCLUSION

[11] We have concluded that we should allow this appeal, and that we should say firmly and unambiguously that it is not open to a court in England and Wales, in the absence of statutory power to do so or (arguably) agreement between the parties that the action should proceed on such a basis, to order a closed material procedure in relation to the trial of an ordinary civil claim, such as a claim for damages for tort or breach of statutory duty.

[12] The primary reason for our conclusion is that, by acceding to the Defendants' argument, the court, while purportedly developing the common law, would in fact be undermining one of its most fundamental principles. In addition, even if it would otherwise be a legitimate development of the common law, it would be neither permissible in the light of the Civil Procedure Rules ("CPR") nor practical, in terms of effective case management or costs management, to adopt the Defendants' proposals.

[13] We propose to develop these points in turn, and then to deal with the cases on which the Judge relied to justify the contrary conclusion. However, before doing so, it is convenient to identify some relevant basic principles of common law, to expand a little on the well established practice and procedure involved when PII is claimed by the Crown, and to explain the basis for the more recent closed material procedure.

PRINCIPLES WHICH ARE INVOLVED IN THIS CASE

[14] Under the common law, a trial is conducted on the basis that each party and his lawyer, sees and hears all the evidence and all the argument seen and heard by the court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair; it is inherent in one of the two fundamental rules of natural justice, the right to be heard (or *audi alterem partem*, the other rule being the rule against bias or *nemo iudex in causa sua*). As the Privy Council said in the context of a hearing which resulted in the dismissal of a police officer:

> "[i]f the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them" - *Kanda v Government of the Federation of Malaya* [1962] AC 322, 337.

[15] More recently, in *R v Davis* [2008] UKHL 36, [2008] 1 AC 1128, [2008] 3 All ER 461, para 5, Lord Bingham of Cornhill traced the history of the common

law "right to be confronted by one's accusers". He explained how this right, having been abrogated during the 16th century by the court of the Star Chamber, had been effectively established during the 17th century. He relied in particular on a civil case, *Duke of Dorset v Girdler* (1720) 2 Eq Cas Abr 181, Prec Ch 531, 532. In the following paragraph, he identified a couple of common law exceptions to the right, namely "dying declarations and statements part of the *res gestae* ", and certain statutory exceptions. He then explained that the right was one which was enshrined in the Constitutions of various common law jurisdictions, including the United States and New Zealand. Turning to the specific issue before the House, Lord Bingham said that, although he appreciated the strong practical case for granting anonymity to prosecution witnesses in certain cases, he rejected the contention that the courts should sanction such a course, emphasising:

> "that the right to be confronted by one's accusers is a right recognised by the common law for centuries, and it is not enough if counsel sees the accusers if they are unknown to and unseen by the Defendant"

[16] Another fundamental principle of our law is that a party to litigation should know the reasons why he won or lost, so that a judge's decision will be liable to be set aside if it contains no, or even insufficient, reasons. As Lord Phillips MR explained in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409, para 16, "justice will not be done if it is not apparent to the parties why one has won and the other has lost".

[17] A further fundamental common law principle is that trials should be conducted in public, and that judgments should be given in public. The importance of the requirement for open justice was emphasised by the House of Lords in *Scott v Scott* [1913] AC 417, 82 LJP 74, [1911-13] All ER Rep 1 and *A-G v Leveller Magazine* [1979] AC 440, 449H-450B, [1979] 1 All ER 745, 143 JP 260. It was recently discussed by Lord Judge CJ in *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, paras 38-39, where he made two points. First, "[t]he public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law". Secondly, that:

> "[i]n litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself."

[18] Connected to these fundamental principles are two other rules developed by the common law. First, a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments for trial. Secondly, a party in civil litigation should be informed of the relevant documents in the control of his opponent, through the medium of what is now called disclosure; this helps ensure that neither party is unfairly taken

by surprise, and that the court reaches the right result, as neither party is able to rely on a selection of documents which presents the court with a misleading picture.

[21] At least in the case of some of these principles, the common law has long accepted that there can be exceptions. Thus, in *Scott* Viscount Haldane LC, while affirming, and applying, the open justice principle, made it clear that a court could sit in private where "justice could not be done at all if it had to be done in public", immediately went on to say, the court considering the issue "must treat it as one of principle, and as turning, not on convenience, but on necessity".

PUBLIC INTEREST IMMUNITY

[22] Similarly, in relation to disclosure, the courts have long recognised that some documents, while relevant, even crucial, to the issues between the parties, may be immune from disclosure on various public interest grounds. Thus, there is legal professional privilege (based on the public interest of people being able to seek legal advice) and "without prejudice" privilege (based on the public interest in parties settling their disputes), and, as already mentioned and particularly relevant for present purposes, there is PII.

[23] PII has become particularly significant since s 28 of the Crown Proceedings Act 1947 removed the Crown's exemption from discovery in civil proceedings, while expressly recognising PII. The disclosure exercise where PII may be involved potentially involves three stages, before the court is involved.

[24] First, the relevant Minister (or his lawyers) must decide whether the documentary material in question is relevant to the proceedings in question – *i.e.* that the material should, in the absence of PII considerations, be disclosed in the normal way. Secondly, the Minister must consider whether there is a real risk that it would harm the national interest if the material was placed in the public domain. The third step is for the Minister to balance the public interests for and against disclosure. If the decision is, that the balance comes down against disclosure, then the Minister states, in a PII certificate, that it is in the public interest that the material be withheld.

[25] As decided in *Conway* [1968] AC 910 and explained in *Wiley* [1995] 1 AC 274, it is then for the court to weigh, as Lord Simon of Glaisdale put it, "the public interest which demands that the evidence be withheld . . . against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material", and if "the former public interest is held to outweigh the latter, the evidence cannot in any circumstances be admitted". On the other hand, if the court concludes that the latter public interest prevails, then the document must be disclosed, unless the Government concedes the issue to which it relates – see per Lord Hoffmann in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, para 51, [2008] 1 All ER 657. As Lord Woolf said in *Wiley* [1995], even where material cannot be disclosed, it may be possible, and therefore appropriate, to summarise the relevant effect of the material, to produce relevant extracts, or even to produce the material "on a restricted basis".

[26] When conducting the balancing exercise between the two competing aspects of the public interest, the court may, in an appropriate case, inspect the material before reaching a conclusion on the issue. In such a case, it has become accepted practice, at least where it is appropriate and fair to do so, for special advocates to be appointed to assist the court on the issue of whether the Crown's claim for PII should be upheld. As Lord Bingham of Cornhill explained in the criminal case of *R v H* [2004] UKHL 3, [2004] 1 All ER 1269, even though there is "little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate" in such a case:

> "novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure the protection of a criminal Defendant's right to a fair trial."

THE CLOSED MATERIAL PROCEDURE

[27] In relation to certain classes of case, the legislature has made further encroachments into these principles. Private hearings and judgments are statutorily mandated in many family and Court of Protection proceedings, as recently discussed in *A v Independent News and Media Ltd* [2010] EWCA Civ 343. More relevantly for present purposes, statute has mandated what has come to be known as a closed material procedure in certain specified circumstances. Two well known examples are to be found in Sch 1 to the Terrorism Act 2005, which deals with control orders, and Sch 7 to the Counter-Terrorism Act 2008, which is concerned with financial restriction proceedings (the latter of which is considered in our judgments in *Bank Mellat v HM Treasury* [2010] EWCA Civ 483, which we are handing down today).

[28] Paragraph 4 of Sch 1 to the 2005 Act requires rules of court to be made to deal with control order proceedings. By virtue of para 4(2)(b) of Sch 1 to the 2005 Act, such rules may make provision for proceedings to be conducted "in the absence of any person, including a relevant party to the proceedings or his legal representative". This has resulted in Civil Procedure Rule (CPR) Pt 76, which contains detailed provisions dealing, for instance, with "Hearings in private", "Appointment of a special advocate", "Modification of the general rules of evidence and disclosure", "Closed material" and "Judgments". CPR 76.2 provides that "the overriding objective [of the rules] must be read and modified and given effect in a way which is compatible with the duty" imposed on the court to "ensure that information is not disclosed contrary to the public interest".

[29] Closed material procedures are also mandated in other tribunals by legislation. Thus, there is r 6 of the Parole Board Rules 2004, which specifically enables the Board to consider material which should be "withheld from the prisoner on the ground that its disclosure would adversely affect national security, the prevention of disorder or crime, or the health or welfare of the prisoner", as discussed in *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, para 55, [2006] 1 All ER 39. Also, r 54(2) of the Employment Tribunals Regulations permits a tribunal, if it considers it to be expedient in the interests of national security, to order, inter alia, that the whole or part of any proceedings

before it are conducted in private, that the Claimant is excluded from the whole or part of the proceedings and that all or part of the tribunal's reasoning is kept secret (and which we consider in our judgments handed down today in *Tariq v The Home Office* [2010] EWCA Civ 462.

THE OBJECTION TO THE CLOSED MATERIAL PROCEDURE IN PRINCIPLE

[30] In our view, the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise. At least so far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum requirement of an ordinary civil trial. Unlike principles such as open justice, or the right to disclosure of relevant documents, a litigant's right to know the case against him and to know the reasons why he has lost or won is fundamental to the notion of a fair trial.

[31] A private hearing in an individual case, with all litigants and their legal representatives present, cannot be said to involve a denial of justice in that case. It is contrary to the public interest that trials should be conducted in private, but, at least absent special circumstances, it could not normally be suggested that any litigant risks suffering an injustice in the conduct or outcome of a particular case simply because the trial takes place in private, although he may of course have cause for complaint if he cannot publicise the contents of the evidence, argument or judgment in the case.

[32] A litigant's right to disclosure of documents is not a fundamental right in the same way as the right to know the evidence and argument presented to the judge and the reasons for the judge's decision. Quite apart from this, if PII, legal professional privilege or "without prejudice" privilege is claimed in respect of a relevant document, the trial process itself is not impugned, as it is still fair: all parties are in the same position in that none of them can rely on the document. That cannot be said where the trial is conducted partly, let alone wholly, through a closed material procedure.

[33] Different considerations may apply where the proceedings do not only concern the interests of the parties to the litigation, but they also have a significant effect on a vulnerable third party, or where a wider public interest is engaged. Thus, where the case directly impinges on the interests of a child, it may be justifiable for the court to see a document which is not seen by the parties to the proceedings.

[37] We accept, of course, that the court has inherent jurisdiction to develop the common law so far as its procedures are concerned. However, in our opinion, the course proposed by the Defendants in this case would involve not merely altering the rules of evidence: it would involve altering what Lord Denning called "the ordinary law, of the land", namely (for the reasons already explained) fundamental principles of the law of England and Wales.

[38] We would respectfully echo Lord Bingham's approval of, and reliance on, two observations of Lord Shaw of Dunfermline in *Scott* [1913]. Lord Shaw said that "[t]here is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of the judges themselves", and that "[t]he policy of widening the area of secrecy is always a serious one, but this is for Parliament, and those to whom the subject has been consigned by Parliament to consider". Those observations were made by Lord Shaw in relation to hearings held in private, and cited by Lord Bingham in relation to concealing from a party (but not from his legal advisers) the identity of witnesses giving evidence in public. They surely apply with even greater force to the suggestion that the common law should permit ordinary civil claims not merely to be conducted in private, but in the absence of a party and his legal advisers. As Lord Brown of Eaton-under-Heywood ringingly observed in *Davis* [2008] 1 AC 1128, para 66, "It is the integrity of the judicial process which is at stake here. This must be safeguarded and vindicated whatever the cost."

[39] Lord Bingham said in *Roberts* [2005] 2 AC 738, para 30, that if Parliament "intends that a tribunal shall have power to depart from, ordinary rules of procedural fairness, it legislates to confer such power in clear and express terms and it requires that subordinate legislation regulating such departures should be the subject of Parliamentary control. It follows this practice even where the security of the nation is potentially at stake".

[40] The fact that a closed material procedure is adopted when the court is considering whether or not to give effect to a PII certificate, even where the issue arises in ordinary civil litigation (or in criminal proceedings), is nothing to the point. The issue at such a hearing is essentially *ex parte*: it is whether the material in question is immune from disclosure and inspection on the ground that the public interest would be harmed by its release into the public sphere. Further, the issue at such a hearing necessarily concerns material which at least arguably should not be shown to the other party, so that material is the very subject matter of the hearing: that is not true in a case where the material may be relevant, even very important, to the issue or subject matter of the hearing. Even more importantly for present purposes, the hearing is not the trial of the action (or the prosecution): it is merely concerned with an interlocutory matter ahead of the trial, and is bound to result in the material either being available for use in the litigation (or at the criminal trial) by both parties or by neither party.

THE EFFECT OF THE CIVIL PROCEDURE RULES

[41] Even if it was, as a matter of principle, open to the court to adopt a closed material procedure in an ordinary civil claim in the absence of all parties consenting, it seems to us that, in the light of the existence and terms of the CPR, there would be no jurisdiction to do so. This conclusion is reinforced when one turns to consider the existence and terms of the legislation which permits the court to adopt a closed material procedure.

[48] Again, there may be necessary exceptions where the very subject matter of the hearing is material which should, or arguably should, not be shown to the

other party, as in the PII procedure itself. In such a case, it is, as a matter of inevitability, necessary to have a closed material procedure. It is not a question of desirability or convenience: the hearing simply could not occur, as a matter of inevitable logic, other than on a closed basis. In an ordinary civil claim, that is not the position. In any event, and crucially, the closed procedure would not be in connection with, let alone part of, the trial, but would be part of the disclosure process.

PRACTICAL CONSIDERATIONS

[49] Although we are asked to determine the preliminary issue as a matter of principle, rather than determining whether a closed material procedure could be adopted in this case, it is helpful to consider what are said by the Defendants to be the potential advantages of adopting a closed material procedure. Mr Crow submits that there would be two potential advantages. The first is that, in an appropriate case, such a procedure would be more likely to achieve a fair result, because the court would be able to rely at trial on relevant material whose disclosure would, if the PII procedure was adopted, be excluded from the trial process altogether. The second advantage is said to be that, at least in cases such as the present, the PII procedure would be unmanageable in practice, and adopting a closed material procedure would be the only way of bringing the case to trial economically and expeditiously.

[50] There is obvious attraction in the submission that the court should have power to order a closed material procedure hearing in a case in which it is satisfied that justice would be more likely to be served by adopting such a procedure. However, even putting to one side the objections in principle to the closed material procedure, the submission begs the important practical question as to how the court would be able to satisfy itself that adopting such a procedure would be more likely to achieve a fair result.

[The process of examining the material to determine whether it should be disclosed is time-consuming regardless of who does it. If the Government wishes to claim PII, then it does the review. Under the proffered "closed material" procedure, it would try to shift some of that to the Special Advocate (SA).]

[56] While considering practical considerations, it is helpful to stand back and consider not merely whether justice is being done, but whether justice is being seen to be done. If the court was to conclude after a hearing, much of which had been in closed session, attended by the Defendants, but not the Claimants or the public, that for reasons, some of which were to be found in a closed judgment that was available to the Defendants, but not the Claimants or the public, that the claims should be dismissed, there is a substantial risk that the Defendants would not be vindicated and that justice would not be seen to have been done. The outcome would be likely to be a pyrrhic victory for the Defendants, whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater.

[57] The contention that the Defendants' proposed procedure should not be adopted is reinforced by recent observations of the Joint Committee on Human Rights on *Counter-Terrorism Policy and Human Rights (Sixteenth Report):*

Annual Renewal of Control Orders Legislation (HL Paper 64 HC 395). In para 15 of the report, the Committee referred to the fact they had previously "maintained an open mind" as to whether "the control orders regime can be made to operate in a way which is compatible with the requirements of basic fairness which are inherent in both the common law and art 6 ECHR", and then said that its "assessment now, in the light of five years' experience of the operation of the system, is that the current regime is not capable of ensuring the substantial measure of procedural justice that is required". It is fair to add that the Committee went on to suggest that "fundamental reforms" were needed, which suggests that the closed material procedure might be made to work more fairly. It is also right to add that, subject to its inherent limitations, the special advocate system enjoys a high degree of confidence among the judiciary, as Maurice Kay LJ says in *Tariq* [2010] EWCA Civ 462, para 32. However, it seems to us that if a regime, which is statutorily authorised in certain classes of case, has been litigated and considered in many cases and is subject to detailed statutory rules, but cannot be guaranteed to ensure procedural justice, that is another reason why the common law should refuse to adopt such a regime.

CONCLUDING REMARKS

[68] We are conscious that in some cases, where evidence which is relevant, or even vital, to the interests of one of the parties (often the Crown, but sometimes not), limiting the procedure to the classic PII exercise can lead to unfairness, and can even result in what may appear to most people to be the wrong outcome, because the exercise will often result in important evidence being withheld. However, even where a PII claim is upheld in respect of material, the effect can often be mitigated by summarising its relevant effect, producing relevant extracts, or even producing it "on a restricted basis". More generally, the evidential rules of exclusion, for instance in relation to material which attracts legal professional privilege or "without prejudice" privilege, will often be to increase the risk of a "wrong" outcome. But that is a risk inherent in any legal system with rules, and indeed it is inevitable in any system with human involvement.

[69] It is nonetheless tempting to accept that there may be the odd exceptional ordinary civil claim, where the closed material procedure would be appropriate. "Never say never" is often an appropriate catchphrase for a judge to have in mind, particularly in the context of common law, which is so open to practical considerations, and in relation to civil procedure, where experience suggests that unpredictability is one of the few dependable features. However, this is one of those cases where it is right for the court to take a clear stand, at least in relation to ordinary civil proceedings. Quite apart from the fact that the issue is one of principle, it is a melancholy truth that a procedure or approach which is sanctioned by a court expressly on the basis that it is applicable only in exceptional circumstances nonetheless often becomes common practice.

[70] The importance of civil trials being fair, the procedures of the court being simple, and the rules of court being clear are all of cardinal importance. It would, in our view, be wrong for judges to introduce into ordinary civil trials a procedure which:

(a) cuts across absolutely fundamental principles (the right to a fair trial and the right to know the reasons for the outcome), initially hard fought for and now well established for over three centuries,

(b) is hard, indeed impossible, to reconcile satisfactorily with the current procedural rules, the CPR,

(c) is for the legislature to consider and introduce, as it has done in certain specific classes of case, where it considers it appropriate to do so,

(d) complicates a well-established procedure for dealing with the problem in question, namely the PII procedure, and

(e) is likely to add to the uncertainty, cost, complication and delay in the initial and interlocutory stages of proceedings, the trial, the judgment, and any appeal.

[71] We leave open the question of whether a closed material procedure can properly be adopted, in the absence of statutory sanction, in an ordinary civil claim, such as the present, where all the parties agree, or in a civil claim involving a substantial public interest dimension (ie where the judge is not simply sitting as an arbiter as between the parties). Both principle and the authorities relied on below seem to us to suggest that a different conclusion may well be justified in such cases, albeit only in exceptional circumstances, but that is an issue which should be considered as and when it arises.

HOME OFFICE v. TARIQ

[2010] EWCA Civ 462 (UK Ct. App. 2010)

MAURICE KAY LJ:

[1] This is another case about closed material procedure and the use of special advocates (SAs). They first entered our lexicon of civil procedure, albeit without the present nomenclature, in the Special Immigration Appeals Act 1997, legislation which was prompted by *Chahal v United Kingdom* (1996) 23 EHRR 413, 1 BHRC 405. Since then they have been deployed in other proceedings, both civil and criminal, as exceptions to the fundamental principle of open justice. Today, this court, identically constituted, has handed down judgment in *Al-Rawi and others v The Security Service and others* [2010] EWCA Civ 482 in which we held that a court does not have the power to order a closed material procedure in relation to a civil claim for damages. The first issue in the present case is whether an Employment Tribunal (ET) has such a power. If it does, the second issue is whether *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2009] 3 All ER 643, [2009] 3 WLR 74 applies in this context so as to require the Home Office to provide a gist of the closed material upon which it seeks to rely to the employee and his legal representatives in the ET proceedings.

[2] The factual background can be briefly stated. Mr Tariq commenced employment with the Home Office in April 2003 as an immigration officer. He received the necessary security clearance. However, in August 2006 he was

suspended from duty due to national security concerns and on 20 December 2006 all levels of security clearance were withdrawn from him. He was told that this was based on his close association with individuals suspected of planning to mount terrorist attacks and that it was considered that association with such individuals might put him at risk of their attempting to exert influence on him to abuse his position as an immigration officer. An internal appeal against the withdrawal of his security clearance was dismissed. He remains suspended.

[3] The events which triggered the suspicion were the arrests on 10 August 2006 of Mr Tariq's brother and cousin in the course of an investigation into a suspected plot to mount a terrorist attack on transatlantic flights. The brother was released without charge. The cousin, Tanveer Hussain, was charged, prosecuted and eventually convicted. He is now serving a sentence of life imprisonment for conspiracy to murder.

[4] Mr Tariq is a Muslim of Asian/Pakistani ethnic origin. He commenced proceedings in the ET in March 2007 claiming that his suspension and the withdrawal of his security clearance were acts of direct or indirect discrimination on the grounds of race and/or religion. There has yet to be a substantive hearing in the ET. The last three years have been taken up with a procedural dispute about whether a closed material procedure and a SA should be deployed (as the Home Office contends but Mr Tariq opposes) and, if so, whether *AF(No 3)* imposes a gisting duty (as Mr Tariq contends but the Home Office opposes).

[5] By a determination dated 5 March 2009, the ET held that it had power to adopt a closed material procedure and that it would hear the closed evidence before the open evidence. Mr Tariq appealed to the Employment Appeal Tribunal (EAT). Between the decision of the ET and the hearing of the EAT, *AF(No 3)* was decided in the House of Lords on 10 June 2009. *AF(No 3)* was conditioned by the Strasbourg case of *A v United Kingdom* (2009) 49 EHRR 29 in which judgment was delivered on 19 February 2009 - a month after the hearing in the ET in the present case and shortly before the ET promulgated its decision. The EAT upheld the decision of the ET that the closed material procedure is lawful and appropriate. However, it concluded that, in the light of *AF(No 3*), art 6 of the ECHR entitled Mr Tariq to be provided with the allegations being made against him in sufficient detail to enable him to give instructions to his legal representatives so that those allegations can be effectively challenged.

[6] Now, in this court, the Home Office appeals on the *AF(No 3)* point and Mr Tariq cross-appeals on the point of principle as to whether a closed material procedure is lawful in the ET. Logically, that is the first issue. In addition, there is a continuing issue as to whether (assuming that a closed material procedure is lawful) the ET was correct about the sequencing of the evidence.

THE STATUTORY FRAMEWORK

[7] Whereas *Al-Rawi* fell to be decided in a statutory vacuum, there is a statutory framework in relation to ET proceedings which provides for a closed material procedure and the appointment of a SA in a national security case. The case for Mr Tariq is that the statutory provisions offend both EU law and art 6

of the ECHR. At this point, it is appropriate simply to set out the statutory provisions.

[8] The Employment Tribunals Rule 54(1) provides:

> "A Minister of the Crown . . . may, if he considers it expedient in the interests of national security, direct a tribunal or Employment Judge by notice to the Secretary to - (a) conduct proceedings in private for all or part of particular Crown employment proceedings; (b) exclude the Claimant from all or part of particular Crown employment proceedings; (c) exclude the Claimant's representatives from all or part of particular Crown employment proceedings; (d) take steps to conceal the identity of a particular witness in particular Crown employment proceedings."

[9] [Rule] 8 provides for the appointment of a SA by the Attorney General:

> "to represent the interests of the Claimant in respect of those parts of the proceedings from which: (a) any representative of his is excluded; (b) both he and his representative are excluded; or (c) he is excluded, where he does not have a representative."

[10] Broadly speaking, a SA in an ET is in the same position as a SA in the Special Immigration Appeals Commission or in control order proceedings in the Administrative Court.

