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Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post 9-11 World

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ARTICLE

DEMOCRACY ON TRIAL:

TERRORISM, CRIME, AND NATIONAL
SECURITY POLICY IN A POST 9-11
WORLD

DAVID SCHULTZ*

INTRODUCTION

The events of 9-11 presented western democracies with a challenge and a test.¹ The challenge: respond to terrorism either by military or diplomatic means (such as criminal apprehension and prosecution) to address national security needs and to protect civilian populations, infrastructure, and commerce. The test: meet the terrorist and national

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¹ The "events of 9-11" in this Article shall refer to the instances of terrorism taking place in the United States on September 11, 2001: the hijacking of several airplanes by al-Qaeda terrorists and their subsequent crashing into the World Trade Center towers in New York City, the Pentagon building in Washington, D.C., and the downing of another passenger plane in Pennsylvania, which was putatively destined for the White House or Capitol.

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security challenges while simultaneously respecting international law, human rights, domestic constitutionalism, rule of law, and individual rights and liberties of both citizens and non-citizens.² Unfortunately, the report card on both the challenge and test reveal a mixed record, especially in the United States.

Following the events of 9-11, the United States has not experienced another domestic act of terrorism—leading President Bush to claim that the country was winning the war against terrorism.³ But both the United Kingdom and Spain were victims of terrorism,⁴ Australia claimed knowledge of an imminent attack,⁵ and Canada arrested several individuals plotting to bomb sites across its nation.⁶ As a result of the events of 9-11, some, such as John C. Yoo, former White House Counsel and now Berkeley law professor, have declared that the West faces a new war, demanding new security measures that perhaps challenge pre-9-11 notions of presidential power and civil liberties.⁷ The result has been various measures such as the Patriot Act, detention of civilians and noncivilians suspected as terrorists, reinterpretations of international law or conventions (including the International Convention Against Torture and the Geneva Accords), and the use of wiretaps by the National Security Agency in the United States. Parallel efforts, both in the United Kingdom and Australia, to increase the surveillance, detention, and prosecution of suspected terrorists, have also been attempted.⁸

² See, e.g., DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 1-2, 17-18 (2006) [hereinafter DYZENHAUS, *THE CONSTITUTION OF LAW*] which makes a similar point.

³ See, e.g., The White House, “Waging and Winning the War on Terror” (available at <http://www.whitehouse.gov/infocus/achievement/chap1.html>) (last visited May 13, 2008) (describing how the United States was winning the war on terrorism).

⁴ See *London rocked by terror attacks*, BBC NEWS, July 7, 2005, <http://news.bbc.co.uk/1/hi/uk/4659093.stm>; *Scores die in Madrid bomb carnage*, BBC NEWS, Mar. 11, 2004, <http://news.bbc.co.uk/2/hi/europe/3500452.stm>.

⁵ Raymond Bonner, *Australia to Present Strict Antiterrorism Statute*, N.Y. TIMES, Nov. 3, 2005 at A6 (reporting that Prime Minister John Howard had warned of a potential terrorist attack based upon unspecified police and intelligence information).

⁶ Ian Austen & David Johnston, *17 Held in Plot to Bomb Sites Across Ontario*, N.Y. TIMES, June 4, 2006 at A1.

⁷ JOHN C. YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* ix-x (2005) [hereinafter YOO, *THE POWERS OF WAR AND PEACE*]. See also MIRKO BAGARIC & JULIE CLARKE, *TORTURE: WHEN THE UNTHINKABLE IS MORALLY PERMISSIBLE* 4 (2007) (arguing that torture is a legitimate tool to protect the innocent as a result of the events of 9-11 and the rise of worldwide terrorism).

⁸ DYZENHAUS, *THE CONSTITUTION OF LAW* at 16 (discussing efforts to use indefinite detention against aliens suspected of being terrorists, and Tony Blair’s proposal for the detaining of suspects without charges for up to 90 days).