[11] In the present case, on 15 February 2008 the Regional Employment Judge made an order under r 54(2) for the exclusion of Mr Tariq and his representatives from any part of the proceedings when closed evidence was being adduced, for the appointment of a SA and for the entirety of the proceedings to be held in private. Mr Tariq raises no issue on appeal about the ET hearing being private.

ISSUE 1: THE LAWFULNESS OF CLOSED MATERIAL PROCEDURE

ECHR Art 6

[23] [Tariq argues] that the closed material procedure contained in the domestic Regulations fundamentally contravenes [ECHR] art 6. In my judgment, this submission, in its fullest form, is unsustainable. The closed material procedures prescribed by or under the Special Immigration Appeals Commission Act 1997 and the Prevention of Terrorism Act 2005, far from being inherently non-compliant with art 6, are sanctioned in principle by decisions of the Strasbourg Court. The 1997 Act was a domestic response to *Chahal* , in which the court put its imprimatur on the closed material procedure prescribed in Canada. It stated (at para 131):

> ". . . in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice."

[24] Indeed from *Chahal* to *A v United Kingdom* in 2009 the focus has been not on any inherent incompatibility of a closed material procedure with art 6 but on the safeguards which art 6 requires a closed material procedure to include. I shall have to return to such safeguards when I address Issue 2.

[25] Any use of a closed material procedure is of course exceptional and requires justification. It is common ground that the procedure must be necessary, in the sense of directed to a proper social objective and no more restrictive than is required to meet that objective; and it must be sufficiently counterbalanced with appropriate protections. It is well established that the protection of national security and public safety can necessitate in that sense a closed material procedure (see *A* and its domestic progeny *AF (No 3)*) and that effective counterbalancing factors can be found in scrutiny by an independent court or tribunal and the use of SAs. Subject to a novel and more detailed critique of the domestic SA system advanced by Mr Allen, it seems to me that it is not inherently incompatible with art 6 for a domestic statute to prescribe or enable the use of a closed material procedure in the interests of national security.

[26] [Counsel for Tariq] is constrained to concede that deployment of SAs under the Special Immigration Appeals Commission Act and the Prevention of Terrorism Act has survived scrutiny in the domestic appellate courts and in Strasbourg, subject to the point I shall deal with as Issue 2. However, his submission is that there are aspects of the system that have not been considered in the existing jurisprudence and he invites reappraisal by reference to them. He points to the fact that SAs are appointed by the Attorney General who is also the Government's principal legal adviser; that they are supported by a unit within the Treasury Solicitor's Department, who acts for the Home Office in this and similar cases; that this gives rise to a conflict of interest which would not be permitted in private litigation and indeed is prohibited without exceptions by Rule 3.01(1) of the Solicitors' Code of Conduct; and that there are no published rules governing the role and conduct of an SA in an Employment Tribunal.

[27] In *R v H* [2004] UKHL 03, [2004] 2 AC 134, [2004] 1 All ER 1269 the House of Lords considered doubts which had been expressed about the system whereby the Attorney General appoints SAs, albeit in the context of criminal proceedings. Giving the unanimous opinion of the Appellate Committee, Lord Bingham said:

> "In my opinion such doubt is misplaced. It is very well-established that when exercising a range of functions the Attorney General acts not as a minister of the Crown (although he is of course such) and not as the public officer with overall responsibility for the conduct of prosecutions, but as an independent, unpartisan guardian of the public interest in the administration of justice . . . . It is in that capacity alone that he approves the list of counsel judged suitable to act as Special Advocates . . . Counsel roundly acknowledged the complete integrity shown by successive holders of the office in exercising this role, and no plausible alternative procedure was suggested."

I consider that that effectively disposes of [the] point about the role of the Attorney General.

[28] The submission about conflict of interest in the office of the Treasury Solicitor [relies on a case] which was concerned with the effectiveness of "Chinese walls" in a private professional practice. Lord Millett said:

> "an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc and dependent on evidence sworn for the purpose by members of staff engaged on the relevant work."

[29] At the hearing of the present appeal, much of the argument on this issue proceeded by way of assertion and counter-assertion. This led us to invite post-hearing written amplification which we now have. The work of the Special Advocates' Support Office (SASO) is described as follows.

[30] SASO was set up in 2006 in response to the recommendation of the Constitutional Affairs Select Committee. The functions of SASO are described in *Special Advocates - A Guide to the Role of Special Advocates and the Special Advocates' Support Office* , which is published on the Treasury Solicitor's Department's website. It is SASO that provides an SA with formal instructions. It also provides legal and administrative support to SAs and acts as the librarian of closed case law for them. Although formal instructions originate with SASO, it has no input into decisions such as whether to appeal a closed adverse judgment or to open part of a closed judgment. Such matters are for the independent judgment of the SA alone. Although SASO is physically located within the premises of the Treasury Solicitor at One Kemble Street, it has an established Chinese wall arrangement and is for all practical purposes a separate entity. It comprises five lawyers and three administrators. Four lawyers and two administrators form the SASO (closed) team, the remaining lawyer and administrator forming the SASO (open) team. The open team does not have security clearance. It alone communicates with the litigant's open representatives. Although other relevant litigation teams within the office of the Treasury Solicitor are able to share their facilities, this is not so in relation to SASO's resources and facilities. It has completely separate document-handling, communication, storage and technology facilities. The four lawyers who carry out casework on cases in which the SAs are instructed do not carry out any work for any other part of the Treasury Solicitor's office. The fifth lawyer is at Grade 6 level. He does not have his own casework in relation to cases involving SAs. His role is more supervisory and he has a wider line management role which extends to the general private law litigation team. He may report to the Attorney General but only in relation to open issues in matters where SAs are instructed. In addition, in order to protect the independence of the SASO team, there are conflict checks to ensure that other members of the private law team do not act in cases which are in any way relevant to SASO.

[32] The procedure is anomalous but it seems to me that it is in substantial conformity with Lord Millett's test. I identify no error of law in the EAT's conclusion that the system permits SAs to do their work effectively and

independently and subjects them to proper scrutiny. If I may be permitted a subjective observation: if such problems were evident they would be expected to provoke adverse judicial comment but, in my experience, the system, although inherently imperfect, enjoys a high degree of confidence among the judges who deal with cases of this kind on a regular basis. I am satisfied that the functioning of SASO does not infringe Mr Tariq's art 6 right to a fair trial.

Conclusion On Issue 1

[33] For all these reasons I am satisfied that the cross-appeal asserting breaches of both EU and ECHR rights fails.

ISSUE 2: DOES AF (NO 3) APPLY TO THE PROCEEDINGS IN THE ET?

[34] Having held that the procedure for national security cases is not in essence unlawful by reference to EU law or art 6 of the ECHR, the next question is whether art 6 impacts upon the content of the Rules. This requires consideration of whether *AF(No 3)* and *A v United Kingdom* which informed it give rise to a disclosure obligation upon the Home Office over and above disclosure to a SA. The case for the Home Office, which was rejected by the EAT, is that *AF(No 3)* and *A* do not apply to a case such as this. It was the appeal of the Home Office on this issue which first brought the present case into this court.

[35] As is well-known, the factual context of *A* was the system of detention without charge or trial created by the Anti-Terrorism, Crime and Security Act 2001 and that of *AF(No 3)* was its replacement - the non-derogating control order - introduced by the Prevention of Terrorism Act 2005. [T]he factual context of the present case is rather different. Whereas in *A* and *AF(No 3)* , the State was seeking to interfere with the personal liberty of the detainee or controlee, either by deprivation or restriction, in the present case Mr Tariq is seeking to enforce his private right not to be subjected to discrimination, albeit that the alleged discriminator is a public authority.

[37] Baroness Hale said in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, (at para 57), [2008] 1 All ER 657:

> "Of the fundamental importance of the right to a fair trial there can be no doubt. But there is equally no doubt that the essential ingredients of a fair trial can vary according to the subject-matter and nature of the proceedings."

[43] It is important to keep in mind what is in issue here. It is not the closed material procedure *per se* . I have addressed that earlier in this judgment. Nor is it disclosure of particular documents. It is the right of a litigant to know the essence of the case against him, if necessary by "gisting". The starting point, whether at common law or by reference to art 6, is that described by the Master of the Rolls in *Al-Rawi*: "Unlike principles such as open justice or the right to disclosure of relevant documents a litigant's right to know the case against him . . . is fundamental to the fairness of a trial."

[44] Although Parliament may prescribe special procedures in the interests of national security or for other reasons, and although in so doing it may curtail to an extent some characteristic of a fair trial without breaching the requirements of art 6 (as the earlier part of this judgment illustrates), the right of a litigant to know the case against him is of particular importance because it is a prerequisite to his being able not merely to deny, but actually to refute (in so far as that is possible) that case. Whilst, in totality, the requirements of fairness may not be immutable, some of them are of more fundamental importance than others.

[45] I do not read *AF (No 3)* as authority for the proposition that, *in other contexts* , the right of a litigant to know the essence of the case against him will be readily eroded.

[46] Lord Hoffmann said (at para 70) ". . . the Strasbourg court has imposed a rigid rule that the requirements of a fair hearing are *never* satisfied if the decision is 'based solely or to a decisive degree' on closed material."

[47] The emphasis of *never* is Lord Hoffmann's. Lord Hope said (at para 84) "If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him."

[48] Lord Scott expressed himself in more general terms, basing his proposition on the common law (at para 96):

> "An essential requirement of a fair hearing is that a party against whom relevant allegations are made is given the opportunity to rebut the allegations. That opportunity is absent if the party does not know what the allegations are. The degree of detail . . . must . . . be sufficient to enable the opportunity to be a real one."

[49] Lord Brown added (at para 116):

> "In short, Strasbourg has decided that the suspect must *always* be told sufficient of the case against him to enable him to give 'effective instructions' to the special advocate, notwithstanding that sometimes this will be impossible and national security will thereby be put at risk."

The emphasis of *always* is Lord Brown's.

[50] In my judgment, the present case is not put in a different category by the fact that the Secretary of State is not seeking to subject Mr Tariq to a control order but is simply defending a discrimination claim. Nor is it to the point that the ultimate issue is discrimination rather than the accuracy of the closed material. The fact is that the Home Office is seeking to rely on closed material in its defence. Whilst the Rules permit that, it seems to me that the principle illustrated by *AF(No 3)* must apply to ensure that fairness to which Mr Tariq is entitled by art 6 and at common law. For present purposes, I am satisfied that the judgment of the EAT was correct on this point and that the appeal of the Home Office should be dismissed.

Chapter 6

TOWARD AN INTERNATIONAL LAW OF TERRORISM

§ 6.02 DEVELOPING INTERNATIONAL CRIMINAL LAW

page 380, modify the section heading to read:

[C] International Criminal Court and Other Tribunals

The ICTY began winding down its activities and handing cases off to the domestic courts of Bosnia-Herzegovina, which have been supported by international judges and prosecutors for the past several years. http://www.sudbih.gov.ba/?jezik=e

In addition to the ICTY and ICTR, international and hybrid (combining international and domestic personnel) courts have been established for Sierra Leone and Cambodia.

Special Court for Sierra Leone: http://www.sc-sl.org/

Extraodinary Chambers in the Courts of Cambodia: http://www.eccc.gov.kh/english/

With regard to the substance of International Humanitarian Law, the special courts have actively pursued a number of topics. The most important development has been with regard to the concept of Joint Criminal Enterprise (JCE), analogous to Anglo-American law of conspiracy. JCE now has three distinct components: JCE I (acting with others pursuant to a common plan), JCE II (contribute to the maintenance or essential functions of a criminal institution or system, such as a concentration or detention camp), JCE III (liability for crimes that were the natural and foreseeable consequence of implementing the common design). JCE III is similar to our felony murder rule in that a person can be held responsible for the acts of others who were carrying out the common design or plan, such as violence against a particular ethnic or cultural group. As such, it is controversial and the ECCC recently declared that it was not part of international customary law at the time of the Cambodian atrocities of the 1970's.

Chapter 7

ALIENS AND ETHNIC PROFILING

§ 7.01 ALIEN DETENTIONS AND SECRECY

page 406, add to "Note on Material Witness Warrants"

ASHCROFT v. AL-KIDD, 510 U.S. __ (2011). The Supreme Court held that former Attorney General Ashcroft enjoyed immunity from civil damage actions for alleged misuse of the material witness procedure. "It is alleged that federal officials had no intention of calling most of these individuals as witnesses, and that they were detained, at Ashcroft's direction, because federal officials suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime."

A damage action against federal officials, however, requires a "showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." Because the detention of a suspected terrorist collaborator was obtained with the prior approval of a judge based on probable cause of the need to detain, whatever "bad faith" there might have been among the persons seeking the warrant were deemed irrelevant. Detention was the judge's decision based on objectively verifiable information, so the motives of the federal agents in seeking the order were not the cause of any harm to the detainee.

> Needless to say, warrantless, "suspicionless intrusions pursuant to a general scheme," are far removed from the facts of this case. A warrant issued by a neutral Magistrate Judge authorized al-Kidd's arrest. The affidavit accompanying the warrant application (as al-Kidd concedes) gave individualized reasons to believe that he was a material witness and that he would soon disappear."

Excerpts from opinions of Ninth Circuit Judges regarding rehearing *en banc* in the *Al-Kidd* case are reproduced here because they add additional color and flavor to the issues, even though the plaintiff was a U.S. citizen rather than an alien.

AL-KIDD v. ASHCROFT
580 F.3d 949 (9th Cir. 2009),
rehearing denied, 598 F.3d 1129 (9th Cir. 2010)

The petition for rehearing en banc is DENIED.

M. SMITH, Circuit Judge, concurring in the denial of rehearing *en banc*:

I concur in the court's decision not to rehear this case *en banc*, and write to respond to the dissents from that decision.

In March 2005, al-Kidd brought suit in the District of Idaho against former United States Attorney General John Ashcroft, the United States, two FBI agents, and a number of other government agencies and officers in their official

capacities. The suit sought damages for violations of al-Kidd's rights under the Fourth and Fifth Amendments to the Constitution, and for a direct violation of 18 U.S.C. § 3144. Each of the defendants moved to dismiss. The district court denied the 12(b)(6) motion, rejecting the defendants' claims of absolute and qualified immunity.

The facts alleged in al-Kidd's complaint are chilling, and serve as a cautionary tale to law-abiding citizens of the United States who fear the excesses of a powerful national government, as did many members of the Founding Generation. Al-Kidd, born Lavoni T. Kidd, is a United States citizen, born in Wichita, Kansas, and raised in Seattle, Washington. He graduated from the University of Idaho, where he was a highly regarded running back on the university's football team. He was married and had two young children.

While at the university, al-Kidd converted to Islam and changed his name to Abdullah al-Kidd. In the spring and summer of 2002, al-Kidd became a target of FBI surveillance conducted as part of a broad anti-terrorism investigation, aimed at Arab and Muslim men. Al-Kidd cooperated with the FBI on several occasions when FBI agents asked to interview him.

Previous to this time, Ashcroft and others operating at his direction, or in concert with him, had decided to undertake a novel use of 18 U.S.C. § 3144, the material witness statute. Specifically,

> 1. At a press briefing, Ashcroft stated that the government was taking steps "to enhance [its] ability to protect the United States from the threat of terrorist aliens" and that "[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks."
>
> 2. In DOJ memoranda, Ashcroft stressed the need "to use . . . aggressive arrest and detention tactics in the war on terror" and to use "every available law enforcement tool" to arrest persons who "participate in, or lend support to, terrorist activities."
>
> 3. A DOJ document entitled "Maintaining Custody of Terrorism Suspects" stated that "[i]f a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant."
>
> 4. Michael Chertoff, who was head of the DOJ's Criminal Division in the years immediately following the 9/11 attacks, stated of the material witness statute, "[i]t's an important investigative tool in the war on terrorism . . . . Bear in mind that you get not only testimony -- you get fingerprints, you get hair samples -- so there's all kinds of evidence you can get from a witness."
>
> 5. Then White House Counsel, Alberto Gonzales, stated that: "In any case where it appears that a U.S. citizen captured within the United States may be an al Qaeda operative and thus may qualify as an enemy combatant, information on the individual is developed and numerous options are considered by the various relative agencies (the Department of Defense, CIA

and DOJ), including the potential for a criminal prosecution, detention as a material witness, and detention as an enemy combatant."

What apparently interested the FBI in al-Kidd was his friendship with one Sami Omar Al-Hussayen, a Saudi national and a computer science student at the university, who was the webmaster of an Islamic proselyting website dedicated to, among other things, "[s]pread[ing] the correct knowledge of Islam; [and] [w]iden[ing] the horizons and understanding . . . among Muslims concerning different Islamic contemporary issues."

In the spring of 2003, al-Kidd planned to fly to Saudi Arabia to study Arabic and Islamic law on a scholarship at a Saudi university. Knowing of his travel plans from their interviews with al-Kidd, and apparently implementing Ashcroft's plan to aggressively use the material witness statute to detain "material witnesses," two FBI agents swore out an affidavit that contained multiple falsehoods to secure a material witness warrant against al-Kidd, allegedly so he would be available to testify against Al-Hussayen (who had been indicted one month previously for visa fraud and making false statements to U.S. officials).

On March 16, 2003, al-Kidd, bearing a round-trip ticket to Saudi Arabia, arrived at Dulles International Airport in Virginia. While al-Kidd was at the ticket counter, FBI agents handcuffed him, perp-walked him through the airport, and drove him to a police station, where he was placed in a holding cell. After being detained and questioned there for hours, al-Kidd was transferred to a detention center in Alexandria, Virginia.

For the next sixteen days, al-Kidd was detained in three different detention centers, one in Alexandria, one in Oklahoma, and one in Idaho. He was housed in high-security units within these facilities, which were the same units used to detain terrorists, and other persons charged with, or convicted of, other serious crimes. While at the Alexandria facility, al-Kidd was required to remain in a small cell where he ate his meals, except for one or two hours a day. He was strip-searched, denied visits by family, and denied requests to shower. Each time he was transferred to a new facility, he was shackled and accompanied by other prisoners who had been charged with, or convicted of, serious crimes. After sixteen days, "al-Kidd was ordered released, on the conditions that he live with his wife at his in-laws' home in Nevada, limit his travel to Nevada and three other states, report regularly to a probation officer and consent to home visits throughout the period of supervision, and surrender his passport.".

Not too long after al-Kidd's arrest and detention, in congressional testimony regarding the government's efforts to fight terrorism, FBI Director Robert Mueller boasted that the government had charged over 200 "suspected terrorists" with crimes. Mueller then offered the names of five individuals as examples of the government's recent successes. Four of those persons had been criminally charged with terrorism-related offenses; the other was al-Kidd.

"After almost a year under these conditions, the court permitted al-Kidd to secure his own residence in Las Vegas, as al-Kidd and his wife were separating. He lived under these conditions for three more months before being released at

the end of Al-Hussayen's trial, more than fifteen months after being arrested. In July 2004, al-Kidd was fired from his job. He alleges he was terminated when he was denied a security clearance because of his arrest. He is now separated from his wife, and has been unable to find steady employment. He was also deprived of his chance to study in Saudi Arabia on scholarship."

Al-Kidd was arrested more than a year before the Al-Hussayen trial began. In their interviews with al-Kidd, the FBI never suggested, let alone demanded, that al-Kidd appear as a witness in the Al-Hussayen trial. While in custody, al-Kidd was repeatedly questioned about matters unrelated to Al-Hussayen's alleged visa violations or false statements, but was never given a Miranda warning. "Al-Kidd was never called as a witness in the Al-Hussayen trial or in any other criminal proceeding" despite his assurances that he would be willing to be a witness. Importantly, al-Kidd was never charged with the commission of any crime, even though Mueller had boasted to Congress that the government had at that point in time charged over 200 "suspected terrorists" with crimes, and named al-Kidd individually, as well as four other persons who had been criminally charged with terrorism-related offenses, as evidence of the government's recent successes.

Accepting al-Kidd's factual allegations as true and drawing all inferences in his favor, we held that al-Kidd alleged sufficient facts in his complaint to state a claim against Ashcroft for creating, authorizing, implementing, and supervising a policy that violated al-Kidd's Fourth Amendment right against unreasonable searches and seizures. In doing so, we determined Ashcroft was not entitled to absolute or qualified immunity because he served an investigative function in connection with the challenged policy, which violated al-Kidd's clearly established constitutional rights. We also held that al-Kidd alleged sufficient facts in his complaint to state a claim that Ashcroft directly violated the material witness statute by his own personal conduct. Accordingly, we affirmed the district court's decision, allowing al-Kidd's case to proceed against Ashcroft beyond the pleading stage.

Contrary to what our dissenting colleague suggests, we did not "effectively declar[e] the material witness statute unconstitutional." Judge O'Scannlain accuses the majority of holding that the Constitution "invalidates arrests authorized by the statute," and therefore, the statute is unconstitutional to the extent it authorizes arrests such as the one in this case. The material witness statute, however, does not authorize arrests like the one in this case.

Here, the statute was not used to secure the testimony of a material witness, but rather to detain and interrogate a criminal suspect. Indeed, al-Kidd contends that the federal government enforced a policy sanctioning the use of the constitutionally-sound material witness statute for an end entirely outside the scope of the statute – criminal investigation. Therefore, we did not address the validity of the material witness statute, and we unequivocally stated that the decision "does nothing to curb the use of the material witness statute for its stated purpose." We treated "only the misuse of the statute," and concluded that when the statute" is not being used for its stated purpose, but instead for the

purpose of criminal investigation," the statute cannot be the basis for authorizing the government's conduct.

The doctrine of qualified immunity seeks to ensure that governmental officials have "fair notice" that their specific actions violate a constitutional right."It is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness [of the defendants' actions] was apparent in light of preexisting law." Accepting the factual allegations in al-Kidd's complaint as true, and drawing all inferences in his favor, we determined that in light of the well-established Fourth Amendment principles in place at the time of al-Kidd's arrest, Ashcroft had a fair warning that the policy he authorized and encouraged was unconstitutional. Under Beck v. Ohio, Ashcroft knew that an arrest of a criminal suspect is constitutional only if at the time of the arrest, there is probable cause that the arrestee has committed or is committing the offense justifying the arrest.

Only after we considered those well-established Fourth Amendment principles did we address a timely district court decision featuring a factual scenario closely analogous to that faced by al-Kidd. In *United States v. Awadallah*, Awadallah, like al-Kidd, was detained as a "material witness" for over two weeks in high-security prisons across the country, where he was kept in solitary confinement, shackled, strip-searched, and denied family contact. 202 F. Supp. 2d 55, 58 (S.D.N.Y. 2002). We recognized that the district court's statements in *Awadallah* were merely dicta, and that ultimately Awadallah was charged with criminal offenses. Nevertheless, the facts at issue in *Awadallah* were so closely analogous to those in *al-Kidd* that we deemed them relevant to the discussion, especially in light of our court's admonition to consider all relevant decisional law.

We did not stake the existence of the clearly established right in this case on the district court's statements in *Awadallah*. Rather, the district court's comments in *Awadallah* were unsurprising and entirely consistent with the long-established Fourth Amendment principles upon which we principally relied for our holding. Thus, we properly included a reference to Awadallah in considering whether al-Kidd had a clearly established right in March 2003.

Lastly, Judge O'Scannlain misreads the majority's decision as holding that a cabinet-level official may be personally liable for actions taken by his subordinate alone. To the contrary, the holding fully complies with the Court's instruction in *Ashcroft v. Iqbal*, that "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Al-Kidd was not required to allege that Ashcroft actually authorized the specific warrant for al-Kidd, or any alleged misrepresentations or omissions contained therein. Under *Iqbal*, al-Kidd had to "plead sufficient factual matter to show that [Ashcroft] adopted and implemented the detention policies at issue" not for some neutral, lawful reason but for an unlawful purpose.

O'SCANNLAIN, Circuit Judge, joined by KOZINSKI, Chief Judge, and KLEINFELD, GOULD, TALLMAN, CALLAHAN, BEA and IKUTA, Circuit Judges, dissenting from the denial of rehearing en banc:

The majority holds that a former Attorney General of the United States may be personally liable for promulgating a policy under which his subordinates took actions expressly authorized by law. Judge Bea's dissent from the panel decision clearly and ably describes the several legal errors the panel makes in reaching this startling conclusion. For my part, I write to express my concern at the scope of this decision. First, the majority holds that al-Kidd's detention under a valid material witness warrant violated his clearly established constitutional rights – a conclusion that effectively declares the material witness statute unconstitutional as applied to al-Kidd. Second, the majority holds that a cabinet-level official may be personally liable for actions taken by his subordinates alone. Because of the gratuitous damage this decision inflicts upon orderly federal law enforcement, I must respectfully dissent from our refusal to rehear this case en banc.

§ 7.02 DETENTIONS AND ETHNIC PROFILING

add at page 416:

***Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).** Plaintiff alleged violations of constitutional rights from having been singled out for questioning in the post-9/11 investigation based on his ethnicity, followed by mistreatment at the hands of jailers in the Manhattan Detention Center, and brought a *Bivens* claim for damages against various federal officials, including FBI Director Mueller and Attorney General Ashcroft. The Supreme Court held that a claim for damages needed to be plausible, that the complaint needed sufficient factual matter from which to infer that the specific defendants adopted and implemented the detention policies not for a neutral investigative reason, but for the purpose of discriminating on account of race, religion, or national origin. The facts in the complaint did not "nudge the claims of invidious discrimination across the line from conceivable to plausible."

Chapter 8

THE MILITARY OPTION

Note on reorganizing Chapter 8:

§ 8.03 will deal with military detentions at both Guantanamo and other locales. § 8.04 will highlight only the law to be applied by military commissions. § 8.05 will deal with domestic executive detentions and the arguments for loosened standards in terrorism cases. Thus, the new Table of Contents will be as follows:

§ 8.03 MILITARY DETENTIONS

The clearest example of departure from peacetime norms in the "war on terrorism" is the military detention without trial of a U.S. citizen arrested by the FBI on U.S. soil and accused of planning to engage in a terrorist act on U.S. soil. His name is Jose Padilla, and he was held in the Navy brig at Charleston, South Carolina, while habeas corpus proceedings ground along for four years until he was finally tried and convicted in an ordinary civilian federal court trial (ordinary except for the skimpiness of the evidence against him). *See Padilla v. Hanft*, p. 152 *infra*.

Another U.S. citizen held under slightly different circumstances was Yaser Hamdi, who was picked up in Afghanistan in early 2002 at the same time and place as John Walker Lindh. Unlike Lindh, however, Hamdi was held in military custody in the U.S. Following the opinion of the U.S. Supreme Court below, he agreed to renounce U.S. citizenship and was expatriated to Saudi Arabia.

And then there were the roughly 700 persons of various nationalities held at Guantanamo Bay, most of whom were captured in Afghanistan but some of whom were captured in various other places under different circumstances. Many of those were captured in Bosnia-Herzegovina after engaging in mujahadin actions during the 1990's conflict there.

In all three instances, the Government claimed that it could detain these persons as "enemy combatants" pursuant to the war powers of the President. In June 2004, the Supreme Court decided all three cases, rejecting the Government s underlying premise of near-unreviewable executive power.

The concepts involved in the "law of war" were introduced in Chapter 3. In short, the "law of war" applies at least during periods of "armed conflict" such that would trigger the Geneva Conventions. Under the law of war, a combatant in an international armed conflict possesses combat immunity for acts that do not violate the law of war, while a civilian would have no combat immunity unless he or she can fall within the definitions of eligibility for POW status under article 4 of Geneva III (GPW). And the law of war generally would not require recognition of combat immunity for violent acts during a period of insurrection or internal armed conflict. These concepts form part of the background for the question of how to deal with violent actors who are not connected with any entity claiming the status of a nation or state.

The administration argument for a hybrid status of "unlawful enemy combatant" has run into the counter argument that the law allows for two types of person, either of whom might be found to be guilty of war crimes or other illegal conduct. Members of armed forces or organized militias would be considered combatants while everyone else would be a civilian. It is important to realize in this construct that neither civilian nor combatant status protects anyone from allegations of illegal conduct – in fact, a civilian who takes up arms ("taking active part in hostilities") would have no combat immunity for violent acts.

[A] The 2004 Cases

HAMDI v. RUMSFELD, 542 U.S. 507 (2004).

Hamdi was a U.S. citizen whose family moved to Saudi Arabia when he was a child. He was picked up by invading forces in Afghanistan, initially taken to Guantanamo, and then (when it was discovered that he was a U.S. citizen) transferred to the naval bring in Norfolk, Virginia. In response to a habeas corpus petition filed by his father in the U.S., the Government argued that

1. the President has inherent authority to imprison those he considers to be "enemy combatants,"
2. nevertheless, Congress has authorized executive detentions in the Authorization to Use Military Force (AUMF),
3. habeas corpus jurisdiction is not available for enemy combatants, and
4. even if a habeas court has jurisdiction, there has been no violation of rights because no due process was required.

When his habeas corpus petition reached the Supreme Court, the Court responded in somewhat fractured fashion. Four Justices (O'Connor joined by three others) believed that habeas corpus jurisdiction was appropriate, that the

AUMF authorized detentions, but that due process required at least an opportunity for the detainee to "rebut the Government's factual assertions before a neutral decisionmaker." Two Justices (Souter joined by Ginsburg) believed that the AUMF did not authorize detention, and two (Scalia joined by Stevens) believed that executive detention of citizens could not be constitutional. Justice Thomas thought detention was authorized and constitutionally valid.

As a result, the Court would have split 4-4 over whether detention could be authorized after a due process hearing, which would have left the Fourth Circuit's opinion validating the detention in place. Therefore, Justices Souter and Ginsburg agreed to "join with the plurality in ordering remand on terms closest to those I would impose."

Justice O'Connor (4 votes) first held that the AUMF authorized detentions by authorizing the President "to use 'all necessary and appropriate force' against 'nations, organizations, or persons' associated with the September 11, 2001 terrorist attacks." This authorization was sufficient to override the Non-Detention Act, 18 U.S.C. § 4001(a), which was passed in the wake of the Japanese internment and states that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The plurality then held that due process required at least a minimal level of neutral review – although the Government's interest in efficient demobilization of combatants was weighty, the personal interest in liberty triggered at least a right to be heard by a neutral decisionmaker. But the "Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided."

Justice Souter found that the AUMF was insufficiently precise to overcome the statutory prohibition of § 4001 but went along with the plurality to avoid a stalemate.

Justices Scalia and Stevens, in a duet not shared before or since, would have held that at least since the time of Blackstone executive detentions were not valid without some judicial process.

Notes and Questions following *Hamdi*

1. Hamdi was released from U.S. custody pursuant to an agreement with Saudi Arabian authorities to accept him into that country. Hamdi agreed to renounce U.S. citizenship, to reside in Saudi Arabia for at least 5 years, and to report any contacts from persons who he has reason to believe could be involved in hostile or terrorist actions..

2. The O'Connor plurality opinion is quite explicit that "individuals legitimately determined to be Taliban combatants" could be held without trial for the remainder of their lives if "active hostilities" continue so long. With four votes for that position coupled with Justice Thomas' position, there seems to be a majority of the Court willing to countenance indefinite detention without trial under some circumstances. The plurality just requires a determination by a

competent tribunal of – what? combatant status? by what criteria? by what level of evidence? by what procedures?

3. Perhaps some slightly tongue-in-cheek examples would clarify the problem of judicial review over executive findings related to national security. If the government's arguments for deference to the President were accepted, would there be anything to prevent the President from classifying a skinhead militant as an enemy combatant? If that worked, how about classifying a politically volatile dissident as an EC? If that worked, how about the President's next election campaign opponent? Obviously, there must be a stopping point but it could be argued that the stopping point should be a matter for citizen or political action rather than judicial action. Which position carries the best message for the democratic process?

4. What is the definition of "enemy combatant" in the O'Connor scheme? If the example of citizen Haupt in the *Quirin* case means that a U.S. citizen arrested in the U.S. can be an enemy combatant, then can the executive declare any alleged terrorist to be an enemy combatant? What would be the standards for reviewing that determination? Justice O'Connor's explanation of battlefield conditions says that the question is "the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States." In what sense had Haupt "taken up arms" against the U.S.? Has any member of a terrorist organization "taken up arms" by engaging in a conspiracy to bomb either a military installation or a civilian target? Justice Scalia answers the Haupt example by pointing out that Haupt did not challenge his combatant status but that Hamdi did.

5. Perhaps the enemy combatant posture can be clarified by thinking of a range of persons and actions. At one extreme would be an Iraqi soldier in uniform wounded while firing a weapon at U.S. forces and then taken into custody. At the other extreme would be Jose Padilla, who was arrested by civilian authorities on U.S. soil while unarmed and having no more access to weapons than any other resident of the U.S. Where in this range of actions does a person become an enemy combatant?

a. uniformed soldier on field of battle

b. insurgent in civilian clothing firing weapon against uniformed invading force

c. insurgent attacking either military or civilian units allied with invading force

d. civilian attacking military installation on domestic soil of another country (the 9/11 plane flown into the Pentagon? does the target matter in this instance?)

e. civilian attacking civilian targets on soil of another country (the 9/11 planes flown into the WTC or almost any act of international terrorism)

f. civilian arrested on home soil allegedly intending to attack civilian targets (how distinguish Padilla from McVeigh?)

6. For an interesting and unfamiliar historical perspective, see Ingrid Brunk Wuerth, *The President's Power To Detain "Enemy Combatants:" Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U.L. REV. 1567 (2004).

RASUL v. BUSH, 542 U.S. 466 (2004).

The many detainees at Guantanamo were addressed in a sampling of habeas petitions grouped together for purpose of certiorari. Justice Stevens wrote for a 6-3 majority holding that habeas corpus review would extend to provide some level of review. The federal courts have personal jurisdiction over the military authorities who are the custodians, and there is nothing in the history of the Writ to preclude "a right to judicial review of the legality of Executive detentions in a territory over which the United States exercises plenary and exclusive jurisdiction" even without "ultimate sovereignty." The arguably contrary precedent of *Eisentrager v. Johnson* was distinguished this way:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

All the Court held was that the petitioners had access to the federal courts. With regard to the merits of their claims, the Court addressed a mere footnote (note 15):

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

Justice Scalia dissented on the ground that there was no law that would protect these persons, making a distinction between citizens and noncitizens, much as he did in *Hamdi*. On remand in these cases, or in ruling on any future habeas corpus petitions, what law will apply to determine whether a detainee in U.S. military custody is being held "in violation of the Constitution or laws" of the U.S.? Consider these possibilities:

a. constitutional rights – It is not clear that an alien held in federal custody outside the U.S. would have constitutional rights other than perhaps some rights regarding conditions of confinement, or perhaps the due process right to a determination of status similar to that accorded to Hamdi. In one of the cases reviewed in *Rasul*, the D.C. Circuit stated: "We cannot see why, or how, the writ may be made available to aliens

abroad when basic constitutional protections are not. This much is at the heart of *Eisentrager*. If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty." Al Odah v. United States, 355 U.S. App. D.C. 189 (D.C. Cir. 2003).

b. statutory rights – An alien seeking admission to the U.S. may have claims to statutory rights under the immigration laws. Are there any statutes protecting the interests of the Guantanamo detainees?

c. treaty rights – Are the Geneva Conventions self-executing or do they create rights on behalf of individuals? The Government argued in the lower courts that the Conventions created diplomatic remedies and not individual remedies, an argument addressed in Hamdan v. Rumsfeld.

d. customary international law – Professor Paust argues that both treaties and customary international law entitle a person to freedom from "arbitrary" detention, which implies some level of judicial review over the propriety of detention. Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT L L.J. 503 (2003).

After the Supreme Court s decision, proceedings with respect to the Guantanamo detainees split into three tracks:

a. Petitions for habeas corpus filed in various courts were transferred to the District of Columbia. Most were consolidated for initial motions.

b. The military established "Combatant Status Review Tribunals" (CSRT) at Guantanamo to make determinations on the status of each detainee, and Congress enacted the Detainee Treatment Act of 2005 to validate the CSRT's.

c. Some detainees were brought before military commissions to answer charges of violations of the law of war. *See Hamdan v. Rumsfeld*, p. 535.

[B] Guantanamo Detention

At its peak, Guantanamo housed about 750 prisoners. By the first of 2008, there were less than 300 remaining and about a third of those were awaiting movement to some country willing to accept them. The rest have been released pursuant to findings that they were No Longer Enemy Combatants (NLEC) or Non Enemy Combatants (NEC).

The treatment of detainees at Guantanamo was the subject of criticism from the beginning but became intense after the disclosures of Abu Ghraib. Allegedly, it was at Guantanamo that some of the harsh treatment methods later employed at Abu Ghraib were developed. A number of released prisoners have recounted tales of serious torture and mistreatment of detainees.

David Hicks, an Australian who eventually pleaded guilty to material support charges and was returned to Australia, was released after completing his sentence on December 29, 2007. According to his father, Hicks pleaded guilty

only to get out of Guantanamo and was concerned that other detainees were still being mistreated.

The more reputable watchdog groups monitoring the situation at Guantanamo are critical but are guarded in their statements about conditions of confinement and treatment of the detainees. Human Rights First, http://www.humanrightsfirst.org/us_law/detainees/militarytribunals.htm. Human Rights Watch, http://www.hrw.org/doc/?t=usa_gitmo.

Meanwhile, criticisms of Guantanamo around the world have continued to build. The British Government has called the situation "unacceptable." "The historic tradition of the United States as a beacon of freedom, liberty and of justice deserves the removal of this symbol" *UK Told US Won't Shut Guantanamo*, BBC News (May 11, 2006), http://news.bbc.co.uk/1/hi/uk_politics/4760365.stm. The UN Committee against Torture, after criticizing the U.S. for aggressive interrogation methods, secret detentions, and extraordinary renditions, had this to say about Guantanamo:

> 22. The Committee, noting that detaining persons indefinitely without charge, constitutes per se a violation of the Convention, is concerned that detainees are held for protracted periods at Guantanamo Bay, without sufficient legal safeguards and without judicial assessment of the justification for their detention. (articles 2, 3 and 16) The State party should cease to detain any person at Guantanamo Bay and close this detention facility, permit access by the detainees to judicial process or release them as soon as possible, ensuring that they are not returned to any State where they could face a real risk of being tortured, in order to comply with its obligations under the Convention.

U.N. Doc #CAT/C/USA/CO/2 (18 May 2006), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/19_05_06_torture.pdf

Colin Powell joined the chorus against Guantanamo in June 2007: "Essentially, we have shaken the belief the world had in America's justice system by keeping a place like Guantanamo open and creating things like the military commission. We don't need it and it is causing us far more damage than any good we get from it." *Colin Powell Says Guantanamo Should Be Closed*, Reuters (June 10, 2007), http://www.reuters.com/article/topNews/idUSN1043646920070610?feedType=RSS

It is a bit difficult to categorize the detainees at Guantanamo. Some of the detainees are there on what Senator Arlen Specter has called flimsy hearsay, while others are there as part of groups that were radicalized dissidents in places such as East Tajikstan. In September 2006, 14 "high value detainees" were transferred from CIA custody to Guantanamo.

In March 2007, the Department of Defense began releasing transcripts of hearings before the Combatant Status Review Tribunals (CSRT's).

See http://www.defenselink.mil/news/Combatant_Tribunals.html.

One of the most interesting transcripts is that of Khalid Sheikh Mohammed (KSM), the alleged mastermind of 9/11 and the uncle of Ramzi Yousef. In his formal statement, KSM claimed responsibility for 31 separate plots and actions (he orally corrected the statement to say that he "shared" responsibility for one of the 31). All 31 statements began with the phrase "I was responsible for" except this one: "I decapitated with my blessed right hand the head of the American Jew, Daniel Pearl." After the formal recitation of his claims, he offered these comments orally:

> What I wrote here, is not I'm making myself hero, when I said I was responsible for this or that. But your are military man. You know very well there are language for any war. So, there are, we are when I admitting these things I'm not saying I'm not did it. I did it but this the language of any war. If America they want to invade Iraq they will not send for Saddam roses or kisses they send for a bombardment. This is the best way if I want. If I'm fighting for anybody admit to them I'm American enemies. For sure, I'm American enemies. . . .
>
> So when we made any war against America we are jackals fighting in the nights. I consider myself, for what you are doing, a religious thing as you consider us fundamentalist. So, we derive from religious leading that we consider we and George Washington doing same thing. As consider George Washington as hero. . . .
>
> So when we say we are enemy combatant, that right. We are. But I'm asking you again to be fair with many Detainees which are not enemy combatant. Because many of them have been unjustly arrested. Many, not one or two or three. . . .
>
> But if you and me, two nations, will be together in war the others are victims. This is the way of the language. You know 40 million people were killed in World War One. Ten million kill in World War. You know that two million four hundred thousand be killed in the Korean War. So this language of the war. Any people who, when Usama bin Laden say I'm waging war because such such reason, now he declared it. But when you said I'm terrorist, I think it is deceiving peoples. Terrorists, enemy combatant. All these definitions as CIA you can make whatever you want. . . .
>
> If now we were living in the Revolutionary War and George Washington he being arrested through Britain. For sure he, they would consider him enemy combatant. But American they consider him as hero. This right the any Revolutionary War they will be as George Washington or Britain. . . .
>
> This is why the language of any war in the world is killing. I mean the language of the war is victims. I don't like to kill people. I feel very sorry they been killed kids in 9/11. What I will do? This is the language. Sometime I want to make great awakening between American to stop foreign policy in our land. . . .

> Killing is prohibited in all what you call the people of the book, Jews, Judaism, Christianity, and Islam. You know the Ten Commandments very well. The Ten Commandments are shared between all of us. We all are serving one God. Then now kill you know it very well. But war language also we have language for the war. You have to kill. . . .
>
> The American have human right. So, enemy combatant itself, it flexible word. So I think God knows that many who been arrested, they been unjustly arrested. Otherwise, military throughout history know very well. They don't want war will never stop. War start from Adam when Cain he killed Abel until now. It's never gonna stop killing people. . . .

The Defense Department provided a list in May 2006 of all detainees who had been through Guantanamo as of that time:

http://www.dod.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf

Following *Rasul*, most of the habeas corpus petitions that were pending in the D.C. District Court were consolidated before Judge Green, who issued a decision upholding some of the petitioners' claims in January 2005. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). Judge Leon retained his cases and issued a contrary decision 12 days before Judge Green released hers. Judge Leon concluded that due process did not apply to aliens detained outside the United States (relying on *Eisentrager*), that the Geneva Conventions were not self-executing, and that international law provided no cognizable rights to the detainees. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

Judge Green, however, held

> that the petitioners have stated valid claims under the Fifth Amendment and that the CSRT procedures are unconstitutional for foiling to comport with the requirements of due process. Additionally, the Court holds that Taliban fighters who have not been specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal have also stated valid claims under the Third Geneva Convention. Finally, the Court concludes that the remaining claims of the petitioners must be denied.

Judge Green began by noting the lack of connection between many of the detainees and anything resembling a battlefield:

> In addition to belligerents captured during the heat of war in Afghanistan, the U.S. authorities are also detaining at Guantanamo Bay pursuant to the AUMF numerous individuals who were captured hundreds or thousands of miles from a battle zone in the traditional sense of that term. For example, detainees at Guantanamo Bay who are presently seeking habeas relief in the United States District Court for the District of Columbia include men who were taken into custody as far away from Afghanistan as Gambia, Zambia, Bosnia, and Thailand. Some have already been detained as long as three years

> while others have been captured as recently as September 2004. Although many of these individuals may never have been close to an actual battlefield and may never have raised conventional arms against the United States or its allies, the military nonetheless has deemed them detainable as "enemy combatants" based on conclusions that they have ties to al Qaeda or other terrorist organizations.

She also injected some levity into the difficulty that detainees would have in proving their innocence without knowing the evidence against them:

> Tribunal President: Mustafa, does that conclude your statement?
>
> Detainee: That is it, but I was hoping you had evidence that you can give me. If I was in your place – and I apologize in advance for these words – but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that.
>
> [Everyone in the Tribunal room laughs.]
>
> Tribunal President: We had to laugh, but it is okay.
>
> Detainee: Why? Because these are accusations that I can't even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don't have any proof to give you except to ask you to catch Bin Laden and ask him if I am a part of Al Qaida. To tell me that I thought, I'll just tell you that I did not. I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.
>
> The laughter reflected in the transcript is understandable, and this exchange might have been truly humorous had the consequences of the detainee's "enemy combatant" status not been so terribly serious and had the detainee's criticism of the process not been so piercingly accurate.

The *Khalid* opinion dealt with the question of constitutional rights and habeas jurisdiction by separating the two, holding that *Rasul* did not impliedly overrule *Eisentrager*. By contrast, the *In re Detainees* opinion engages in an extensive review of cases before and after *Eisentrager* to determine that due process applies at least to aliens detained on soil under the exclusive control of the U.S.

For the Supreme Court to hold in *Rasul* that the courts have power to entertain the petition, did it necessarily hold that there must be some rights that pertain to the petitioners? How can there be jurisdiction in the absence of a claim of right? This is the conundrum presented by Justice Stevens' footnote 15. If *Khalid* is correct, then what is the point of *Rasul*?

Judge Leon held that detention was authorized by Congress but then found that the petitioners could not identify any rights protecting them under federal law. With regard to treaty law, they "conceded at oral argument that [the

Geneva] Convention does not apply because these petitioners were not captured in the 'zone of hostilities . . . in and around Afghanistan.'" The combination of these two holdings seems to place the alleged terrorist within authorization to use executive force but outside the protection of any law other than international law. Of course, the Geneva Conventions are not the only source of international law but the petitioners seem to have made no arguments under international other than with respect to their conditions of confinement. Is the court correct to view allegations regarding conditions of confinement as failing to state a claim regarding the basis of confinement?

What about Professor Paust's argument that customary international law requires some level of judicial review to prevent "arbitrary" confinement? Do other countries have no interest in our imprisoning their citizens? Can the U.S. run around the world apprehending and detaining anyone we want with no controls? *Khalid* raises what may be the ultimate question to which this course is addressed: what law applies in dealing with terrorists around the world. Is it permissible for U.S. agents to apprehend suspects wherever they may be found? without probable cause? to imprison them without due process? to shoot them?

BOUMEDIENE v. BUSH

553 U.S. 723 (2008)

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C. § 2241(e) (Supp. 2007), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

I

Under the Authorization for Use of Military Force (AUMF), the President is authorized "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of

international terrorism against the United States by such nations, organizations or persons."

In *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." After *Hamdi*, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were "enemy combatants," as the Department defines that term. A later memorandum established procedures to implement the CSRTs. The Government maintains these procedures were designed to comply with the due process requirements identified by the plurality in *Hamdi*.

Interpreting the AUMF, the Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT; was determined to be an enemy combatant; and has sought a writ of habeas corpus in the United States District Court for the District of Columbia.

The first actions commenced in February 2002. The District Court ordered the cases dismissed for lack of jurisdiction because the naval station is outside the sovereign territory of the United States. The Court of Appeals for the District of Columbia Circuit affirmed. We granted certiorari and reversed, holding that 28 U.S.C. § 2241 extended statutory habeas corpus jurisdiction to Guantanamo. [*Rasul v. Bush*, 542 U.S. 466 (2004).] The constitutional issue presented in the instant cases was not reached in *Rasul*.

After *Rasul*, petitioners' cases were consolidated and entertained in two separate proceedings. In the first set of cases, Judge Richard J. Leon granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas corpus action. In the second set of cases Judge Joyce Hens Green reached the opposite conclusion, holding the detainees had rights under the Due Process Clause of the Fifth Amendment. See *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (DC 2005); *In re Guantanamo Detainee Cases,* 355 F. Supp. 2d 443, 464 (DC 2005).

While appeals were pending from the District Court decisions, Congress passed the DTA. Subsection (e) of § 1005 of the DTA amended 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." Section 1005 further provides that the Court of Appeals for the District of

Columbia Circuit shall have "exclusive" jurisdiction to review decisions of the CSRTs.