Overall, post 9-11 concerns regarding terrorism in the United States, among the members of the European Union (“EU”), and in other western democracies have led to the convergence of the traditionally distinct policy areas of domestic criminal justice and national security. This convergence has produced several policy and institutional conflicts that pit individual rights against homeland security, domestic law and institutions against international norms and tribunals, and criminal justice agencies against national security organizations. As David Dyzenhaus aptly describes it, situations such as the West faces in a post 9-11 environment challenge claims about the viability or the rule of law and traditional notions of constitutionalism during emergencies.⁹

This Article examines regime responses to international terrorism, principally in the United States, in comparison to the European Union, and describes the consequences of the merger of criminal justice norms with national security imperatives.¹⁰ The collapse of criminal justice into national security norms has manifested numerous contradictions that pose perhaps even more significant challenges to Western European and North American style democracies than does international terrorism. Specifically, the collapse of the criminal justice norms into national security has both threatened civil liberties and augmented claims (at least in the United States) of extra-constitutional powers for the president. Moreover, while the courts have generally placed some limits on these trends, it is not so clear that abuses of individual rights or executive power can be reconciled with substantive notions of rule of law and constitutionalism.

Part I of this Article establishes the basic values and norms that frame western-style democracies, such as the United States and the states of the EU. Part II examines the development of the war on terrorism in the United States, concentrating on actions taken by the Bush Administration in response to 9-11, its justification for expansion of presidential authority, and the impact both have had upon individual liberties. Part III assesses the Bush Administration’s legal arguments for the war on terrorism and the expansion of presidential power, by discussing how the courts have responded to the government’s efforts to curtail individual liberties. Part IV briefly switches to the impact of the

⁹ *Id.* at 17, 34.

¹⁰ While not the focus of this Article, on November 3, 2005, Australia amended its antiterrorism law. *See* Anti-Terrorism Act 2005 (Austl.), available at [http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/36EFCECD88B7EF2BCA2570B2000C3E91/\\$file/127-2005.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/36EFCECD88B7EF2BCA2570B2000C3E91/$file/127-2005.pdf). This Act made it easier to prosecute an individual under existing law by dropping the requirement that a particular act was terrorist in nature. Instead, one would merely need to show how the act was “related” to terrorism.

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war on terrorism in England and the EU, seeking to provide a contrast to approaches found in the United States.

While recognizing that 9-11 was a tragedy, the response to these events has been even more tragic, especially in light of threats to individual and civil rights, international law, and democratic processes in general. The convergence of national security or intelligence gathering with criminal justice, in the name of homeland security and the war on terror, has resulted in a war on civil liberties that has undermined responses to terrorism and threatened democracy and individual rights.

I. DEMOCRACY AND CONSTITUTIONALISM

Western European and North American style democracies are indebted to a confluence of three political traditions that inform the way their institutions operate. These traditions are democracy, liberalism, and constitutionalism.

The concept of “democracy” is very old, dating back to Plato and the ancient Greeks who saw it as a rule by the masses.¹¹ More modern notions of democracy labeled it a form of popular government where the people rule, either directly or indirectly through their representatives, based upon the principle of majority rule. “Liberalism,” a concept whose origins are often traced to John Locke,¹² represents a set of political values committed to the protection of individual rights, to polities instituted on the basis of the consent of the governed, and to a notion of a limited government.¹³ Third, “constitutionalism” as a concept is also very old, again dating back to the ancient Greeks,¹⁴ especially Aristotle, and it refers to the basic structures, “grundnorm,” or rules that constitute a government.¹⁵ As the term has evolved in Western Europe and North America, constitutionalism refers to a government of limited powers, which often must adhere to rule of law, procedural due process or regularity, and a commitment to the protection of individual rights.¹⁶

¹¹ J. ROLAND PENNOCK, DEMOCRATIC POLITICAL THEORY 1-5 (1979).

¹² See generally JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., Cambridge U. Press 1967).

¹³ See generally J. ROLAND PENNOCK & JOHN W. CHAPMAN, LIBERAL DEMOCRACY (NYU Press 1983). See also GUIDO DE RUGGIERO, THE HISTORY OF EUROPEAN LIBERALISM 1-8 (Beacon Press 1959) (describing the differences between democracy and liberalism).

¹⁴ CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 1-3 (rev. ed. 1958).