In *Hamdan v. Rumsfeld,* 548 U.S. 557, 576-577 (2006), the Court held this provision did not apply to cases (like petitioners') pending when the DTA was enacted. Congress responded by passing the MCA, which again amended § 2241. The text of the statutory amendment is discussed below. (Four Members of the *Hamdan* majority noted that "[n]othing prevent[ed] the President from returning to Congress to seek the authority he believes necessary." (BREYER, J., concurring). The authority to which the concurring opinion referred was the authority to "create military commissions of the kind at issue" in the case. Nothing in that opinion can be construed as an invitation for Congress to suspend the writ.)

Petitioners' cases were consolidated on appeal, and the parties filed supplemental briefs in light of our decision in *Hamdan*. The Court of Appeals' ruling, 375 U.S. App. D.C. 48, 476 F.3d 981 (D.C. Cir. 2007), is the subject of our present review and today's decision.

The Court of Appeals concluded that MCA § 7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners' habeas corpus applications; that petitioners are not entitled to the privilege of the writ or the protections of the Suspension Clause; and, as a result, that it was unnecessary to consider whether Congress provided an adequate and effective substitute for habeas corpus in the DTA.

II

As a threshold matter, we must decide whether MCA § 7 denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. We hold the statute does deny that jurisdiction, so that, if the statute is valid, petitioners' cases must be dismissed.

There is little doubt that the effective date provision applies to habeas corpus actions.

We acknowledge, moreover, the litigation history that prompted Congress to enact the MCA. In *Hamdan* the Court found it unnecessary to address the petitioner's Suspension Clause arguments but noted the relevance of the clear statement rule in deciding whether Congress intended to reach pending habeas corpus cases. This interpretive rule facilitates a dialogue between Congress and the Court. If the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text. If Congress amends, its intent must be respected even if a difficult constitutional question is presented.

If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute; and we agree with its conclusion

that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.

III

In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, *i.e.*, petitioners' designation by the Executive Branch as enemy combatants, or their physical location, *i.e.*, their presence at Guantanamo Bay. The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

We begin with a brief account of the history and origins of the writ. Our account proceeds from two propositions. First, protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause. Second, to the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases.

A

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchial power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.

Magna Carta decreed that no man would be imprisoned contrary to the law of the land. Art. 39. Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled. 9 W. Holdsworth, A History of English Law 112 (1926) (hereinafter Holdsworth).

The development was painstaking, even by the centuries-long measures of English constitutional history. The early courts were considered agents of the Crown, designed to assist the King in the exercise of his power. Over time it became clear that by issuing the writ of habeas corpus common-law courts sought to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner.

Even so, from an early date it was understood that the King, too, was subject to the law. As the writers said of Magna Carta, "it means this, that the king is and shall be below the law." 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH

LAW 173 (2d ed. 1909); see also 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 33 (S. Thorne transl. 1968) ("The king must not be under man but under God and under the law, because law makes the king"). And, by the 1600's, the writ was deemed less an instrument of the King's power and more a restraint upon it.

Still, the writ proved to be an imperfect check. Even when the importance of the writ was well understood in England, habeas relief often was denied by the courts or suspended by Parliament. Denial or suspension occurred in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them. [T]he Habeas Corpus Act of 1679, which later would be described by Blackstone as the "stable bulwark of our liberties," 1 W. BLACKSTONE, COMMENTARIES *137 (hereinafter Blackstone), established procedures for issuing the writ; and it was the model upon which the habeas statutes of the 13 American Colonies were based.

This history was known to the Framers. It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty. Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles.

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2.

B

The broad historical narrative of the writ and its function is central to our analysis, but we seek guidance as well from founding-era authorities addressing the specific question before us: whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection.

To support their arguments, the parties in these cases have examined historical sources to construct a view of the common-law writ as it existed in 1789 – as have *amici* whose expertise in legal history the Court has relied upon in the past. The Government argues the common-law writ ran only to those territories over which the Crown was sovereign. Petitioners argue that jurisdiction followed the King's officers. Diligent search by all parties reveals no certain conclusions. In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used

in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.

We know that at common law a petitioner's status as an alien was not a categorical bar to habeas corpus relief. See, *e.g.*, *Sommersett's Case*, 20 How. St. Tr. 1, 80-82 (1772) (ordering an African slave freed upon finding the custodian's return insufficient). We know as well that common-law courts entertained habeas petitions brought by enemy aliens detained in England – "entertained" at least in the sense that the courts held hearings to determine the threshold question of entitlement to the writ.

As the Court noted in *Rasul,* common-law courts granted habeas corpus relief to prisoners detained in the exempt jurisdictions. But these areas, while not in theory part of the realm of England, were nonetheless under the Crown's control. Petitioners and their *amici* further rely on cases in which British courts in India granted writs of habeas corpus to noncitizens detained in territory over which the Moghul Emperor retained formal sovereignty and control. The analogy to the present cases breaks down, however, because of the geographic location of the courts in the Indian example. The Supreme Court of Judicature (the British Court) sat in Calcutta; but no federal court sits at Guantanamo. The Supreme Court of Judicature was, moreover, a special court set up by Parliament to monitor certain conduct during the British Raj. That it had the power to issue the writ in nonsovereign territory does not prove that common-law courts sitting in England had the same power. If petitioners were to have the better of the argument on this point, we would need some demonstration of a consistent practice of common-law courts sitting in England and entertaining petitions brought by alien prisoners detained abroad. We find little support for this conclusion.

The Government argues, in turn, that Guantanamo is more closely analogous to Scotland and Hanover, territories that were not part of England but nonetheless controlled by the English monarch (in his separate capacities as King of Scotland and Elector of Hanover). Lord Mansfield can be cited for the proposition that, at the time of the founding, English courts lacked the "power" to issue the writ to Scotland and Hanover, territories Lord Mansfield referred to as "foreign." But what matters for our purposes is why common-law courts lacked this power. Given the English Crown's delicate and complicated relationships with Scotland and Hanover in the 1700's, we cannot disregard the possibility that the common-law courts' refusal to issue the writ to these places was motivated not by formal legal constructs but by what we would think of as prudential concerns. Even after the Act of Union, Scotland (like Hanover) continued to maintain its own laws and court system. Under these circumstances prudential considerations would have weighed heavily when courts sitting in England received habeas petitions from Scotland or the Electorate. Common-law decisions withholding the writ from prisoners detained in these places easily could be explained as efforts to avoid either or both of two embarrassments: conflict with the judgments of another court of competent jurisdiction; or the practical inability, by reason of distance, of the English courts to enforce their judgments outside their territorial jurisdiction.

In the end a categorical or formal conception of sovereignty does not provide a comprehensive or altogether satisfactory explanation for the general understanding that prevailed when Lord Mansfield considered issuance of the writ outside England. Blackstone put it as follows: "[A]s Scotland and England are now one and the same kingdom, and yet differ in their municipal laws; so England and Ireland are, on the other hand, distinct kingdoms, and yet in general agree in their laws." This distinction, and not formal notions of sovereignty, may well explain why the writ did not run to Scotland (and Hanover) but would run to Ireland.

Each side in the present matter argues that the very lack of a precedent on point supports its position. The Government points out there is no evidence that a court sitting in England granted habeas relief to an enemy alien detained abroad; petitioners respond there is no evidence that a court refused to do so for lack of jurisdiction.

[G]iven the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point.

IV

Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

Guantanamo Bay is not formally part of the United States. And under the terms of the lease between the United States and Cuba, Cuba retains "ultimate sovereignty" over the territory while the United States exercises "complete jurisdiction and control." Under the terms of the 1934 Treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base.

The United States contends, nevertheless, that Guantanamo is not within its sovereign control. This was the Government's position well before the events of September 11, 2001. And in other contexts the Court has held that questions of sovereignty are for the political branches to decide.

Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles.

A

The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's

argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends.

Fundamental questions regarding the Constitution's geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories: Puerto Rico, Guam, and the Philippines – ceded to the United States by Spain at the conclusion of the Spanish-American War – and Hawaii – annexed by the United States in 1898. At this point Congress chose to discontinue its previous practice of extending constitutional rights to the territories by statute.

In a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. See *De Lima v. Bidwell,* 182 U.S. 1 (1901); . . . *Dorr v. United States,* 195 U.S. 138 (1904). The Court held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position.

Prior to their cession to the United States, the former Spanish colonies operated under a civil-law system, without experience in the various aspects of the Anglo-American legal tradition, for instance the use of grand and petit juries. At least with regard to the Philippines, a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory. The Court thus was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories.

Practical considerations likewise influenced the Court's analysis a half-century later in *Reid [v. Covert],* 354 U.S. 1 (1957). The petitioners there, spouses of American servicemen, lived on American military bases in England and Japan. They were charged with crimes committed in those countries and tried before military courts, consistent with executive agreements the United States had entered into with the British and Japanese governments. Because the petitioners were not themselves military personnel, they argued they were entitled to trial by jury. [The Court in *Reid* agreed.]

Justice Black, writing for the plurality, contrasted the cases before him with the Insular Cases, which involved territories "with wholly dissimilar traditions and institutions" that Congress intended to govern only "temporarily." Justice Frankfurter argued that the "specific circumstances of each particular case" are relevant in determining the geographic scope of the Constitution. And Justice Harlan, who had joined an opinion reaching the opposite result in the case in the previous Term, was most explicit in rejecting a "rigid and abstract rule" for determining where constitutional guarantees extend.

That the petitioners in *Reid* were American citizens was a key factor in the case and was central to the plurality's conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States. But practical considerations, related not to the petitioners' citizenship but to the place of their confinement and trial, were relevant to each Member of the *Reid*

majority. And to Justices Harlan and Frankfurter (whose votes were necessary to the Court's disposition) these considerations were the decisive factors in the case.

Practical considerations weighed heavily as well in *Johnson v. Eisentrager,* 339 U.S. 763 (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. The prisoners were detained at Landsberg Prison in Germany during the Allied Powers' postwar occupation. The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It "would require allocation of shipping space, guarding personnel, billeting and rations" and would damage the prestige of military commanders at a sensitive time. In considering these factors the Court sought to balance the constraints of military occupation with constitutional necessities.

True, the Court in *Eisentrager* denied access to the writ, and it noted the prisoners "at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." The Government seizes upon this language as proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. We reject this reading for three reasons.

First, we do not accept the idea that the above-quoted passage from *Eisentrager* is the only authoritative language in the opinion and that all the rest is dicta.

Second, because the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. That the Court devoted a significant portion of [its opinion] to a discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it.

Third, if the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the *Insular Cases'* (and later *Reid*'s) functional approach to questions of extraterritoriality. We cannot accept the Government's view. Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus. Were that the case, there would be considerable tension between *Eisentrager*, on the one hand, and the *Insular Cases* and *Reid*, on the other. Our cases need not be read to conflict in this manner. A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the *Insular Cases*, *Eisentrager*, and *Reid:* the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.

B

The Government's formal sovereignty-based test raises troubling separation-of-powers concerns as well. The political history of Guantanamo illustrates the deficiencies of this approach. The United States has maintained complete and uninterrupted control of the bay for over 100 years. At the close of the Spanish-American War, Spain ceded control over the entire island of Cuba to the United States and specifically "relinquishe[d] all claim[s] of sovereignty . . . and title." From the date the treaty with Spain was signed until the Cuban Republic was established on May 20, 1902, the United States governed the territory "in trust" for the benefit of the Cuban people. And although it recognized, by entering into the 1903 Lease Agreement, that Cuba retained "ultimate sovereignty" over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898. Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."

These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

C

As we recognized in *Rasul,* the outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*. In addition to the practical concerns discussed above, the *Eisentrager* Court found relevant that each petitioner:

> (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses

> against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Based on this language from *Eisentrager*, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were "enemy alien[s]." In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager,* there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses.

In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a "Personal Representative" to assist him during CSRT proceedings, the Secretary of the Navy's memorandum makes clear that person is not the detainee's lawyer or even his "advocate." The Government's evidence is accorded a presumption of validity. The detainee is allowed to present "reasonably available" evidence, but his ability to rebut the Government's evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.

As to the second factor relevant to this analysis, the detainees here are similarly situated to the *Eisentrager* petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause. But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States' control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces. The Court's holding in *Eisentrager* was thus consistent with the Insular Cases, where it had held there was no need

to extend full constitutional protections to territories the United States did not intend to govern indefinitely. Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.

As to the third factor, we recognize, as the Court did in *Eisentrager*, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned along side each other at various points in our history. See, *e.g., Duncan v. Kahanamoku,* 327 U.S. 304 (1946); *Ex parte Milligan,* 71 U.S. 2 (1866). The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And in light of the plenary control the United States asserts over the base, none are apparent to us.

It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. This Court may not impose a *de facto* suspension by abstaining from these controversies. The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.

V

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus. The Government submits there has been compliance with the Suspension Clause because the DTA review process in the Court of Appeals, provides an adequate substitute. Congress has granted that court jurisdiction to consider

> (i) wether the status determination of the [CSRT] . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the

> United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional. The parties before us have addressed the adequacy issue. While we would have found it informative to consider the reasoning of the Court of Appeals on this point, we must weigh that against the harms petitioners may endure from additional delay. And, given there are few precedents addressing what features an adequate substitute for habeas corpus must contain, in all likelihood a remand simply would delay ultimate resolution of the issue by this Court.

We do have the benefit of the Court of Appeals' construction of key provisions of the DTA. When we granted certiorari in these cases, we noted "it would be of material assistance to consult any decision" in the parallel DTA review proceedings pending in the Court of Appeals, specifically any rulings in the matter of *Bismullah v. Gates*. Although the Court of Appeals has yet to complete a DTA review proceeding, the three-judge panel in *Bismullah* has issued an interim order giving guidance as to what evidence can be made part of the record on review and what access the detainees can have to counsel and to classified information. See 378 U.S. App. D.C. 179, 501 F.3d 178 (CADC) *(Bismullah I)*, *reh'g denied*, 378 U.S. App. D.C. 238, 503 F.3d 137 (CADC 2007) *(Bismullah II)*. In that matter the full court denied the Government's motion for rehearing en banc, see *Bismullah v. Gates,* 514 F.3d 1291 (CADC 2008) *(Bismullah III)*. The order denying rehearing was accompanied by five separate statements from members of the court, which offer differing views as to scope of the judicial review Congress intended these detainees to have.

Under the circumstances we believe the costs of further delay substantially outweigh any benefits of remanding to the Court of Appeals to consider the issue it did not address in these cases.

A

Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation's history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims.

In § 2241 Congress confirmed the authority of "any justice" or "circuit judge" to issue the writ. That statute accommodates the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for factfinding is superior to his or her own. By granting the Court of Appeals "exclusive" jurisdiction over petitioners' cases, Congress has foreclosed that option. This choice indicates Congress intended the Court of Appeals to have a more limited role in enemy combatant status determinations than a district

court has in habeas corpus proceedings. The DTA should be interpreted to accord some latitude to the Court of Appeals to fashion procedures necessary to make its review function a meaningful one, but, if congressional intent is to be respected, the procedures adopted cannot be as extensive or as protective of the rights of the detainees as they would be in a § 2241 proceeding. Otherwise there would have been no, or very little, purpose for enacting the DTA.

To the extent any doubt remains about Congress' intent, the legislative history confirms what the plain text strongly suggests: In passing the DTA Congress did not intend to create a process that differs from traditional habeas corpus process in name only. It intended to create a more limited procedure.

It is against this background that we must interpret the DTA and assess its adequacy as a substitute for habeas corpus.

B

We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained – though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. These are the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required.

The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context. See *Mathews v. Eldridge,* 424 U.S. 319 (1976). [W]here relief is sought from a sentence that resulted from the judgment of a court of record, considerable deference is owed to the court that ordered confinement. Likewise in those cases the prisoner should exhaust adequate alternative remedies before filing for the writ in federal court. Both aspects of federal habeas corpus review are justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding. In cases involving state convictions this framework also respects federalism; and in federal cases it has added justification because the prisoner already has had a chance to seek review of his conviction in a federal forum through a direct appeal. The present cases fall outside these categories, however; for here the detention is by executive order.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus

proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners' designation as enemy combatants became final. Whether one characterizes the CSRT process as direct review of the Executive's battlefield determination that the detainee is an enemy combatant – as the parties have and as we do – or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.

Petitioners identify what they see as myriad deficiencies in the CSRTs. The most relevant for our purposes are the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. As already noted, at the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention. The detainee can confront witnesses that testify during the CSRT proceedings. But given that there are in effect no limits on the admission of hearsay evidence – the only requirement is that the tribunal deem the evidence "relevant and helpful" – the detainee's opportunity to question witnesses is likely to be more theoretical than real.

The Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi*. Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand. None of the parties in *Hamdi* argued there had been a suspension of the writ. Nor could they. The § 2241 habeas corpus process remained in place. Accordingly, the plurality concentrated on whether the Executive had the authority to detain and, if so, what rights the detainee had under the Due Process Clause. True, there are places in the *Hamdi* plurality opinion where it is difficult to tell where its extrapolation of § 2241 ends and its analysis of the petitioner's Due Process rights begins. But the Court had no occasion to define the necessary scope of habeas review, for Suspension Clause purposes, in the context of enemy combatant detentions. The closest the plurality came to doing so was in discussing whether, in light of separation-of-powers concerns, § 2241 should be construed to forbid the District Court from inquiring beyond the affidavit Hamdi's custodian provided in answer to the detainee's habeas petition. The plurality answered this question with an emphatic "no."

Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to "cu[t] through all forms and g[o] to the very tissue of

the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant. This is so, as *Hayman* and *Swain* make clear, even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights. Were this not the case, there would have been no reason for the Court to inquire into the adequacy of substitute habeas procedures in *Hayman* and *Swain*. That the prisoners were detained pursuant to the most rigorous proceedings imaginable, a full criminal trial, would have been enough to render any habeas substitute acceptable *per se*.

Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." See *Bismullah III,* 514 F.3d at 1296 (Ginsburg, C. J., concurring in denial of rehearing en banc). And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting. Here that opportunity is constitutionally required.

Consistent with the historic function and province of the writ, habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here. In two habeas cases involving enemy aliens tried for war crimes, *In re Yamashita,* 327 U.S. 1 (1946), and *Ex parte Quirin,* 317 U.S. 1 (1942), for example, this Court limited its review to determining whether the Executive had legal authority to try the petitioners by military commission. Military courts are not courts of record. And the procedures used to try General Yamashita have been sharply criticized by Members of this Court. We need not revisit these cases, however. For on their own terms, the proceedings in *Yamashita* and *Quirin*, like those in *Eisentrager*, had an adversarial structure that is lacking here.

The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.

C

We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards.

The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify detention. This is troubling. Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy. In that case it would be possible to hold that a remedy of release is impliedly provided for. The DTA might be read, furthermore, to allow the petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely. (Whether the President has such authority turns on whether the AUMF authorizes – and the Constitution permits – the indefinite detention of "enemy combatants" as the Department of Defense defines that term. Thus a challenge to the President's authority to detain is, in essence, a challenge to the Department's definition of enemy combatant, a "standard" used by the CSRTs in petitioners' cases.) At oral argument, the Solicitor General urged us to adopt both these constructions, if doing so would allow MCA § 7 to remain intact.

The absence of a release remedy and specific language allowing AUMF challenges are not the only constitutional infirmities from which the statute potentially suffers, however. The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. The DTA enables petitioners to request "review" of their CSRT determination in the Court of Appeals; but the "Scope of Review" provision confines the Court of Appeals' role to reviewing whether the CSRT followed the "standards and procedures" issued by the Department of Defense and assessing whether those "standards and procedures" are lawful. Among these standards is "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence . . . allowing a rebuttable presumption in favor of the Government's evidence."

Assuming the DTA can be construed to allow the Court of Appeals to review or correct the CSRT's factual determinations, as opposed to merely certifying that the tribunal applied the correct standard of proof, we see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.

On its face the statute allows the Court of Appeals to consider no evidence outside the CSRT record. In the parallel litigation, however, the Court of Appeals determined that the DTA allows it to order the production of all "'reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant,'" regardless of whether this evidence was put before the CSRT. For present purposes, we can assume that the Court of Appeals was correct that the DTA allows introduction and consideration of relevant exculpatory evidence that was "reasonably available" to the Government at the time of the CSRT but not

made part of the record. Even so, the DTA review proceeding falls short of being a constitutionally adequate substitute, for the detainee still would have no opportunity to present evidence discovered after the CSRT proceedings concluded.

Under the DTA the Court of Appeals has the power to review CSRT determinations by assessing the legality of standards and procedures. This implies the power to inquire into what happened at the CSRT hearing and, perhaps, to remedy certain deficiencies in that proceeding. But should the Court of Appeals determine that the CSRT followed appropriate and lawful standards and procedures, it will have reached the limits of its jurisdiction. There is no language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings. This evidence, however, may be critical to the detainee's argument that he is not an enemy combatant and there is no cause to detain him.

This is not a remote hypothetical. One of the petitioners, Mohamed Nechla, requested at his CSRT hearing that the Government contact his employer. The petitioner claimed the employer would corroborate Nechla's contention he had no affiliation with al Qaeda. Although the CSRT determined this testimony would be relevant, it also found the witness was not reasonably available to testify at the time of the hearing. Petitioner's counsel, however, now represents the witness is available to be heard. If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court. Even under the Court of Appeals' generous construction of the DTA, however, the evidence identified by Nechla would be inadmissible in a DTA review proceeding. The role of an Article III court in the exercise of its habeas corpus function cannot be circumscribed in this manner.

By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete. In other contexts, *e.g.*, in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims, similar limitations on the scope of habeas review may be appropriate. In this context, however, where the underlying detention proceedings lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record.

We do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limitations on the detainee's ability to present exculpatory evidence. For even if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so. To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release

would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation. Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas corpus.

Although we do not hold that an adequate substitute must duplicate § 2241 in all respects, it suffices that the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA § 7 thus effects an unconstitutional suspension of the writ. In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.

VI

A

In light of our conclusion that there is no jurisdictional bar to the District Court's entertaining petitioners' claims the question remains whether there are prudential barriers to habeas corpus review under these circumstances.

The Government argues petitioners must seek review of their CSRT determinations in the Court of Appeals before they can proceed with their habeas corpus actions in the District Court. As noted earlier, in other contexts and for prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief. Most of these cases were brought by prisoners in state custody and thus involved federalism concerns that are not relevant here. But we have extended this rule to require defendants in courts-martial to exhaust their military appeals before proceeding with a federal habeas corpus action.

The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept.

In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way. Cf. *Ex parte Milligan*, 4 Wall., at 127 ("If, in

foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course"). Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power.

The cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here. In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. The first DTA review applications were filed over a year ago, but no decisions on the merits have been issued. While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.

Our decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA § 7. Accordingly, both the DTA and the CSRT process remain intact. Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition. The CSRT process is the mechanism Congress and the President set up to deal with these issues. Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.

B

Although we hold that the DTA is not an adequate and effective substitute for habeas corpus, it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent. *Felker*, *Swain*, and *Hayman* stand for the proposition that the Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be

made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.

In the DTA Congress sought to consolidate review of petitioners' claims in the Court of Appeals. Channeling future cases to one district court would no doubt reduce administrative burdens on the Government. This is a legitimate objective that might be advanced even without an amendment to § 2241. If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, the Government can move for change of venue to the court that will hear these petitioners' cases, the United States District Court for the District of Columbia.

Another of Congress' reasons for vesting exclusive jurisdiction in the Court of Appeals, perhaps, was to avoid the widespread dissemination of classified information. The Government has raised similar concerns here and elsewhere. We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible.

These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.

* * *

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation's present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as

necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism. Cf. *Hamdan,* 548 U.S., at 636 (BREYER, J., concurring) ("[J]udicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine – through democratic means – how best to do so").

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

The determination by the Court of Appeals that the Suspension Clause and its protections are inapplicable to petitioners was in error. The judgment of the Court of Appeals is reversed. The cases are remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

I join the Court's opinion in its entirety and add this afterword only to emphasize two things one might overlook after reading the dissents.

Four years ago, this Court in *Rasul v. Bush* held that statutory habeas jurisdiction extended to claims of foreign nationals imprisoned by the United States at Guantanamo Bay, "to determine the legality of the Executive's potentially indefinite detention" of them. Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all. Justice Scalia is thus correct that here, for the first time, this Court holds there is (he says "confers") constitutional habeas jurisdiction over aliens imprisoned by the military outside an area of *de jure* national sovereignty. But no one who reads the Court's opinion

in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Court's reliance on the historical background of habeas generally in answering the statutory question. Indeed, the Court in *Rasul* directly answered the very historical question that Justice Scalia says is dispositive; it wrote that "[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus." Justice Scalia dismisses the statement as dictum, but if dictum it was, it was dictum well considered, and it stated the view of five Members of this Court on the historical scope of the writ. But whether one agrees or disagrees with today's decision, it is no bolt out of the blue.

A second fact insufficiently appreciated by the dissents is the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years. Hence the hollow ring when the dissenters suggest that the Court is somehow precipitating the judiciary into reviewing claims that the military (subject to appeal to the Court of Appeals for the District of Columbia Circuit) could handle within some reasonable period of time. These suggestions of judicial haste are all the more out of place given the Court's realistic acknowledgment that in periods of exigency the tempo of any habeas review must reflect the immediate peril facing the country.

It is in fact the very lapse of four years from the time *Rasul* put everyone on notice that habeas process was available to Guantanamo prisoners, and the lapse of six years since some of these prisoners were captured and incarcerated, that stand at odds with the repeated suggestions of the dissenters that these cases should be seen as a judicial victory in a contest for power between the Court and the political branches. The several answers to the charge of triumphalism might start with a basic fact of Anglo-American constitutional history: that the power, first of the Crown and now of the Executive Branch of the United States, is necessarily limited by habeas corpus jurisdiction to enquire into the legality of executive detention. And one could explain that in this Court's exercise of responsibility to preserve habeas corpus something much more significant is involved than pulling and hauling between the judicial and political branches. Instead, though, it is enough to repeat that some of these petitioners have spent six years behind bars. After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The

Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation. And to what effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.

The majority is adamant that the Guantanamo detainees are entitled to the protections of habeas corpus – its opinion begins by deciding that question. I regard the issue as a difficult one, primarily because of the unique and unusual jurisdictional status of Guantanamo Bay. I nonetheless agree with Justice Scalia's analysis of our precedents and the pertinent history of the writ, and accordingly join his dissent. The important point for me, however, is that the Court should have resolved these cases on other grounds. Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention. The critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess. If so, there is no need for any additional process, whether called "habeas" or something else.

Congress entrusted that threshold question in the first instance to the Court of Appeals for the District of Columbia Circuit, as the Constitution surely allows Congress to do. But before the D. C. Circuit has addressed the issue, the Court cashiers the statute, and without answering this critical threshold question itself. The Court does eventually get around to asking whether review under the DTA is, as the Court frames it, an "adequate substitute" for habeas, but even then its opinion fails to determine what rights the detainees possess and whether the DTA system satisfies them. The majority instead compares the undefined DTA process to an equally undefined habeas right – one that is to be given shape only in the future by district courts on a case-by-case basis. This whole approach is misguided.

It is also fruitless. How the detainees' claims will be decided now that the DTA is gone is anybody's guess. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners' detention with the undoubted need to protect the American people from the terrorist threat – precisely the challenge Congress undertook in drafting the DTA. All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.

I believe the system the political branches constructed adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy. I therefore would dismiss these cases on that ground. With all respect for the contrary views of the majority, I must dissent.

I

The Court's opinion makes plain that certiorari to review these cases should never have been granted. As two Members of today's majority once recognized, "traditional rules governing our decision of constitutional questions and our practice of requiring the exhaustion of available remedies . . . make it appropriate to deny these petitions." Just so. Given the posture in which these cases came to us, the Court should have declined to intervene until the D. C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee's case.

It is grossly premature to pronounce on the detainees' right to habeas without first assessing whether the remedies the DTA system provides vindicate whatever rights petitioners may claim. The plurality in *Hamdi* explained that the Constitution guaranteed an American *citizen* challenging his detention as an enemy combatant the right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." The plurality specifically stated that constitutionally adequate collateral process could be provided "by an appropriately authorized and properly constituted military tribunal," given the "uncommon potential to burden the Executive at a time of ongoing military conflict." This point is directly pertinent here, for surely the *Due Process Clause* does not afford *non*-citizens in such circumstances greater protection than citizens are due.

If the CSRT procedures meet the minimal due process requirements outlined in *Hamdi*, and if an Article III court is available to ensure that these procedures are followed in future cases, there is no need to reach the Suspension Clause question. Detainees will have received all the process the Constitution could possibly require, whether that process is called "habeas" or something else. The question of the writ's reach need not be addressed.

II

The majority's overreaching is particularly egregious given the weakness of its objections to the DTA. Simply put, the Court's opinion fails on its own terms. The majority strikes down the statute because it is not an "adequate substitute" for habeas review, but fails to show what rights the detainees have that cannot be vindicated by the DTA system.

Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner's claims and, when necessary, order release. See *Brown v. Allen, 344 U.S. 443, 533, 73 S. Ct. 397, 97 L. Ed. 469 (1953)* (Jackson, J., concurring in result). Beyond that, the process a given prisoner is entitled to receive depends on the circumstances and the rights of the prisoner. See *Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).* After much hemming and hawing, the majority appears to concede that the DTA provides an Article III court competent to order release. See *ante*, at 61. The only issue in dispute is the process the Guantanamo prisoners are entitled to use to test the legality of their detention. *Hamdi* concluded that American citizens detained as enemy combatants are entitled to only limited process, and that

much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have.

A

The Court reaches the opposite conclusion partly because it misreads the statute. The majority appears not to understand how the review system it invalidates actually works – specifically, how CSRT review and review by the D. C. Circuit fit together.

First of all, the majority is quite wrong to dismiss the Executive's determination of detainee status as no more than a "battlefield" judgment, as if it were somehow provisional and made in great haste. In fact, detainees are designated "enemy combatants" only after "multiple levels of review by military officers and officials of the Department of Defense."

The majority is equally wrong to characterize the CSRTs as part of that initial determination process. They are instead a means for detainees to *challenge* the Government's determination. The Executive designed the CSRTs to mirror Army Regulation 190-8, the very procedural model the plurality in *Hamdi* said provided the type of process an enemy combatant could expect from a habeas. The CSRTs operate much as habeas courts would if hearing the detainee's collateral challenge for the first time: They gather evidence, call witnesses, take testimony, and render a decision on the legality of the Government's detention. If the CSRT finds a particular detainee has been improperly held, it can order release.

The majority insists that even if "the CSRTs satisf[ied] due process standards," full habeas review would still be necessary, because habeas is a collateral remedy available even to prisoners "detained pursuant to the most rigorous proceedings imaginable." This comment makes sense only if the CSRTs are incorrectly viewed as a method used by the Executive for determining the prisoners' status, and not as themselves part of the collateral review to test the validity of that determination.

Hamdi merits scant attention from the Court – a remarkable omission, as *Hamdi* bears directly on the issues before us. In light of the Government's national security responsibilities, the plurality found the process could be "tailored to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict." For example, the Government could rely on hearsay and could claim a presumption in favor of its own evidence.

Hamdi further suggested that this "basic process" on collateral review could be provided by a military tribunal. It pointed to prisoner-of-war tribunals as a model that would satisfy the Constitution's requirements.

Contrary to the majority, *Hamdi* is of pressing relevance because it establishes the procedures American *citizens* detained as enemy combatants can expect from a habeas court proceeding under § 2241. The DTA system of military tribunal hearings followed by Article III review looks a lot like the procedure *Hamdi* blessed. If nothing else, it is plain from the design of the DTA that

Congress, the President, and this Nation's military leaders have made a good-faith effort to follow our precedent.

Congress and the Executive did not envision "DTA review" – by which I assume the Court means D. C. Circuit review – as the detainees' only opportunity to challenge their detentions. Instead, the political branches crafted CSRT *and* D. C. Circuit review to operate together, with the goal of providing noncitizen detainees the level of collateral process *Hamdi* said would satisfy the due process rights of American citizens.

B

By virtue of its refusal to allow the D. C. Circuit to assess petitioners' statutory remedies, and by virtue of its own refusal to consider, at the outset, the fit between those remedies and due process, the majority now finds itself in the position of evaluating whether the DTA system is an adequate substitute for habeas review without knowing what rights either habeas or the DTA is supposed to protect.

To what basic process are these detainees due as habeas petitioners? The majority admits that a number of historical authorities suggest that at the time of the Constitution's ratification, "common-law courts abstained altogether from matters involving prisoners of war." If this is accurate, the process provided prisoners under the DTA is plainly more than sufficient – it allows alleged combatants to challenge both the factual and legal bases of their detentions.

Assuming the constitutional baseline is more robust, the DTA still provides adequate process, and by the majority's own standards. Today's Court opines that the Suspension Clause guarantees prisoners such as the detainees "a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law." Further, the Court holds that to be an adequate substitute, any tribunal reviewing the detainees' cases "must have the power to order the conditional release of an individual unlawfully detained." The DTA system – CSRT review of the Executive's determination followed by D. C. Circuit review for sufficiency of the evidence and the constitutionality of the CSRT process – meets these criteria.

C

At the CSRT stage, every petitioner has the right to present evidence that he has been wrongfully detained. This includes the right to call witnesses who are reasonably available, question witnesses called by the tribunal, introduce documentary evidence, and testify before the tribunal.

As to classified information, while detainees are not permitted access to it themselves, the Implementation Memo provides each detainee with a "Personal Representative" who may review classified documents at the CSRT stage and summarize them for the detainee. The prisoner's counsel enjoys the same privilege on appeal before the D. C. Circuit. Indeed, prisoners of war who challenge their status determinations under the Geneva Convention are afforded no such access, and the prisoner-of-war model is the one *Hamdi* cited as consistent with the demands of due process for *citizens*.

What alternative does the Court propose? Allow free access to classified information and ignore the risk the prisoner may eventually convey what he learns to parties hostile to this country, with deadly consequences for those who helped apprehend the detainee? If the Court can design a better system for communicating to detainees the substance of any classified information relevant to their cases, without fatally compromising national security interests and sources, the majority should come forward with it. Instead, the majority fobs that vexing question off on district courts to answer down the road.

Keep in mind that all this is just at the CSRT stage. Detainees receive additional process before the D. C. Circuit, including full access to appellate counsel and the right to challenge the factual and legal bases of their detentions. All told, the DTA provides the prisoners held at Guantanamo Bay adequate opportunity to contest the bases of their detentions, which is all habeas corpus need allow. The DTA provides more opportunity and more process, in fact, than that afforded prisoners of war or any other alleged enemy combatants in history.

D

Despite these guarantees, the Court finds the DTA system an inadequate habeas substitute, for one central reason: Detainees are unable to introduce at the appeal stage exculpatory evidence discovered after the conclusion of their CSRT proceedings. The Court hints darkly that the DTA may suffer from other infirmities, but it does not bother to name them, making a response a bit difficult. As it stands, I can only assume the Court regards the supposed defect it did identify as the gravest of the lot.

If this is the most the Court can muster, the ice beneath its feet is thin indeed. As noted, the CSRT procedures provide ample opportunity for detainees to introduce exculpatory evidence – whether documentary in nature or from live witnesses – before the military tribunals. And if their ability to introduce such evidence is denied contrary to the Constitution or laws of the United States, the D. C. Circuit has the authority to say so on review.

E

The Court's second criterion for an adequate substitute is the "power to order the conditional release of an individual unlawfully detained." As the Court basically admits, the DTA can be read to permit the D. C. Circuit to order release in light of our traditional principles of construing statutes to avoid difficult constitutional issues, when reasonably possible.

The Solicitor General concedes that remedial authority of some sort must be implied in the statute, given that the DTA – like the general habeas law itself – provides no express remedy of any kind.

The D. C. Circuit can thus order release, the CSRTs can order release, and the head of the Administrative Review Boards can, at the recommendation of those panels, order release. These multiple release provisions within the DTA system more than satisfy the majority's requirement that any tribunal substituting for a habeas court have the authority to release the prisoner.

The basis for the Court's contrary conclusion is summed up in the following sentence near the end of its opinion: "To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with newly discovered or previously unavailable evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them." In other words, any interpretation of the statute that would make it an adequate substitute for habeas must be rejected, because Congress could not possibly have intended to enact an adequate substitute for habeas. The Court could have saved itself a lot of trouble if it had simply announced this Catch-22 approach at the beginning rather than the end of its opinion.

III

For all its eloquence about the detainees' right to the writ, the Court makes no effort to elaborate how exactly the remedy it prescribes will differ from the procedural protections detainees enjoy under the DTA. What it does say leaves open the distinct possibility that its "habeas" remedy will, when all is said and done, end up looking a great deal like the DTA review it rejects.

The majority rests its decision on abstract and hypothetical concerns. Step back and consider what, in the real world, Congress and the Executive have actually granted aliens captured by our Armed Forces overseas and found to be enemy combatants:

> . The right to hear the bases of the charges against them, including a summary of any classified evidence.
>
> . The ability to challenge the bases of their detention before military tribunals modeled after Geneva Convention procedures. Some 38 detainees have been released as a result of this process. Brief for Federal Respondents 57, 60.
>
> . The right, before the CSRT, to testify, introduce evidence, call witnesses, question those the Government calls, and secure release, if and when appropriate.
>
> . The right to the aid of a personal representative in arranging and presenting their cases before a CSRT.
>
> . Before the D. C. Circuit, the right to employ counsel, challenge the factual record, contest the lower tribunal's legal determinations, ensure compliance with the Constitution and laws, and secure release, if any errors below establish their entitlement to such relief.

In sum, the DTA satisfies the majority's own criteria for assessing adequacy. This statutory scheme provides the combatants held at Guantanamo greater procedural protections than have ever been afforded alleged enemy detainees – whether citizens or aliens – in our national history.

* * *

So who has won? Not the detainees. The Court's analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D. C. Circuit – where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to "determine – through democratic means – how best" to balance the security of the American people with the detainees' liberty interests, has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.

I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing War. The Chief Justice's dissent, which I join, shows that the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows. My problem with today's opinion is more fundamental still: The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*.

I shall devote most of what will be a lengthy opinion to the legal errors contained in the opinion of the Court. Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.

I

America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen. On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D. C., and 40 in Pennsylvania. It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one. Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court's blatant *abandonment* of such a principle that produces the decision today. The President relied on our settled precedent in *Johnson v. Eisentrager* when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President's Office of Legal Counsel advised him "that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay]." Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Dept. of Defense (Dec. 28, 2001). Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.

In the long term, then, the Court's decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect. In the short term, however, the decision is devastating. At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. Some have been captured or killed. But others have succeeded in carrying on their atrocities against innocent civilians. In one case, a detainee released from Guantanamo Bay masterminded the kidnapping [sic] of two Chinese dam workers, one of whom was later shot to death when used as a human shield against Pakistani commandoes. Another former detainee promptly resumed his post as a senior Taliban commander and murdered a United Nations engineer and three Afghan soldiers. Still another murdered an Afghan judge. It was reported only last month that a released detainee carried out a suicide bombing against Iraqi soldiers in Mosul, Iraq.

These, mind you, were detainees whom *the military* had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection. Astoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified. As the Chief Justice's dissent makes clear, we have no idea what those procedural and evidentiary rules are, but they will be determined by civil courts and (in the Court's contemplation at least) will be more detainee-friendly than those now applied, since otherwise there would no reason to hold the congressionally prescribed procedures unconstitutional. If they impose a higher standard of proof (from foreign battlefields) than the current procedures require, the number of the enemy returned to combat will obviously increase.

But even when the military has evidence that it can bring forward, it is often foolhardy to release that evidence to the attorneys representing our enemies.

And one escalation of procedures that the Court *is* clear about is affording the detainees increased access to witnesses (perhaps troops serving in Afghanistan?) and to classified information. During the 1995 prosecution of Omar Abdel Rahman, federal prosecutors gave the names of 200 unindicted co-conspirators to the "Blind Sheik's" defense lawyers; that information was in the hands of Osama Bin Laden within two weeks. In another case, trial testimony revealed to the enemy that the United States had been monitoring their cellular network, whereupon they promptly stopped using it, enabling more of them to evade capture and continue their atrocities.

The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent." "The Government," it declares, "presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.

II

The Suspension Clause of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. As a court of law operating under a written Constitution, our role is to determine whether there is a conflict between that Clause and the Military Commissions Act. A conflict arises only if the Suspension Clause preserves the privilege of the writ for aliens held by the United States military as enemy combatants at the base in Guantanamo Bay, located within the sovereign territory of Cuba.

The Court purports to derive from our precedents a "functional" test for the extraterritorial reach of the writ, which shows that the Military Commissions Act unconstitutionally restricts the scope of habeas. That is remarkable because the most pertinent of those precedents, *Johnson v. Eisentrager,* conclusively establishes the opposite. There we were confronted with the claims of 21 Germans held at Landsberg Prison, an American military facility located in the American Zone of occupation in postwar Germany. They had been captured in China, and an American military commission sitting there had convicted them of war crimes – collaborating with the Japanese after Germany's surrender. Like the petitioners here, the Germans claimed that their detentions violated the Constitution and international law, and sought a writ of habeas corpus. Writing for the Court, Justice Jackson held that American courts lacked habeas jurisdiction:

> We are cited to *[sic]* no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

Lest there be any doubt about the primacy of territorial sovereignty in determining the jurisdiction of a habeas court over an alien, Justice Jackson distinguished two cases in which aliens had been permitted to seek habeas relief, on the ground that the prisoners in those cases were in custody within the sovereign territory of the United States.

Eisentrager thus held – *held* beyond any doubt – that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.

The category of prisoner comparable to these detainees are not the *Eisentrager* criminal defendants, but the more than 400,000 prisoners of war detained in the United States alone during World War II. Not a single one was accorded the right to have his detention validated by a habeas corpus action in federal court – and that despite the fact that they were present on U.S. soil. The Court's analysis produces a crazy result: Whereas those convicted and sentenced to death for war crimes are without judicial remedy, all enemy combatants detained during a war, at least insofar as they are confined in an area away from the battlefield over which the United States exercises "absolute and indefinite" control, may seek a writ of habeas corpus in federal court. And, as an even more bizarre implication from the Court's reasoning, those prisoners whom the military plans to try by full-dress Commission at a future date may file habeas petitions and secure release before their trials take place.

What drives today's decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy. The Court says that if the extraterritorial applicability of the Suspension Clause turned on formal notions of sovereignty, "it would be possible for the political branches to govern without legal constraint" in areas beyond the sovereign territory of the United States. That cannot be, the Court says, because it is the duty of this Court to say what the law is. Our power "to say what the law is" is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction. And that is precisely the question in these cases: whether the Constitution confers habeas jurisdiction on federal courts to decide petitioners' claims. It is both irrational and arrogant to say that the answer must be yes, because otherwise we would not be supreme.

But so long as there are *some* places to which habeas does not run – so long as the Court's new "functional" test will not be satisfied *in every case* – then there will be circumstances in which "it would be possible for the political branches to govern without legal constraint." Or, to put it more impartially, areas in which the legal determinations of the *other* branches will be (shudder!) *supreme*. In other words, judicial supremacy is not really assured by the constitutional rule that the Court creates. The gap between rationale and rule leads me to conclude that the Court's ultimate, unexpressed goal is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world. The "functional" test usefully evades the precedential landmine of *Eisentrager* but is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.

III

Putting aside the conclusive precedent of *Eisentrager*, it is clear that the original understanding of the Suspension Clause was that habeas corpus was not available to aliens abroad.

It is entirely clear that, at English common law, the writ of habeas corpus did not extend beyond the sovereign territory of the Crown. To be sure, the writ had an "extraordinary territorial ambit," because it was a so-called "prerogative writ," which, unlike other writs, could extend beyond the realm of England to other places where the Crown was sovereign. But prerogative writs could not issue to foreign countries, even for British subjects; they were confined to the King's dominions – those areas over which the Crown was sovereign.

Despite three opening briefs, three reply briefs, and support from a legion of *amici,* petitioners have failed to identify a single case in the history of Anglo-American law that supports their claim to jurisdiction. The Court finds it significant that there is no recorded case *denying* jurisdiction to such prisoners either. But a case standing for the remarkable proposition that the writ could issue to a foreign land would surely have been reported, whereas a case denying such a writ for lack of jurisdiction would likely not. At a minimum, the absence of a reported case either way leaves unrefuted the voluminous commentary stating that habeas was confined to the dominions of the Crown.

In sum, because I conclude that the text and history of the Suspension Clause provide no basis for our jurisdiction, I would affirm the Court of Appeals even if *Eisentrager* did not govern these cases.

* * *

Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable "functional" test for the extraterritorial reach of habeas corpus (and, no doubt, for the extraterritorial reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson's opinion for the Court in *Johnson v. Eisentrager*. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today. I dissent.

[D] GUANTANAMO AFTER BOUMEDIENE

PARHAT v. GATES

382 U.S. App. D.C. 233, 532 F.3d 834 (D.C. Cir. 2008)

Parhat is an ethnic Uighur, who fled his home in the People's Republic of China in opposition to the policies of the Chinese government. It is undisputed that he is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies. The Tribunal's determination that Parhat is an enemy combatant is based on its finding that he is "affiliated" with a Uighur independence group, and the further finding that the group was "associated" with al Qaida and the Taliban. The Tribunal's findings regarding the Uighur group rest, in key respects, on statements in classified State and Defense Department documents that provide no information regarding the sources of the reporting upon which the statements are based, and otherwise lack sufficient indicia of the statements' reliability. Parhat contends, with support of his own, that the Chinese government is the source of several of the key statements.

Parhat's principal argument on this appeal is that the record before his Combatant Status Review Tribunal s insufficient to support the conclusion that he is an enemy combatant, even under the Defense Department's own definition of that term. We agree.

First, the government suggests that several of the assertions in the intelligence documents are reliable because they are made in at least three different documents. We are not persuaded. Lewis Carroll notwithstanding, the fact that the government has "said it thrice" does not make an allegation true. *See* LEWIS CARROLL, THE HUNTING OF THE SNARK 3 (1876) ("I have said it thrice: What I tell you three times is true."). In fact, we have no basis for concluding that there are independent sources for the documents' thrice-made assertions. To the contrary, many of those assertions are made in identical language, suggesting that later documents may merely be citing earlier ones, and hence that all may ultimately derive from a single source. And as we have also noted, Parhat has made a credible argument that – at least for some of the assertions – the common source is the Chinese government, which may be less than objective with respect to the Uighurs.

Second, the government insists that the statements made in the documents are reliable because the State and Defense Departments would not have put them in intelligence documents were that not the case. This comes perilously close to suggesting that whatever the government says must be treated as true, thus rendering superfluous both the role of the Tribunal and the role that Congress assigned to this court. We do not in fact know that the departments regard the statements in those documents as reliable; the repeated insertion of qualifiers indicating that events are "reported" or "said" or "suspected" to have occurred suggests at least some skepticism.

In this opinion, we neither prescribe nor proscribe possible ways in which the government may demonstrate the reliability of its evidence. We merely reject the government's contention that it can prevail by submitting documents that read as if they were indictments or civil complaints, and that simply assert as facts the elements required to prove that a detainee falls within the definition of enemy combatant. To do otherwise would require the courts to rubber-stamp the

government's charges, in contravention of our understanding that Congress intended the court "to engage in *meaningful* review of the record."

Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir 2009). After the opinion in *Parhat*, the government concluded that the Uighur detainees could not be repatriated to China for fear of how they would be treated there. When no other country stepped forward to take them, the petitioners demanded to be released into the United States. The D.C. Circuit rejected that argument.