¹⁵ See generally HANS Kelsen, GENERAL THEORY OF THE LAW AND STATE (Russell & Russell 1961) (describing a “grundnorm” as the constitution or theory of rules for a state.)

¹⁶ JAMES T. MCHUGH, COMPARATIVE CONSTITUTIONAL TRADITIONS 5-10 (2002).

However, as both Lon Fuller¹⁷ and David Dyzenhaus¹⁸ have argued, adherence to rule of law is more than a formal set of rules. For Fuller, there are eight requisites to giving the law an inner morality that constrains arbitrary actions.¹⁹ Similarly, Dyzenhaus asserts that the inner morality of law as described by Fuller is more than a procedural adherence to rule of law.²⁰ Instead, rule of law imposes a substantive limit on the government. Hence, he rejects the idea that there needs to be special constitutional rules or powers during emergencies.²¹

Together, democratic, liberal, and constitutional values are important values in the United States, the United Kingdom, and many, if not all, of the European Union member states.²² Even if the exact application of the three values varies across these countries,²³ commitments to majority rule balanced by minority rights, procedural regularity, and a government subject to some limits, are shared by many countries in the west claiming to be democracies.

A. UNITED STATES

The United States of America generally shares in having democratic, liberal, and constitutional values that inform its political traditions. As conceived in 1787, its Constitution is more specifically indebted to a set of political values found in the liberal, republican, and legal traditions indebted to John Locke, James Harrington, and William Blackstone.²⁴ The original logic for American government is often referred to as Madisonian democracy, a reference to James Madison, one of the primary authors of the Constitution.²⁵ He is also one of the authors

¹⁷ LON FULLER, *THE MORALITY OF LAW* 245-53 (Yale University Press 1975).

¹⁸ DYZENHAUS, *THE CONSTITUTION OF LAW* 10, 61 (2006).

¹⁹ FULLER, *THE MORALITY OF LAW* at 33-38.

²⁰ DYZENHAUS, *THE CONSTITUTION OF LAW* at 10.

²¹ *Id.* at 59-62.

²² Compare C.B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* (1973) (noting the tensions and strains among varieties or variations of democratic theories and liberal theory).

²³ See G. BINGHAM POWELL, JR., *ELECTIONS AS INSTRUMENTS OF DEMOCRACY* 20-46 (2000) (discussing the differences in how constitutional designs in majoritarian and proportional systems affect political accountability).

²⁴ See generally David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 *A J. LEGAL. HIST.* 464 (1993); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (Harcourt Brace Jovanich 1955); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLIC TRADITION* (Princeton University Press, 1975).

²⁵ ROBERT DAHL, *A PREFACE TO DEMOCRATIC THEORY: HOW DOES POPULAR SOVEREIGNTY FUNCTION IN AMERICA?* 4-34 (University of Chicago Press 1956) (describing the

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of the *Federalist Papers*, which are often described as an authoritative gloss on the intent of the constitutional framers.

Madisonian democracy is depicted as a government set up to prevent tyrannies of the majority.²⁶ As described in *The Federalist No. 10*, majority factions pose a threat to the public good or the rights of others in traditional republics.²⁷ To control this threat, Madison described the need to create a political system that was socially heterogeneous and geographically large, so as to make it more difficult for factions to compete.²⁸ But he also proposed a system of legislative supremacy, separation of powers, checks and balances, bicameralism, and federalism as ways to break open concentrations of power and thwart the ability of majority factions to form.²⁹ In addition, factions would be encouraged to compete, thereby also reducing the potency and likelihood of any one from dominating.³⁰

In addition to this design, James Madison subsequently proposed a Bill of Rights to offer additional protections for individual rights. These, along with other amendments to the Constitution, provide further protection for individuals or minorities against majority rule. Moreover, as a result of fears of communism and the rise of fascism during the middle of the twentieth century, some have argued that Madisonian democracy in the United States evolved into a pluralist democracy.³¹ A pluralist democracy is one based upon group competition for political power while traditional Madisonian democracy envisions individual competition.³² Whatever variant of democracy, the American Constitution is one that confers political power.³³ It provides that, absent explicit or implied constitutional clauses conferring power upon the three branches of the federal government, there is no extra constitutional power to act.

facets or features of Madisonian democracy).