Kiyemba v. Obama, 130 S. Ct. 1235 (2010). The Supreme Court granted certiorari on the Uighurs' case but before the case was decided, the U.S. was able to relocate them to Bermuda, reportedly to the chagrin of the U.K. Government, where they now work as greenskeepers on a golf course.

President Obama and Guantanamo

In his second full day in office, President Obama signed three Executive Orders. The first, EO 13491, dealt with interrogation. EO 13493 established an Interagency Task Force chaired by the Attorney General and Secretary of Defense to develop policy for dealing with future detainees – specifically "to develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations that are consistent with the national security and foreign policy interests of the United States and the interests of justice."

EO 13492 dealt with Guantanamo and the existing detainees. It had three critical elements:

1. Closing Guantanamo: "The detention facilities at Guantanamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantanamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States."

2. Review of each detainee: The Attorney General was tasked to head up a review of each of the remaining 240 detainees to decide whether to release, transfer to another country, prosecute, or otherwise deal with each person. If neither release, transfer, nor prosecution "is achieved,", then the task force is to find "lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals."

3. Military Commissions: The proceedings before military commissions were suspended pending the review.

Former Vice-President Cheney went so far as to imply that President Obama would be responsible for the deaths of Americans at the hands of terrorists:

> "If you release the hard-core al-Qaeda terrorists that are held at Guantanamo, I think they go back into the business of trying to kill more Americans and mount further mass-casualty attacks," he said. "If you turn 'em loose and they go kill more Americans, who's responsible for that?"

Daily Telegraph, Feb. 4, 2009.

On May 20, 2009, Congress voted 90-6 to deny funding for the closure of Guantanamo. This action was viewed widely as a rejection of Obama's policies but some observers noted that it was merely a delay of action pending the review started in January. The next day, the President made a major policy address from in front of the Constitution at the National Archives:

> [W]e will be ill-served by some of the fear-mongering that emerges whenever we discuss this issue.
>
> Now, let me begin by disposing of one argument as plainly as I can: We are not going to release anyone if it would endanger our national security, nor will we release detainees within the United States who endanger the American people.
>
> [G]oing forward, these cases will fall into five distinct categories.
>
> First, whenever feasible, we will try those who have violated American criminal laws in federal court.
>
> The second category of cases involves detainees who violate the laws of war and are therefore best tried through military commissions.
>
> The third category of detainees includes those who have been ordered released by the courts.
>
> The fourth category of cases involves detainees who we have determined can be transferred safely to another country.
>
> Now, finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people.
>
> We must have clear, defensible, and lawful standards for those who fall into this category. I want to be very clear that our goal is to construct a legitimate legal framework for the remaining Guantanamo detainees that cannot be transferred.

Critics were quick to point out that this approach leaves two categories of detainees in highly contentious situations, some to be tried by military commissions and some to be detained apparently without trial. It is not clear how to construct a system of executive detention that is "consistent with our values and our Constitution." Nor does the speech rule out the use of classified information before military commissions.

Predictably, however, the more vociferous criticism was not from the standpoint of civil liberties but from the right. Dick Cheney again went on the offensive in a speech the same day to the American Enterprise Institute,

> [W]e promised an all-out effort to protect this country. To the very end of our administration, we kept al-Qaida terrorists busy with other problems. We focused on getting their secrets, instead of sharing ours with them. And on our watch, they never hit this country again. After the most lethal and devastating terrorist attack ever, seven-and-a-half years without a repeat is not a record to be rebuked and scorned, much less criminalized. It is a record to be continued until the danger has passed.

http://www.aei.org/speech/100050

Defense Secretary Gates, a holdover from the previous administration, appeared on the Today show and decried the "fear-mongering on this," saying that Guantanamo had to be closed if for no other reason than that it was a "taint" on America and the "name itself is a condemnation."

The Task Force reported on January 22, 2010, and recommended that 126 prisoners be transferred to other countries, 44 were referred for prosecution either in federal court or before military commissions, and 48 "were determined to be too dangerous to transfer but not feasible for prosecution." Those 48 would be held indefinitely without trial subject to habeas corpus proceedings following *Boumediene*.

An unusually articulate defense of keeping Guantanamo open was this exchange on NPR between host Steve Inskeep and Bradford Berenson, an attorney who "previously served in the Office of White House Counsel where he worked on detainee policy."

> INSKEEP: We've heard plenty of arguments for closing the Guantanamo detention center. What is the argument for keeping it open?
>
> Mr. BERENSON: Guantanamo has become a symbol for a set of practices in the war on terror that people object to. But it's really not Guantanamo that people have a problem with. It's the practices involving detainees at Guantanamo that are the fodder for the critics. So closing Guantanamo really will have only symbolic value. The things that we are doing at Guantanamo Bay will still have to take place somewhere and Guantanamo is in many ways the ideal location to have prison camps of this kind. It is completely secure, so there are no risks to American civilian populations, no risks of escape, yet it is close to the United States so that policy-makers, lawyers, journalists, can have ready access, but it is not within the United States. In that sense, Guantanamo's somewhat unique.
>
> INSKEEP: Forgive me, are you saying that the practices that have been widely criticized in the way that US has treated detainees are going to continue no matter what?

> Mr. BERENSON: No, I don't mean that the abuses or the violations of US policy that have occurred from time to time are going to take place elsewhere or anyway. But those things are not really what are stimulating the criticism. The critics of Guantanamo Bay and the critics of the administration's detainee policy don't like the fact that we are holding people as enemy combatants in a war on terror and that we are keeping them outside of the criminal justice system. That won't change.

Meanwhile, the federal courts in D.C. continued to process cases coming out of Guantanamo. Although the D.C. Circuit had earlier ordered the release of several Uighar detainees in *Parhat*, the administration was unable to find a country willing to take them until June 11, when they were transferred to Bermuda – to the apparent distress of the British government. The D.C. courts, however, quit reviewing CSRT determinations after the holding in *Bismullah* below, which decided that review would have to be by habeas corpus rather than by CSRT reviews.

So where do Guantanamo prisoners go if we decide to keep them? In an ironic and almost amusing byplay of the Guantanamo controversy, there are two western U.S. communities squabbling over the "hosting" of detainees. Although most residents of Canon City, Colorado, were unconcerned about having more terrorists housed at the nearby Florence supermax prison, a few worried that the move could make the town a target for attack while others worried that "large numbers of Muslims – the family members and friends of inmates – would move into town if the transfer occurred. Property values would fall, [one] said, and some family members of terrorists might be terrorists, too." *In Area Packed With Prisons, a Split on Jihadists*, N.Y. TIMES (May 23, 2009).

Meanwhile, up the road a ways, the town of Hardin, Montana, is lobbying to get more prisoners.

> Hardin, a dusty town of 3,400 people so desperate that it built a $27 million jail a couple of years ago in the vain hope it would be a moneymaker, is offering to house hundreds of Gitmo detainees at the empty, never-used institution. The medium-security jail was conceived as a holding facility for drunks and other scofflaws, but town leaders said it could be fortified with a couple of guard towers and some more concertina wire. Apart from that, it is a turnkey operation, fully outfitted with everything from cafeteria trays and sweatsocks to 88 surveillance cameras. "I'm a lot more worried about some sex offender walking my streets than a guy that's a world-class terrorist. He's not going to escape, pop into the IGA (supermarket), grab a six-pack and go sit in the park."

Montana Town Offers to Take Guantanamo Prisoners, ASSOCIATED PRESS (May 29, 2009).

Israeli Practice. An amicus brief filed with the Supreme Court in the *Boumediene* case on behalf of "Specialists in Israeli Military Law and Constitutional Law" makes the following points:

> Despite great danger and pressing needs for intelligence, Israel affords all detainees prompt, independent judicial review of their detention, protected by procedural safeguards and aided by access to counsel.
>
> 1. Unlike the United States, Israel provides suspected unlawful combatants the right to judicial review of the basis for their detention within no more than 14 days of their seizure.
>
> 2. Unlike the United States, Israel provides suspected unlawful combatants the right to judicial review in a tribunal independent from the executive.
>
> 3. Unlike the United States, Israel limits detention to only those circumstances in which the suspected unlawful combatant poses a threat to State security and when no other means are available to neutralize the threat.
>
> 4. Unlike the United States, Israel subjects the evidence and judgments supporting the detention of suspected unlawful combatants to searching judicial review.
>
> 5. Unlike the United States, Israel prohibits all inhumane methods of interrogation and limits the use of coerced testimony against suspected unlawful combatants when assessing the basis for their detention.
>
> 6. Unlike the United States, Israel requires judicial approval before limiting a suspected unlawful combatant's access to classified information offered in support of detention.
>
> 7. Unlike the United States, Israel provides access to counsel within no more than 34days.
>
> 8. Unlike the United States, Israel provides for periodic review of detention at least once every 6 months, permitting the continuation of detention only upon a fresh judicial finding of dangerousness following a fully adversarial hearing.

Notice particularly point #3 in the Israeli amicus brief, in which a standard for detention is set out. Compare the definition of "unlawful enemy combatant" in the MCA: "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant."

Could you be an unlawful enemy combatant if you sent money to a Pakistani opposition group without knowing whether they might engage in violence against a government friendly to the U.S.? Perhaps you should be prevented from doing so, but should you not be entitled to a hearing to determine if indeed you had done so?

AL-BIHANI v. OBAMA
590 F.3d 866 (D.C. Cir. 2010)

BROWN, Circuit Judge:

Ghaleb Nassar Al-Bihani appeals the denial of his petition for a writ of habeas corpus and seeks reversal or remand. He claims his detention is unauthorized by statute and the procedures of his habeas proceeding were constitutionally infirm. We reject these claims and affirm the denial of his petition.

Al-Bihani, a Yemeni citizen, has been held at the U.S. naval base detention facility in Guantanamo Bay, Cuba since 2002. He came to Guantanamo by a circuitous route. It began in Saudi Arabia in the first half of 2001 when a local sheikh issued a religious challenge to Al-Bihani. In response, Al-Bihani traveled through Pakistan to Afghanistan eager to defend the Taliban's Islamic state against the Northern Alliance. Along the way, he stayed at what the government alleges were Al Qaeda-affiliated guesthouses; Al-Bihani only concedes they were affiliated with the Taliban. During this transit period, he may also have received instruction at two Al Qaeda terrorist training camps, though Al-Bihani disputes this. What he does not dispute is that he eventually accompanied and served a paramilitary group allied with the Taliban, known as the 55th Arab Brigade, which included Al Qaeda members within its command structure and which fought on the front lines against the Northern Alliance. He worked as the brigade's cook and carried a brigade-issued weapon, but never fired it in combat. Combat, however – in the form of bombing by the U.S.-led Coalition that invaded Afghanistan in response to the attacks of September 11, 2001 – forced the 55th to retreat from the front lines in October 2001. At the end of this protracted retreat, Al-Bihani and the rest of the brigade surrendered, under orders, to Northern Alliance forces, and they kept him in custody until his handover to U.S. Coalition forces in early 2002. The U.S. military sent Al-Bihani to Guantanamo for detention and interrogation.

Soon after the *Boumediene* decision, the district court, acting with admirable dispatch, revived Al-Bihani's petition and convened counsel to discuss the process to be used. The district court finalized the procedure in a published case management order. *See Al-Bihani v. Bush (CMO),* 588 F. Supp. 2d 19 (D.D.C. 2008) (case management order). The order established that the government had the burden of proving the legality of Al-Bihani's detention by a preponderance of the evidence; it obligated the government to explain the legal basis for Al-Bihani's detention, to share all documents used in its factual return, and to turn over any exculpatory evidence found in preparation of its case.

Adopting a definition that allowed the government to detain anyone "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,"[19] the district court found Al Bihani's actions met the standard. It cited as sufficiently credible the evidence – primarily drawn from Al-Bihani's own admissions during interrogation – that Al-Bihani stayed at Al Qaeda-affiliated guesthouses and that he served in and retreated with the 55th Arab Brigade.

Al-Bihani's many arguments present this court with two overarching questions regarding the detainees at the Guantanamo Bay naval base. The first concerns whom the President can lawfully detain pursuant to statutes passed by Congress. The second asks what procedure is due to detainees challenging their detention in habeas corpus proceedings. The Supreme Court has provided scant guidance on these questions, consciously leaving the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion. In this decision, we aim to narrow the legal uncertainty that clouds military detention.

Al-Bihani challenges the statutory legitimacy of his detention by advancing a number of arguments based upon the international laws of war. He first argues that relying on "support," or even "substantial support" of Al Qaeda or the Taliban as an independent basis for detention violates international law. As a result, such a standard should not be read into the ambiguous provisions of the AUMF.

Before considering these arguments in detail, we note that all of them rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war. This premise is mistaken. There is no indication that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.

Al-Bihani is lawfully detained whether the definition of a detainable person is, as the district court articulated it, "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," or the modified definition offered by the government that requires that an individual "substantially support" enemy forces.

While we think the facts of this case show Al-Bihani was both part of and substantially supported enemy forces, we realize the picture may be less clear in other cases where facts may indicate only support, only membership, or neither. We have no occasion here to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention

[19] This was the initial definition offered by the government as the controlling standard. In its filings before this court, the government modified the definition in its initial habeas return to replace the term "support" with "substantially supported." The district court adopted the initial definition.

standard. We merely recognize that both prongs are valid criteria that are independently sufficient to satisfy the standard.

With the government's detention authority established as an initial matter, we turn to the argument that Al-Bihani must now be released according to longstanding law of war principles because the conflict with the Taliban has allegedly ended. The principle Al-Bihani espouses – were it accurate – would make each successful campaign of a long war but a Pyrrhic prelude to defeat. The initial success of the United States and its Coalition partners in ousting the Taliban from the seat of government and establishing a young democracy would trigger an obligation to release Taliban fighters captured in earlier clashes. Thus, the victors would be commanded to constantly refresh the ranks of the fledgling democracy's most likely saboteurs.

Unlike either Hamdi or Al-Marri, Al-Bihani is a non-citizen who was seized in a foreign country. Requiring highly protective procedures at the tail end of the detention process for detainees like Al-Bihani would have systemic effects on the military's entire approach to war. From the moment a shot is fired, to battlefield capture, up to a detainee's day in court, military operations would be compromised as the government strove to satisfy evidentiary standards in anticipation of habeas litigation.

In addition to the *Hamdi* plurality's approving treatment of military tribunal procedure, it also described as constitutionally adequate – even for the detention of U.S. citizens – a "burden-shifting scheme" in which the government need only present "credible evidence that the habeas petitioner meets the enemy-combatant criteria" before "the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." That description mirrors a preponderance standard.

We find Al-Bihani's hearsay challenges to be similarly unavailing. Al-Bihani claims that government reports of his interrogation answers – which made up the majority, if not all, of the evidence on which the district court relied – and other informational documents were hearsay improperly admitted absent an examination of reliability and necessity.

But that such evidence was hearsay does not automatically invalidate its admission – it only begins our inquiry. We observe Al-Bihani cannot make the traditional objection based on the Confrontation Clause of the Sixth Amendment. This is so because the *Confrontation Clause* applies only in criminal prosecutions, and is not directly relevant to the habeas setting.

Therefore, the question a habeas court must ask when presented with hearsay is not whether it is admissible – it is always admissible – but what probative weight to ascribe to whatever indicia of reliability it exhibits.

In Al-Bihani's case, the district court had ample contextual information about evidence in the government's factual return to determine what weight to give various pieces of evidence. [T]he district court afforded Al-Bihani the opportunity in a traverse to rebut the evidence and to attack its credibility. Further, Al-Bihani did not contest the truth of the majority of his admissions

upon which the district court relied, enhancing the reliability of those reports. We therefore find that the district court did not improperly admit hearsay evidence.

For these reasons, the order of the district court denying Al-Bihani's petition for a writ of habeas corpus is

Affirmed.

BROWN, *Circuit Judge*, concurring:

The Supreme Court in *Boumediene* and *Hamdi* charged this court and others with the unprecedented task of developing rules to review the propriety of military actions during a time of war, relying on common law tools. We are fortunate this case does not require us to demarcate the law's full substantive and procedural dimensions. But as other more difficult cases arise, it is important to ask whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation. The common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple. None of those factors exist in the Guantanamo context.

These cases present hard questions and hard choices, ones best faced directly. Judicial review, however, is just that: *re*-view, an indirect and necessarily backward looking process. And looking backward may not be enough in this new war. The saying that generals always fight the last war is familiar, but familiarity does not dull the maxim's sober warning.

The legal issues presented by our nation's fight with this enemy have been numerous, difficult, and to a large extent novel. What drives these issues is the unconventional nature of our enemy: they are neither soldiers nor mere criminals, claim no national affiliation, and adopt long-term strategies and asymmetric tactics that exploit the rules of open societies without respect or reciprocity.

War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.

Uthman v. Obama, 637 F.3d 400 (D.C. Cir. 2011). Uthman was alleged to have been a bodyguard for Osama bin Laden. District Judge Kennedy described the evidence against him as consisting mostly of highly questionable photo identifications of him by other detainees under "harsh interrogation."

> In sum, the Court gives credence to evidence that Uthman (1) studied at a school at which other men were recruited to fight for Al Qaeda; (2) received money for his trip to Afghanistan from an individual who supported jihad; (3) traveled to Afghanistan along a route also taken by Al Qaeda recruits; (4) was seen at two Al Qaeda guesthouses in Afghanistan; and (5) was with Al Qaeda members in the vicinity of Tora Bora after the battle that occurred there.
>
> Even taken together, these facts do not convince the Court by a preponderance of the evidence that Uthman received and executed orders from Al Qaeda. Certainly none of the facts respondents have demonstrated are true are direct evidence of fighting or otherwise "receiv[ing] and execut[ing] orders," and they also do not, even together, paint an incriminating enough picture to demonstrate that the inferences respondents ask the Court to make are more likely accurate than not. Associations with Al Qaeda members, or institutions to which Al Qaeda members have connections, are not alone enough to demonstrate that, more likely than not, Uthman was part of Al Qaeda.

On appeal, the D.C. Circuit held that the district court had applied an improper standard to the facts and remanded with instructions that the habeas petition be denied.

> The District Court stated that "the key question" in determining someone's membership in al Qaeda "is whether an individual receives and executes orders from the enemy force's combat apparatus." The District Court derived that test from two previous district court opinions applying this "command structure test."
>
> Several of this Court's cases – all decided after the District Court granted Uthman's petition – have held that the "command structure test" does not reflect the full scope of the Executive's detention authority under the AUMF. "These decisions make clear that the determination of whether an individual is 'part of' al-Qaida 'must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.'" Salahi v. Obama, 625 F.3d 745, 751-52 (D.C. Cir. 2010) (quoting Bensayah, 610 F.3d at 725). To be sure, demonstrating that someone is part of al Qaeda's command structure is sufficient to show that person is part of al Qaeda. But it is not necessary. Indicia other than the receipt and execution of al Qaeda's orders may prove "that a particular individual is sufficiently involved with the organization to be deemed part of it."

Salahi v. Obama, 625 F.3d 745 (D.C. Cir. 2010). Salahi was taken into custody by the U.S. in November 2001 from Mauritania on suspicion that he was connected to the failed "Millennium Plot" for which Ahmed Ressam was

convicted of attempting to bomb Los Angeles International Airport. Ressam was part of a group in Montreal, Canada, with whom Salahi had maintained contact over the years. Salahi admitted to going to Afghanistan in early 1990 to join alQaeda but claimed that "his association with al-Qaida ended after 1992, and that, even though he remained in contact thereafter with people he knew to be al-Qaida members, he did nothing for al-Qaida after that time." The district court found that most of the government's evidence against Salahi consisted of his own statements, which were not particularly credible because they had been acquired during or after "extensive and severe mistreatment" at Guantanamo. The court concluded:

> The government had to adduce evidence – which is different from intelligence – showing that it was more likely than not that Salahi was "part of" al-Qaida. To do so, it had to show that the support Salahi undoubtedly did provide from time to time was provided within al-Qaida's command structure. The government has not done so. The government has shown that Salahi was an al-Qaida sympathizer – perhaps a "fellow traveler"; that he was in touch with al-Qaida members; and that from time to time, before his capture, he provided sporadic support to members of al-Qaida.
>
> The government's problem is that its proof that Salahi gave material support to terrorists is so attenuated, or so tainted by coercion and mistreatment, or so classified, that it cannot support a successful criminal prosecution. Nevertheless, the government wants to hold Salahi indefinitely, because of its concern that he might renew his oath to al-Qaida and become a terrorist upon his release. That concern may indeed be well-founded. Salahi fought with al-Qaida in Afghanistan (twenty years ago), associated with at least a half-dozen known al-Qaida members and terrorists, and somehow found and lived among or with al-Qaida cell members in Montreal. But a habeas court may not permit a man to be held indefinitely upon suspicion, or because of the government's prediction that he may do unlawful acts in the future – any more than a habeas court may rely upon its prediction that a man will not be dangerous in the future and order his release if he was lawfully detained in the first place. The question, upon which the government had the burden of proof, was whether, at the time of his capture, Salahi was a "part of al-Qaida. On the record before me, I cannot find that he was.

On appeal, the D.C. Circuit noted that the district court had applied the now-repudiated "command structure" test but it also could not accept the government's position that the burden of proof was on Salahi merely because he had once been engaged with alQaeda.

> [T]he government contends that Salahi should bear the burden of proving that he disassociated from al-Qaida after swearing bayat to the organization in 1991. [But] the relevant inquiry is whether Salahi was "part of" al-Qaida when captured. Therefore, in order to shift the burden of proof to Salahi, we would have to presume that having once

> sworn bayat to al-Qaida, Salahi remained a member of the organization until seized in November 2001. Although such a presumption may be warranted in some cases, such as where an individual swore allegiance to al-Qaida on September 12, 2001, and was captured soon thereafter, the unique circumstances of Salahi's case make the government's proposed presumption inappropriate here.
>
> When Salahi took his oath of allegiance in March 1991, al-Qaida and the United States shared a common objective: they both sought to topple Afghanistan's Communist government. Not until later did al-Qaida begin publicly calling for attacks against the United States. Salahi's March 1991 oath of bayat is insufficiently probative of his relationship with al-Qaida at the time of his capture in November 2001 to justify shifting the burden to him to prove that he disassociated from the organization.
>
> Salahi is not accused of participating in military action against the United States. Instead, the government claims that Salahi was "part of" al-Qaida because he swore bayat and thereafter provided various services to the organization, including recruiting, hosting leaders, transferring money, etc. Under these circumstances, whether Salahi performed such services pursuant to al-Qaida orders may well be relevant to determining if he was "part of" al-Qaida or was instead engaged in the "purely independent conduct of a freelancer." Bensayah, 610 F.3d at 725. The problem with the district court's decision is that it treats the absence of evidence that Salahi received and executed orders as dispositive.

The government urges us to reverse and direct the district court to deny Salahi's habeas petition. Although we agree that Awad and Bensayah require that we vacate the district court's judgment, we think the better course is to remand for further proceedings consistent with those opinions. For example, does the government's evidence support the inference that even if Salahi was not acting under express orders, he nonetheless had a tacit understanding with al-Qaida operatives that he would refer prospective jihadists to the organization? Did al-Qaida operatives ask Salahi to assist the organization with telecommunications projects in Sudan, Afghanistan, or Pakistan? Did Salahi provide any assistance to al-Qaida in planning denial-of-service computer attacks, even if those attacks never came to fruition? May the court infer from Salahi's numerous ties to known al-Qaida operatives that he remained a trusted member of the organization? With answers to questions like these, which may require additional testimony, the district court will be able to determine in the first instance whether Salahi was or was not "sufficiently involved with [al-Qaida] to be deemed part of it." Bensayah, 610 F.3d at 725.

ABDAH [ODAINI] v. OBAMA
717 F. Supp. 2d 21 (D.D.C. 2010)

KENNEDY, District Judge:

Mohamed Mohamed Hassan Odaini, a Yemeni citizen, was seized by Pakistani authorities on March 28, 2002 and has been held by the United States at the naval base detention facility in Guantanamo Bay, Cuba since June 2002. [T]he Court concludes that respondents have failed to demonstrate that the detention of Odaini is lawful. Therefore, Odaini's petition shall be granted.

I. LEGAL STANDARDS

A. Scope of the Government's Detention Authority

The U.S. Supreme Court has held that the District Court for the District of Columbia has jurisdiction over petitions for writs of habeas corpus brought by detainees held at Guantanamo Bay pursuant to the AUMF. *See Boumediene v. Bush*; *Rasul v. Bush*. The Supreme Court has provided "scant guidance," however, as to whom respondents may lawfully detain under the statute. *AI-Bihani v. Obama*.

In the absence of controlling law governing the question of by what standard to evaluate the lawfulness ofthe detention of the individuals held at Guantanamo Bay, the Court shall rely on the reasoning of other Judges of this Court who have thoroughly and thoughtfully addressed this issue. Accordingly, consistent with Judge Bates's ruling in *Hamlily v. Obama*, the government may detain "those who are part of the Taliban or al Qaida forces." As Judge Walton ruled in *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009), such membership requires that the person in question "have some sort of 'structured' role in the 'hierarchy' of the enemy force."

B. Burden of Proof

As stated in the Amended Case Management Order that governs this case, "[t]he government bears the burden of proving by a preponderance of the evidence that the petitioner's detention is lawful." *In re Guantanamo Bay Litig*. Accordingly, Odaini need not prove that he is unlawfully detained; rather, respondents must produce "evidence which as a whole shows that the fact sought to be proved," that Odaini was part of Al Qaeda, "is more probable than not."

C. Evidentiary Issues

The Court notes at the outset two issues regarding the evidence in this case. First, the Court has permitted the admission of hearsay evidence but considers at this merits stage the accuracy, reliability, and credibility of all of the evidence presented to support the parties' arguments. This approach is consistent with a directive from the D.C. Circuit. *See Al Bihani* ("[T]he question a habeas court must ask when presented with hearsay is not whether it is admissible – it is always admissible – but what probative weight to ascribe to whatever indicia of reliability it exhibits."). The Court's assessment of the weight properly accorded to particular pieces of evidence appears throughout this memorandum opinion.

II. ANALYSIS

A. The Evidence Before the Court Overwhelmingly Supports Odaini's Contention that He is Unlawfully Detained.

The Court begins by summarizing the evidence in the record directly related to Odaini's case. This evidence consists of statements Odaini has made while in detention about his time in Pakistan, statements other Guantanamo Bay detainees seized at the same time and location as Odaini have made while in U.S. custody, and respondents' records regarding Odaini's detention.

From the first time he was interrogated in American captivity to the declaration he created for use in this litigation, Odaini has told the same story. He was bom in Taiz, Yemen on September 20, 1983. He is Muslim. His father, who works for the Yemeni Security Service, has two wives and sixteen children. Odaini went to high school in his hometown. Odaini's father wanted Odaini to pursue religious studies in Pakistan after his graduation from high school in 2001.Odaini's father provided his son with a passport, a visa for travel to Pakistan, a plane ticket to Lahore, Pakistan via Karachi, Pakistan, and money to take with him on his journey.

Odaini enrolled in Salafia University, where he was one of approximately two hundred students. He lived in a university dormitory. Another student, whose name was Emad, told Odaini he was welcome to visit Emad's of f-campus home, which was a guesthouse. Odaini accepted this invitation on the evening of March 27, 2002, when he went to Issa House for dinner; after spending the evening talking to other Yemeni, Salafia University students who lived there about religion as well as "their past and where they lived in Yemen," he decided to spend the night. There were other people in the house, but Odaini did not know them.

At around 2:00 a.m., Pakistani police raided the house and seized all of its occupants. After his initial seizure, Odaini was held in Lahore and then taken to Islamabad, Pakistan. He was transported to Bagram, Afghanistan, then Kandahar, Afghanistan, and ultimately to Guantanamo Bay, Cuba. He was told shortly after being taken into custody and upon arrival at Guantanamo Bay that he would be released within two weeks. Odaini has been repeatedly interrogated while in U.S. custody, and has consistently told the story described in this memorandum opinion. He has also consistently, explicitly denied membership in Al Qaeda.

[Many statements from other unidentified detainees corroborated Odaini's account.]

B. Respondents Have Failed to Show that Odaini is Lawfully Detained.

[Much of the counter evidence was classified and redacted from the court's opinion. The court noted that it consisted mostly of information about the nature of Issa House and connections to Abu Zubaydah, but nothing in those accounts credibly connected Odaini himself to Al Qaeda activities.]

Respondents also argue that Odaini's assertion that he was a student is a cover story the occupants of lssa House had agreed to use. Only by refusing to deviate from a predetermined conclusion could this explanation of consistent statements from so many men over so many years seem at all reasonable. This theory ignores the fact that several occupants of the house did not claim to be students but nevertheless said that Odaini was a student.

Furthermore, to find that Odaini's version of events is a cover story in the complete absence of information suggesting that he was anything other than a student would render meaningless the principle of law that places the burden of proof on respondents rather than Odaini.

C. Conclusion

Respondents have kept a young man from Yemen in detention in Cuba from age eighteen to age twenty-six. They have prevented him from seeing his family and denied him the opportunity to complete his studies and embark on a career. The evidence before the Court shows that holding Odaini in custody at such great cost to him has done nothing to make the United States more secure. There is no evidence that Odaini has any connection to Al Qaeda. Consequently, his detention is not authorized by the AUMF. The Court therefore emphatically concludes that Odaini's motion must be granted.

III. CONCLUSION

For the foregoing reasons, Odaini's petition for a writ of habeas corpus shall be granted.

Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010). Bensayah, an Algerian citizen, was arrested by the Bosnian police on immigration charges in late 2001. He and five other Algerian men arrested in Bosnia were suspected of plotting to attack the United States Embassy in Sarajevo but eventually were released for insufficient evidence. The six were turned over to the U.S. and transported to Guantanamo in early 2002.

The district court granted habeas relief to the other five on the ground that there was no reliable evidence that they had intended to travel to Afghanistan to fight against the U.S. The district court, however, denied Bensayah's petition for habeas corpus, holding that the Government had adduced sufficient evidence to show it was more likely than not that he had "supported" al Qaeda. The evidence for this conclusion consisted primarily of a classified document plus corroboration from a classified source. On appeal, the Government disclaimed reliance on the source and abandoned the argument that he had provided "support" for al Qaeda. Instead, it argued that he was "part of" al Qaeda. The court of appeals panel started with this observation:

> Although it is clear al Qaeda has, or at least at one time had, a particular organizational structure, the details of its structure are generally unknown, but it is thought to be somewhat amorphous. As a result, it is impossible to provide an exhaustive list of criteria for

> determining whether an individual is "part of" al Qaeda. That determination must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization. That an individual operates within al Qaeda's formal command structure is surely sufficient but is not necessary to show he is "part of" the organization; there may be other indicia that a particular individual is sufficiently involved with the organization to be deemed part of it, but the purely independent conduct of a freelancer is not enough.

Without the asserted corroboration for the classified document, the court of appeal found there was insufficient evidence to show that he was "part of" an organization and remanded for the district court to receive any further evidence that the Government might choose to bring forward.

ProPublica is an "investigative journalism" group with sufficient credibility to be linked on an American Bar Association website. According to their counts, as of August, 2010, 53 Guantanamo detainee habeas corpus petitions had been decided by federal courts, while approximately 100 similar lawsuits are pending. Of the 53 decided cases, 37 have been declared eligible for release (that includes the 17 Uighur detainees considered in *Parhat*) while 16 lost their habeas claims. *http://projects.propublica.org/tables/gitmo-detainee-lawsuits* Thus, taking the Uighurs out of the mix, the count would be 20-16 at that time. The results in cases since then have been similarly mixed.

NOTES AND QUESTIONS

What do you think of each of the following reasons for military detention?

a. *Indeterminate Duration of Hostilities.* If this were a war, when would prisoners be repatriated and to what country? If either Hamdi or Padilla were prosecuted for a criminal violation and sentenced to a few years in prison, how safe would you feel with them on the streets at the end of their sentence? Should this be a reason for avoiding the civilian justice system?

b. *Detention as Incentive To Talk.* The information presented by the Government in all three cases emphasized that government agents wanted to pump the detainees for further information about al Qaeda and other operatives who may still be at large. If they were treated as recalcitrant witnesses before a grand jury, for example, they could be imprisoned until they agreed to disclose. But the government argues that the mere fact of isolation creates a sense of dependency on the interrogator which is conducive to disclosure. Is this a reasonable constitutional argument? To what extent might the Supreme Court have been influenced by the disclosures of prisoner abuse made public while these cases were pending?

c. *Detention to Prevent Violent Acts*. Administrative detention to prevent violence has been discussed loosely in the past, particularly with respect to child molesters and the criminally insane. The Supreme Court has flatly rejected detention without at least a judicial finding of propensity to harm.

d. *Problems With the Civilian Criminal System*. The principal rights that Hamdi and Padilla would be able to claim if charged in the civilian criminal system are notice of charges, right to counsel, confrontation of witnesses, public trial by jury. How would these same rights fare in the military justice system if charges were brought? *See United States v. Grunden*, *supra*.

e. *The Mosaic Concern*. If Padilla were brought to trial, then the methods by which federal agents discovered his alleged plot would be much more likely to come out into public scrutiny.

[B] Habeas Corpus in Iraq and Afghanistan

MUNAF v. GEREN
553 U.S. 674 (2008)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Multinational Force-Iraq (MNF-I) is an international coalition force operating in Iraq composed of 26 different nations, including the United States. The force operates under the unified command of United States military officers, at the request of the Iraqi Government, and in accordance with United Nations Security Council Resolutions. Pursuant to the U. N. mandate, MNF-I forces detain individuals alleged to have committed hostile or warlike acts in Iraq, pending investigation and prosecution in Iraqi courts under Iraqi law.

These consolidated cases concern the availability of habeas corpus relief arising from the MNF-I's detention of American citizens who voluntarily traveled to Iraq and are alleged to have committed crimes there. We are confronted with two questions. *First*, do United States courts have jurisdiction over habeas corpus petitions filed on behalf of American citizens challenging their detention in Iraq by the MNF-I? *Second*, if such jurisdiction exists, may district courts exercise that jurisdiction to enjoin the MNF-I from transferring such individuals to Iraqi custody or allowing them to be tried before Iraqi courts?

We conclude that the habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition. Under circumstances such as those presented here, however, habeas corpus provides petitioners with no relief.

I

Pursuant to its U. N. mandate, the MNF-I has "'the authority to take all necessary measures to contribute to the maintenance of security and stability in

Iraq.'" The multinational force, for example, conducts combat operations against insurgent factions, trains and equips Iraqi security forces, and aids in relief and reconstruction efforts.

MNF-I forces also detain individuals who pose a threat to the security of Iraq. The Government of Iraq retains ultimate responsibility for the arrest and imprisonment of individuals who violate its laws, but because many of Iraq's prison facilities have been destroyed, the MNF-I agreed to maintain physical custody of many such individuals during Iraqi criminal proceedings. MNF-I forces are currently holding approximately 24,000 detainees. An American military unit, Task Force 134, oversees detention operations and facilities in Iraq, including those located at Camp Cropper, the detention facility currently housing Shawqi Omar and Mohammad Munaf (hereinafter petitioners). The unit is under the command of United States military officers who report to General David Petraeus.

A

Petitioner Shawqi Omar, an American-Jordanian citizen, voluntarily traveled to Iraq in 2002. In October 2004, Omar was captured and detained in Iraq by U.S. military forces operating as part of the MNF-I during a raid of his Baghdad home. Omar is believed to have provided aid to Abu Musab al-Zarqawi – the late leader of al Qaeda in Iraq – by facilitating his group's connection with other terrorist groups, bringing foreign fighters into Iraq, and planning and executing kidnappings in Iraq.

Following Omar's arrest, a three-member MNF-I Tribunal composed of American military officers concluded that Omar posed a threat to the security of Iraq and designated him a "security internee." The tribunal also found that Omar had committed hostile and warlike acts, and that he was an enemy combatant in the war on terrorism. In accordance with Article 5 of the Geneva Convention, Omar was permitted to hear the basis for his detention, make a statement, and call immediately available witnesses.

In addition to the review of his detention by the MNF-I Tribunal, Omar received a hearing before the Combined Review and Release Board (CRRB) – a nine-member board composed of six representatives of the Iraqi Government and three MNF-I officers. The CRRB, like the MNF-I Tribunal, concluded that Omar's continued detention was necessary because he posed a threat to Iraqi security. At all times since his capture, Omar has remained in the custody of the United States military operating as part of the MNF-I.

Omar's wife and son filed a next-friend petition for a writ of habeas corpus on Omar's behalf in the District Court for the District of Columbia. After the Department of Justice informed Omar that the MNF-I had decided to refer him to the Central Criminal Court of Iraq (CCCI) for criminal proceedings, his attorney sought and obtained a preliminary injunction barring Omar's "remov[al] . . . from United States or MNF-I custody."

B

Petitioner Munaf, a citizen of both Iraq and the United States, voluntarily traveled to Iraq with several Romanian journalists. He was to serve as the journalists' translator and guide. Shortly after arriving in Iraq, the group was kidnapped and held captive for two months. After the journalists were freed, MNF-I forces detained Munaf based on their belief that he had orchestrated the kidnappings.

A three-judge MNF-I Tribunal conducted a hearing to determine whether Munaf's detention was warranted. The MNF-I Tribunal reviewed the facts surrounding Munaf's capture, interviewed witnesses, and considered the available intelligence information. Munaf was present at the hearing and had an opportunity to hear the grounds for his detention, make a statement, and call immediately available witnesses. At the end of the hearing, the tribunal found that Munaf posed a serious threat to Iraqi security, designated him a "security internee," and referred his case to the Central Criminal Court of Iraq (CCCI) for criminal investigation and prosecution.

During his CCCI trial, Munaf admitted on camera and in writing that he had facilitated the kidnapping of the Romanian journalists. He also appeared as a witness against his alleged co-conspirators. Later in the proceedings, Munaf recanted his confession, but the CCCI nonetheless found him guilty of kidnapping. On appeal, the Iraqi Court of Cassation vacated Munaf's conviction and remanded his case to the CCCI for further investigation. The Court of Cassation directed that Munaf was to "remain in custody pending the outcome" of further criminal proceedings.

Meanwhile, Munaf 's sister filed a next-friend petition for a writ of habeas corpus in the District Court for the District of Columbia.

II

The Solicitor General argues that the federal courts lack jurisdiction over the detainees' habeas petitions because the American forces holding Omar and Munaf operate as part of a multinational force. The United States acknowledges that Omar and Munaf are American citizens held overseas in the immediate "'physical custody'" of American soldiers who answer only to an American chain of command. We think these concessions the end of the jurisdictional inquiry.

The Government's primary contention is that the District Courts lack jurisdiction in these cases because of this Court's decision in *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam). That slip of a case cannot bear the weight the Government would place on it. In *Hirota*, Japanese citizens sought permission to file habeas corpus applications directly in this Court. The petitioners were noncitizens detained in Japan. They had been convicted and sentenced by the International Military Tribunal for the Far East – an international tribunal established by General Douglas MacArthur acting, as the Court put it, in his capacity as "the agent of the Allied Powers." Although those familiar with the history of the period would appreciate the possibility of confusion over who General MacArthur took orders from, the Court concluded that the sentencing tribunal was "not a tribunal of the United States." The Court then held that, "[u]nder the foregoing circumstances," United States courts had

"no power or authority to review, to affirm, set aside or annul the judgments and sentences" imposed by that tribunal. Accordingly, the Court denied petitioners leave to file their habeas corpus applications, without further legal analysis.

Even if the Government is correct that the international authority at issue in *Hirota* is no different from the international authority at issue here, the present "circumstances" differ in another respect. These cases concern American citizens while *Hirota* did not, and the Court has indicated that habeas jurisdiction can depend on citizenship.

III

We now turn to the question whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution.

[A] party seeking a preliminary injunction must demonstrate, among other things, "a likelihood of success on the merits." But one searches the opinions below in vain for any mention of a likelihood of success as to the merits of Omar's habeas petition. Instead, the District Court concluded that the "*jurisdictional* issues" presented questions "so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation."

A difficult question as to jurisdiction is, of course, no reason to grant a preliminary injunction. It says nothing about the "likelihood of success on the merits," other than making such success more *unlikely* due to potential impediments to even reaching the merits. Indeed, if all a "likelihood of success on the merits" meant was that the district court likely had jurisdiction, then preliminary injunctions would be the rule, not the exception. In light of these basic principles, we hold that it was an abuse of discretion for the District Court to grant a preliminary injunction on the view that the "jurisdictional issues" in Omar's case were tough, without even considering the merits of the underlying habeas petition.

What we have said thus far would require reversal and remand in each of these cases: The lower courts in *Munaf* erred in dismissing for want of jurisdiction, and the lower courts in *Omar* erred in issuing and upholding the preliminary injunction. There are occasions, however, when it is appropriate to proceed further and address the merits. This is one of them.

Given that the present cases involve habeas petitions that implicate sensitive foreign policy issues in the context of ongoing military operations, reaching the merits is the wisest course. Because the Government is entitled to judgment as a matter of law, it is appropriate for us to terminate the litigation now.

IV

The habeas petitioners argue that the writ should be granted in their cases because they have "a legally enforceable right" not to be transferred to Iraqi

authority for criminal proceedings under both the Due Process Clause and the Foreign Affairs Reform and Restructuring Act of 1998 (FARR Act), and because they are innocent civilians who have been unlawfully detained by the United States in violation of the Due Process Clause. With respect to the transfer claim, petitioners request an injunction prohibiting the United States from transferring them to Iraqi custody. With respect to the unlawful detention claim, petitioners seek "release" – but only to the extent that release would not result in "unlawful" transfer to Iraqi custody. Both of these requests would interfere with Iraq's sovereign right to "punish offenses against its laws committed within its borders." We accordingly hold that the detainees' claims do not state grounds upon which habeas relief may be granted, that the habeas petitions should have been promptly dismissed, and that no injunction should have been entered.

The habeas petitioners do not dispute that they voluntarily traveled to Iraq, that they remain detained within the sovereign territory of Iraq today, or that they are alleged to have committed serious crimes in Iraq. Indeed, Omar and Munaf both concede that, if they were not in MNF-I custody, Iraq would be free to arrest and prosecute them under Iraqi law. Given these facts, our cases make clear that Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil.

To allow United States courts to intervene in an ongoing foreign criminal proceeding and pass judgment on its legitimacy seems at least as great an intrusion as the plainly barred collateral review of foreign convictions.

Petitioners contend that these general principles are trumped in their cases because their transfer to Iraqi custody is likely to result in torture. This allegation was raised in Munaf's petition for habeas, but not in Omar's. Such allegations are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the judiciary. See M. Bassiouni, International Extradition: United States Law and Practice 921 (2007) ("*Habeas corpus* has been held not to be a valid means of inquiry into the treatment the relator is anticipated to receive in the requesting state").

The Executive Branch may, of course, decline to surrender a detainee for many reasons, including humanitarian ones. Petitioners here allege only the possibility of mistreatment in a prison facility; this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway. Indeed, the Solicitor General states that it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result.

* * *

Munaf and Omar are alleged to have committed hostile and warlike acts within the sovereign territory of Iraq during ongoing hostilities there. Pending their criminal prosecution for those offenses, Munaf and Omar are being held in Iraq by American forces operating pursuant to a U. N. Mandate and at the request of the Iraqi Government. Petitioners concede that Iraq has a sovereign right to prosecute them for alleged violations of its law. Yet they went to federal court seeking an order that would allow them to defeat precisely that sovereign

authority. Habeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

The Court reserves judgment on an "extreme case in which the Executive has determined that a detainee [in United States custody] is likely to be tortured but decides to transfer him anyway." I would add that nothing in today's opinion should be read as foreclosing relief for a citizen of the United States who resists transfer, say, from the American military to a foreign government for prosecution in a case of that sort, and I would extend the caveat to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it.

MAQALEH v. GATES
605 F.3d 84 (DC Cir. 2010)

SENTELLE, *Chief Judge*:

Three detainees at Bagram Air Force Base in Afghanistan petitioned the district court for habeas corpus relief from their confinement by the United States military.

All three petitioners are being held as unlawful enemy combatants at the Bagram Theater Internment Facility on the Bagram Airfield Military Base in Afghanistan. Petitioner Fadi Al-Maqaleh is a Yemeni citizen who alleges he was taken into custody in 2003. While Al-Maqaleh's petition asserts "on information and belief" that he was captured beyond Afghan borders, a sworn declaration from Colonel James W. Gray, Commander of Detention Operations, states that Al-Maqaleh was captured in Zabul, Afghanistan. Redha Al-Najar is a Tunisian citizen who alleges he was captured in Pakistan in 2002. Amin Al-Bakri is a Yemeni citizen who alleges he was captured in Thailand in 2002. Both Al-Najar and Al-Bakri allege they were first held in some other unknown location before being moved to Bagram.

Bagram Airfield Military Base is the largest military facility in Afghanistan occupied by United States and coalition forces. The United States entered into an "Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield" with the Islamic Republic of Afghanistan in 2006, which "consigns all facilities and land located at Bagram Airfield . . . owned by [Afghanistan,] or Parwan Province, or private individuals, or others, for use by the United States and coalition forces for military purposes." (Accommodation and Consignment Agreement for Lands and Facilities at Bagram Airfield Between the Islamic Republic of Afghanistan and the United States of America) (internal capitalization altered). The Agreement refers to Afghanistan as the "host nation" and the United States "as the lessee." The leasehold created by the agreement

is to continue "until the United States or its successors determine that the premises are no longer required for its use."

Afghanistan remains a theater of active military combat. The United States and coalition forces conduct "an ongoing military campaign against al Qaeda, the Taliban regime, and their affiliates and supporters in Afghanistan." These operations are conducted in part from Bagram Airfield. Bagram has been subject to repeated attacks from the Taliban and al Qaeda, including a March 2009 suicide bombing striking the gates of the facility, and Taliban rocket attacks in June of 2009 resulting in death and injury to United States service members and other personnel.

In a thorough and detailed opinion, the [*Boumediene*] Court undertook its inquiry into the constitutional questions on two levels. First, it explored the breadth of the Court's holding in *Eisentrager* (still not overruled) in response to the argument by the United States that constitutional rights protected by the writ of habeas corpus under the Suspension Clause extended only to territories over which the United States held *de jure* sovereignty. Second, it explored the more general question of extension of constitutional rights and the concomitant constitutional restrictions on governmental power exercised extraterritorially and with respect to noncitizens.

[T]he Court concluded that "at least three factors are relevant in determining the reach of the Suspension Clause." Those three factors, which we must apply today in answering the same question as to detainees at Bagram, are:

> (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

At the outset, we note that each of the parties has asserted both an extreme understanding of the law after *Boumediene* and a more nuanced set of arguments upon which each relies in anticipation of the possible rejection of the bright-line arguments. The United States would like us to hold that the *Boumediene* analysis has no application beyond territories that are, like Guantanamo, outside the *de jure* sovereignty of the United States but are subject to its *de facto* sovereignty. We note that the very fact that the *Boumediene* Court set forth the three-factor test outlined above parallels the *Eisentrager* Court's further reasoning addressed by the *Boumediene* Court in its rejection of the bright-line *de jure* sovereignty argument before it. That is, had the *Boumediene* Court intended to limit its understanding of the reach of the Suspension Clause to territories over which the United States exercised *de facto* sovereignty, it would have had no need to outline the factors to be considered either generally or in the detail which it in fact adopted. We therefore reject the proposition that *Boumediene* adopted a bright-line test with the effect of substituting *de facto* for *de jure* in the otherwise rejected interpretation of *Eisentrager*.

For similar reasons, we reject the most extreme position offered by the petitioners. At various points, the petitioners seem to be arguing that the fact of United States control of Bagram under the lease of the military base is sufficient to trigger the extraterritorial application of the Suspension Clause, or at least satisfy the second factor of the three set forth in *Boumediene*. Again, we reject this extreme understanding. Such an interpretation would seem to create the potential for the extraterritorial extension of the Suspension Clause to noncitizens held in any United States military facility in the world, and perhaps to an undeterminable number of other United States-leased facilities as well. Again, such an extended application is not a tenable interpretation of *Boumediene*.

Having rejected the bright-line arguments of both parties, we must proceed to their more nuanced arguments, and reach a conclusion based on the application of the Supreme Court's enumerated factors to the case before us.

The first of the enumerated factors is "the citizenship and status of the detainee and the adequacy of the process through which that status determination was made." Citizenship is, of course, an important factor in determining the constitutional rights of persons before the court. It is well established that there are "constitutional decisions of [the Supreme] Court expressly according differing protection to aliens than to citizens." However, clearly the alien citizenship of the petitioners in this case does not weigh against their claim to protection of the right of habeas corpus under the Suspension Clause. So far as citizenship is concerned, they differ in no material respect from the petitioners at Guantanamo who prevailed in *Boumediene*. As to status, the petitioners before us are held as enemy aliens. While the *Eisentrager* petitioners were in a weaker position by having the status of war criminals, that is immaterial to the question before us. This question is governed by *Boumediene* and the status of the petitioners before us again is the same as the Guantanamo detainees, so this factor supports their argument for the extension of the availability of the writ.

So far as the adequacy of the process through which that status determination was made, the petitioners are in a stronger position for the availability of the writ than were either the *Eisentrager* or *Boumediene* petitioners. As the Supreme Court noted, the *Boumediene* petitioners were in a very different posture than those in *Eisentrager* in that "there ha[d] been no trial by military commission for violations of the laws of war." The *Eisentrager* detainees were "entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses" in an adversarial proceeding.

The status of the Bagram detainees is determined not by a Combatant Status Review Tribunal but by an "Unlawful Enemy Combatant Review Board" (UECRB). As the district court correctly noted, proceedings before the UECRB afford even less protection to the rights of detainees in the determination of status than was the case with the CSRT. Therefore, as the district court noted, "while the important adequacy of process factor strongly supported the extension

of the Suspension Clause and habeas rights in *Boumediene*, it even more strongly favors petitioners here."

The second factor, "the nature of the sites where apprehension and then detention took place," weighs heavily in favor of the United States. Like all petitioners in both *Eisentrager* and *Boumediene*, the petitioners here were apprehended abroad. While this in itself would appear to weigh against the extension of the writ, it obviously would not be sufficient, otherwise *Boumediene* would not have been decided as it was. However, the nature of the place where the detention takes place weighs more strongly in favor of the position argued by the United States and against the extension of habeas jurisdiction than was the case in either *Boumediene* or *Eisentrager*. In the first place, while *de facto* sovereignty is not determinative, for the reasons discussed above, the very fact that it was the subject of much discussion in *Boumediene* makes it obvious that it is not without relevance. As the Supreme Court set forth, Guantanamo Bay is "a territory that, while technically not part of the United States, is under the complete and total control of our Government." While it is true that the United States holds a leasehold interest in Bagram, and held a leasehold interest in Guantanamo, the surrounding circumstances are hardly the same. The United States has maintained its total control of Guantanamo Bay for over a century, even in the face of a hostile government maintaining *de jure* sovereignty over the property. In Bagram, while the United States has options as to duration of the lease agreement, there is no indication of any intent to occupy the base with permanence, nor is there hostility on the part of the "host" country. Therefore, the notion that *de facto* sovereignty extends to Bagram is no more real than would have been the same claim with respect to Landsberg in the *Eisentrager* case. While it is certainly realistic to assert that the United States has *de facto* sovereignty over Guantanamo, the same simply is not true with respect to Bagram. Though the site of detention analysis weighs in favor of the United States and against the petitioners, it is not determinative.

But we hold that the third factor, that is "the practical obstacles inherent in resolving the prisoner's entitlement to the writ," particularly when considered along with the second factor, weighs overwhelmingly in favor of the position of the United States. It is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war. Not only does this suggest that the detention at Bagram is more like the detention at Landsberg than Guantanamo, the position of the United States is even stronger in this case than it was in *Eisentrager*. As the Supreme Court recognized in *Boumediene*, even though the active hostilities in the European theater had "c[o]me to an end," at the time of the *Eisentrager* decision, many of the problems of a theater of war remained:

> In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But at the time *Eisentrager* was decided, the Court was right to be concerned about judicial interference with the military's efforts to contain "enemy elements, guerilla fighters, and 'were-wolves.'"

We do not ignore the arguments of the detainees that the United States chose the place of detention and might be able "to evade judicial review of Executive detention decisions by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will." However, that is not what happened here. Indeed, without dismissing the legitimacy or sincerity of appellees' concerns, we doubt that this fact goes to either the second or third of the Supreme Court's enumerated factors. We need make no determination on the importance of this possibility, given that it remains only a possibility; its resolution can await a case in which the claim is a reality rather than a speculation. In so stating, we note that the Supreme Court did not dictate that the three enumerated factors are exhaustive. It only told us that "*at least* three factors" are relevant. Perhaps such manipulation by the Executive might constitute an additional factor in some case in which it is in fact present. However, the notion that the United States deliberately confined the detainees in the theater of war rather than at, for example, Guantanamo, is not only unsupported by the evidence, it is not supported by reason. To have made such a deliberate decision to "turn off the Constitution" would have required the military commanders or other Executive officials making the situs determination to anticipate the complex litigation history set forth above and predict the *Boumediene* decision long before it came down.

For the reasons set forth above, we hold that the jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in Executive detention in the Bagram detention facility in the Afghan theater of war. We therefore reverse the order of the district court denying the motion for dismissal of the United States and order that the petitions be dismissed for lack of jurisdiction.

§ 8.04 GUANTANAMO: MILITARY TRIBUNALS AND CONGRESS

move Note from p. 529 to former p. 514:

Note on the Lawyers of Guantanamo

Much has been written about the question of whether key lawyers in the crafting of interrogation and detention policies violated ethical norms by advising policymakers that it would be legally acceptable to ignore certain statutory and treaty obligations in pursuit of the President's executive powers. *See, e.g.*, Milan Markovic, *Can Lawyers Be War Criminals*? 20 GEO. J. LEGAL ETHICS 347 (2007). JACK GOLDSMITH, THE TERROR PRESIDENCY (2007) created further controversy first by disclosing his role in repudiating the "torture memo" and also by appearing to disclose conversations that could be argued to have been protected by attorney-client privilege.

In contrast, a number of military lawyers have come forward with criticisms of the processes of the military commissions and CSRTs.

Colonel Charles Swift, who was assigned to represent Salim Hamdan, pursued Hamdan's case to the rather clear detriment of his career. Swift took Hamdan's constitutional claims to the Supreme Court, gave an interview to Vanity Fair, was passed over for promotion, served temporarily as Visiting Associate Professor and Acting Director of the International Humanitarian Law Clinic at Emory Law School, and eventually entered private law practice.

Maj. Thomas Roughneen, Swift's replacement as Hamdan's lawyer, reportedly told the Miami Herald, "It's like the Titanic. You know someday the ship is going to sink. God almighty, let's get there already." http://www.andyworthington.co.uk/?p=97

Lt. Col. Stephen Abraham is a lawyer and intelligence officer who was assigned to review files going before the CSRTs and to provide an assurance that other intelligence agencies did not possess exculpatory information for the detainee's benefit. He provided an affidavit that was attached to the petition for rehearing from denial of certiorari in *al-Odah*. In that affidavit, he described some problems with the chain of command and training of CSRT members. Specifically, he addressed the availability of information from intelligence agencies this way:

> I was specifically told on a number of occasions that the information provided to me was all that I would be shown, but I was never told that the information that was provided constituted all available information. On those occasions when I asked that a representative of the organization provide a written statement that there was no exculpatory evidence, the requests were summarily denied. At one point, following a review of information, I asked the Office of General Counsel of the intelligence organization that I was visiting for a statement that no exculpatory information had been withheld. I explained that I was tasked to review all available materials and to reach a conclusion regarding the non-existence of exculpatory information, and that I could not do so without knowing that I had seen all information. The request was denied, coupled with a refusal even to acknowledge whether there existed additional information that I was not permitted to review.

http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf

Colonel Morris Davis had this to say about his experience:

> I was the chief prosecutor for the military commissions at Guantanamo Bay, Cuba, until Oct. 4 [2007], the day I concluded that full, fair and open trials were not possible under the current system. I resigned on that day because I felt that the system had become deeply politicized and that I could no longer do my job effectively or responsibly.

AWOL Military Justice, Op-Ed LOS ANGELES TIMES (Dec 15, 2007), http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story?coll=la-opinion-rightrail

An unidentified legal officer filed an affidavit in the habeas corpus case of Adel Hamad. In his affidavit, this officer observed that many CSRT determinations were supported by mere conclusory statements from intelligence files, and that when CSRT panels found that a detainee was not an enemy combatant, the file would be sent back with instructions to make different findings but without any additional evidence.
http://jurist.law.pitt.edu/pdf/TeesdaleCSRTofficerRedacted.pdf

§ 8.05 DOMESTIC EXECUTIVE DETENTIONS

add at page 530:

RUMSFELD v. PADILLA, 542 U.S. 426 (2004).

After *Hamdi*, Jose Padilla would seem to have a slam-dunk. But the Court held that his habeas petition had been filed in the wrong court. He was initially held in New York on a material witness warrant. When counsel appeared and moved to quash the warrant, he was transferred to the naval brig in Charleston, South Carolina. as an "enemy combatant." Two days later, counsel filed for habeas corpus in New York. The Court held that the petition should have been filed in South Carolina where he was imprisoned. The Guantanamo detainees were different because they were not located within any judicial district so all the courts need would be personal jurisdiction over the military custodians.

***Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).** Following the Supreme Court opinion, Padilla's attorneys filed a habeas corpus petition in South Carolina. The District Court, Judge Floyd, held that the AUMF did not authorize detention of Padilla, who was not captured on the battlefield (unlike Hamdi) and who was not charged with any violation of the law of war or any other crime but was merely held in preventive detention. Calling the situation a "law enforcement matter, not a military matter," the court ordered that Padilla be released in 45 days unless the Government decided to charge him with a crime. Government lawyers had already indicated in several settings that it would be impossible to assemble admissible evidence for a civilian prosecution.

The Fourth Circuit, Judge Luttig, diagreed. "Like Haupt [the U.S. citizen involved in *Quirin*], Padilla associated with the military arm of the enemy, and with its aid, guidance, and direction entered this country bent on committing hostile acts on American soil. Padilla thus falls within *Quirin*'s definition of enemy belligerent, as well as within the definition of the equivalent term accepted by the plurality in *Hamdi*."

Padilla then petitioned for certiorari, at which point the Government decided to transfer him to civilian custody to face charges in federal court. Supreme Court Rules required a court order to allow transfer of custody, which the Fourth

Circuit refused but the Supreme Court then granted. Ultimately, the Court denied certiorari, 126 S. Ct. 1649 (April 3, 2006).

Justice Kennedy, for himself and two others, concurred in the denial of certiorari with these comments:

> In light of the previous changes in his custody status and the fact that nearly four years have passed since he first was detained, Padilla, it must be acknowledged, has a continuing concern that his status might be altered again. That concern, however, can be addressed if the necessity arises. Padilla is now being held pursuant to the control and supervision of the United States District Court for the Southern District of Florida, pending trial of the criminal case. In the course of its supervision over Padilla's custody and trial the District Court will be obliged to afford him the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants. Were the Government to seek to change the status or conditions of Padilla's custody, that court would be in a position to rule quickly on any responsive filings submitted by Padilla. In such an event, the District Court, as well as other courts of competent jurisdiction, should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised. Padilla, moreover, retains the option of seeking a writ of habeas corpus in this Court.

Justice Ginsburg dissented from the denial of certiorari on the ground that the case was one "capable of repetition yet evading review."

Subsequently, Padilla was tried in Florida and convicted of conspiracy to murder and material support for seeking to attend a training camp. The principal evidence against him was a form for training bearing his fingerprints. There was no evidence of any particular plans on his part to do anything. *See* Jenny S. Martinez, *The Real Verdict on Jose Padilla*, WASHINGTON POST A23 (Aug 17, 2007). David Cole provided this assessment:

> In the end, the prosecution succeeded, as the jury found Padilla guilty of attending the training camp and of one count of conspiracy to maim, murder or kidnap overseas. But given how weak the evidence was, the case could easily have come out the other way – and may not withstand appeal. If what the Administration says about Padilla is true, this should not have been a close case. But because the Administration obtained its evidence against him through unconstitutional means, it was never able to tell the jury what it really thinks Padilla was up to.

David Cole, *The Real Lesson of the Padilla Conviction*, THE NATION (Aug. 18, 2007), http://www.thenation.com/doc/20070827/cole.

Chapter 9

INTERROGATION & EMERGENCY POWERS

add at page 549

Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845 (2009):

> In an armed conflict, in the zone of hostilities, combatants may be targeted without warning or detained without trial. Such treatment is unlawful against persons engaging in violence in the absence of armed conflict. Armed conflict occurs when organized armed groups exchange protracted, intense, armed hostilities. The groups must be associated with territory. In addition to the concept of armed conflict, the concept of conflict zone is important. Killing combatants or detaining them without trial until the end of hostilities is consistent with the principles of necessity and proportionality, as well as general human rights, when related to a zone of actual armed hostilities. Outside such a zone, however, authorities must attempt to arrest a suspect and only target to kill those who pose an immediate lethal threat and refuse to surrender. Those arrested outside a conflict zone should receive a speedy trial on the basis of the evidence that has led to the arrest.

§ 9.01 INTERROGATION & TORTURE

The most consistent coverage of the torture issue has been provided by journalism professor Mark Danner: *http://www.markdanner.com*

The International Committee of the Red Cross is recognized as the official agency for monitoring nations' compliance with the Geneva Conventions. It investigates detention facilities and addresses its reports in confidence to the responsible government officials. Its report on CIA interrogation techniques in February 2007, however, became publicly available. ICRC, Report on the Treatment of Fourteen "High-Level Detainees" in CIA Custody. It concluded that their detention "outside protection of the law" constituted "arbitrary deprivation of liberty and forced disappearance, in violation of international law." The report also described interrogation and confinement to which the detainees were subjected and concluded that these conditions constituted in some instances torture and in others cruel inhuman or degrading treatment.

One of the three Executive Orders signed by President Obama on January 22, 2009, was directed to interrogation and to the CIA detention facilities. EO 13491 set Common Article 3 as the "baseline" for treatment of prisoners, directed that all interrogations would be conducted under the Army Field Manual, and ordered that the CIA detention facilities be closed "as expeditiously as possible."

On April 16, 2009, President Obama released four more memos dealing with "interrogation" techniques used by the CIA. While releasing these memos, the

President ruled out prosecutions, stating that it is a "time for reflection, not retribution."

DOJ Memo Re Interrogation of Abu Zubaydah (August 1, 2002):

> Zubaydah is currently being held by the United States. The interrogation team is certain that he has additional information that he refuses to divulge. Specifically, he is w!ithholding information regarding terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas. Zubaydah has become accustomed to a certain level of treatment and displays no signs of willingness to disclose further information. Moreover, your intelligence indicates that there is currently a level of "chatter" equal to that which preceded the September 11 attacks. In1ight of the information you believe Zubaydah has and the high level of threat you believe now exists, you wish to move the interrogations into what you have described. as an "increased pressure phase."
>
> [The memo then describes 10 techniques including stress positions, waterboarding, and poisonous insects – it relates that these are used in SERE training but admits that trainees know the limited duration and that they will not be harmed.]
>
> To violate the statute, an individual must have the specific intent to inflict severe pain or suffering. Because specific intent is an element of the offense, the absence of specific intent negates the charge of torture. [The presence of medical personnel and the prior experience with SERE training negate the presence of specific intent.]

DOJ Memo Re Use of Techniques in Combination (May 10, 2005):

> [O]ur advice does not extend to the use of techniques on detainees unlike those we have previously considered; and whether other detainees would, in the relevant ways, be like the ones at issue in our previous advice would be a factual question we cannot now decide. Finally, we emphasize that these are issues about which reasonable persons may disagree. Our task has been made more difficult by the imprecision of the statute and the relative absence of judicial guidance, but we have applied our best reading of the law to the specific facts that you have provided.

DOJ Memo Re Legal Standards (May 10, 2005):

> A paramount recognition emphasized in our 2004 Legal Standards Opinion merits re-emphasis at the outset and guides our analysis: Torture is abhorrent both to American law and values and to international norms. The universal repudiation of torture is reflected not only in our criminal law, but also in international agreements, in

centuries of Anglo-American law, and in the longstanding policy of the United States, repeatedly and recently reaffirmed by the President. Consistent with these norms, the President has directed unequivocally that the United States is not to engage in torture.

In sum, based on the information you have provided and the limitations, procedures, and safeguards that would be in place, we conclude that - although extended sleep deprivation and use of the waterboard present more substantial questions in certain respects under the statute and the use of the waterboard raises the most substantial issue – none of these specific techniques, considered individually, would violate the prohibition.

DOJ Memo Re Application of CAT to Interrogation of Detainees (May 30, 2005):

You have asked us to address whether certain "enhanced interrogation techniques" employed by the Central Intelligence Agency ("CIA") in the interrogation of high value at Qaeda detainees are consistent with United States obligations under Article 16 of the United Nations Convention Against Torture and Other Cruel, !nhuman or Degrading Treatment or Punishment, ("CAT"), We conclude that use of these techniques, subject to the CIA's careful screening criteria and limitations and its medical safeguards, is consistent with United States obligations under Article 16.

By its terms, Article 16 is limited to conduct within "territory under [United States] jurisdiction." We conclude that territory under United States jurisdiction includes, at most, areas over which the United States exercises at feast de facto authority as the government. Based on CIA assurances, we understand that the interrogations do not take place in any such areas. We therefore conclude that Article 16 is inapplicable to the CIA's interrogation practices and that those practices thus cannot violate Article 16.

Given the paucity of relevant precedent and the-subjective nature of the inquiry, however, we cannot predict with confidence whether a court would agree with this conclusion, though, for the reasons explained, the question is unlikely [to] be subject to judicial inquiry.

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add at page 555:

The Inspector General of the Justice Department published "A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq" in October 2009. The report concluded:

Our review determined that the vast majority of FBI complied with FBI interview policies and separated themselves from interrogators who used non-FBI techniques. In a few instances, FBI agents used or

> participated in interrogations during which techniques were used that would not normally be permitted in the United States. . . . We also concluded that the FBI had not provided sufficient guidance for how agents should respond when confronted with military interrogators who used interrogation techniques that were not permitted by FBI policies.

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add at page 558:

Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc) affirmed the district court holdings over four dissents. The dissenters would have allowed the *Bivens* claim to proceed on the basis that Arar's treatment in Syria stemmed directly from actions of U.S. agents in the U.S.

See also Al Kidd v. Ashcroft, p. * *supra*, allowing a *Bivens* action to proceed against various U.S. officials for misuse of the material witness statute in violation of constitutional guarantees.

Meanwhile, an Italian judge convicted 23 Americans (21 CIA agents and two others) and two Italian intelligence agents on kidnaping charges in connection with the capture and rendition of Abu Omar from Italy to Egypt. The Americans were convicted *in absentia* and are not likely to be extradited to Italy.

§ 9.02 EMERGENCY POWERS & CIVIL LIBERTIES

***A v. United Kingdom*, ECHR 3455/05 (Feb 19, 2009).** The European Court of Human Rights agreed with the House of Lords that executive detention of aliens suspected of terrorist connections was a violation of the European Covenant on Human Rights. The ECHR, however, found that the deprivation was rather minimal and assessed rather nominal damages against the UK.

***Gillan & Quinton v. United Kingdom*, ECHR 4158/05 (2010).** Plaintiffs were British nationals who were stopped and searched by police while on their way to a demonstration close to an arms fair held in the Docklands area of East London. The United Kingdom Terrorism Act of 2000 created a system in which police officials could authorize, if "expedient for the prevention of acts of terrorism," police officers within a defined geographical area to stop any person and search the person and anything carried by him or her. The search can be carried out by an officer in an authorised area whether or not he has grounds for suspicion "for articles of a kind which could be used in connection with terrorism." The 2000 Act went into effect on 19 February 2001 and successive authorizations, each covering the whole of the Metropolitan Police district and each for the maximum permissible period (28 days), have been made and confirmed ever since that time. Between 2004 and 2008 the total of searches recorded by the Ministry of Justice went from 33,177 to 117,278.

The European Court held that the searches constituted an invasion of the right of privacy under article 8 of the ECHR. Article 8 permits invasion of privacy only "in accordance with the law." The unfettered discretion conferred by the 2000 Act first on the authorizing official and then on the individual officer meant there was no effective control. Without "adequate legal safeguards" the individual was subject to arbitrary interference with the right of privacy, and thus the searches were not "in accordance with law."

The Government unsuccessfully tried to compare these searches with searches of travelers at airports. Air travelers essentially consent to searches because they know that a search will be conducted and the traveler can choose whether to travel under those terms. The individual walking on the street has no similar choice available.

Appendix

DOCUMENTS

Statutes on Domestic Use of Military

18 USC § 1385. Use of Army and Air Force as posse comitatus

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

10 USC § 331. Federal aid for State governments

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

10 USC § 332. Use of militia and armed forces to enforce Federal authority

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

10 USC § 372. Use of military equipment and facilities

(a) In general. The Secretary of Defense may, in accordance with other applicable law, make available any equipment (including associated supplies or spare parts), base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes.

add at page App 45

Military Commission Act of 2006

10 USC § 950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court

(a) Exclusive appellate jurisdiction.

(1) (A) Except as provided in subparagraph (B), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter.

(B) The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted.

(2) A petition for review must be filed by the accused in the Court of Appeals not later than 20 days after the date on which—

(A) written notice of the final decision of the Court of Military Commission Review is served on the accused or on defense counsel; or

(B) the accused submits, in the form prescribed by section 950c, a written notice waiving the right of the accused to review by the Court of Military Commission Review under section 950f of this title.

(b) Standard for review. In a case reviewed by it under this section, the Court of Appeals may act only with respect to matters of law.

(c) Scope of review. The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the consideration of--

(1) whether the final decision was consistent with the standards and procedures specified in this chapter and

(2) to the extent applicable, the Constitution and the laws of the United States.

(d) Supreme Court. The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to[28 USCS § 1257.

10 USC § 950j. Finality of proceedings, findings, and sentences

(a) Finality. The appellate review of records of trial provided by this chapter, and the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive.

(b) Provisions of chapter sole basis for review of military commission procedures and actions. Except as otherwise provided in this chapter and notwithstanding any other provision of law (including 28 USC § 2241 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006 [enacted Oct. 17, 2006], relating to the prosecution, trial, or judgment

of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions.

add at page App 45

Executive Order 13491 (Jan 22, 2009)

Section 1. Revocation. Executive Order 13440 of July 20, 2007, is revoked. All executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order.

Sec. 3. Standards and Practices for Interrogation of Individuals in the Custody or Control of the United States in Armed Conflicts.

(a) Common Article 3 Standards as a Minimum Baseline. Consistent with the requirements of the Federal torture statute, the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.

(b) Interrogation Techniques and Interrogation-Related Treatment. Effective immediately, an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3

Sec. 4. Prohibition of Certain Detention Facilities, and Red Cross Access to Detained Individuals.

(a) CIA Detention. The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.

UNITED KINGDOM

Terrorism Act 2006, Ch. 11, s. 1

Encouragement of terrorism

(1) This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.

(2) A person commits an offence if—

(a) he publishes a statement to which this section applies or causes another to publish such a statement; and

(b) at the time he publishes it or causes it to be published, he—

(i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or

(ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.

(3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

(4) For the purposes of this section the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both—

(a) to the contents of the statement as a whole; and

(b) to the circumstances and manner of its publication.

(5) It is irrelevant for the purposes of subsections (1) to (3) . . . (b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.