²⁶ *Id.*

²⁷ THE FEDERALIST NO. 10, at 59-61 (James Madison) (Edward M. Earle ed. 1937).

²⁸ *Id.*

²⁹ See also LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990) for a similar analysis and description of American constitutionalism, especially as it applies to foreign affairs.

³⁰ THE FEDERALIST NO. 51 at 335, 337 (James Madison) (Edward M. Earle ed., 1937).

³¹ DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION, 6-7, 520 (2d ed. 1971).

³² *Id.*

³³ *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819).

B. UNITED KINGDOM

Bernard Bailyn has argued that growing disagreement over what representation, constitutionalism, and sovereignty meant were at the core of the disputes between America and Great Britain, precipitating the American Revolution.³⁴ Bailyn's comments point to some of the differences between these governments that would eventually characterize the respective countries.³⁵

While the American political tradition emphasizes the importance of a written constitution serving as a limit upon the government, in the United Kingdom that is not the case.³⁶ There is no real written constitution. Instead there is a series of practices, legislative enactments, and documents, such as the Magna Carta, the English Bill of Rights, and the Petition of Right, that form the British Constitution. In addition, the concept of legislative or parliamentary sovereignty seems to make Parliament equal to what is constitutional.³⁷ The constitution, then, is not something that necessarily limits Parliament since the two are not seen as distinct,³⁸ as is the government and the Constitution in the United States.

A second critical difference between the United States and the United Kingdom regards the concept of separation of powers. Even though the separation of judicial, executive, and legislative powers into the three branches of the American government was augmented by checks and balances and some sharing of powers, parliamentary systems of government, such as in the United Kingdom, are characterized by even less formal notions of separation of powers than in the United States.³⁹ For example, while the crown is often considered the government, the prime minister and his cabinet are both members of Parliament and the government. Similarly, courts are also considered part of the government, arising out of the crown.⁴⁰

While individual rights can be altered by Parliament, respect for them is an important part of the British legal tradition, as is a

³⁴ BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (Belknap Press 1967).

³⁵ *Id.* at 1-9.

³⁶ D.C.M. YARDLEY, *INTRODUCTION TO BRITISH CONSTITUTIONAL LAW*, 1-6 (1984); T.R.S. ALLAN, *LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM*, 4-5 (1994).

³⁷ YARDLEY, *INTRODUCTION TO BRITISH CONSTITUTIONAL LAW* at 31-43.

³⁸ *Id.*

³⁹ *Id.* at 75-80; ALLAN, *LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM* at 183-211.

⁴⁰ YARDLEY, *INTRODUCTION TO BRITISH CONSTITUTIONAL LAW* at 75-80.

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commitment to a rule of law.⁴¹ Finally, while prior to the ascension of William and Mary in the seventeenth century the crown was considered to have certain inherent royal prerogatives, they now exist only at the pleasure of Parliament.⁴²

Overall, despite important differences from the United States, the British Constitution, like its American counterpart, also seems committed to limited government, respect for individual rights, and rule of law as a method of enforcing procedural regularity.

C. EUROPEAN UNION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The various treaties and agreements that have produced the European Union have developed a series of political institutions for the facilitation of open markets across its member states. Several agreements support what is often described as the three pillars of EU. The first pillar is the creation of the European Community (EC), built from the 1951 European Steel and Coal Community, the 1955 European Atomic Energy Community, and finally, in 1993, the Treaty on European Union ("TEU") of Maastricht.⁴³ This treaty, as amended by the 1997 Treaty of Amsterdam ("TOA"), created the basic structure of the EC.⁴⁴ Together, the TEU and the TOA forged the second pillar, the Common Foreign and Security Policy ("CFSP"), and the third pillar, Justice and Home Affairs.⁴⁵ These three pillars constitute the heart of the EU.

The European Commission approximates an executive branch of career civil servants and is headed by twenty-seven Commissioners, including the Commission President, who oversee the bureaucracy, which is organized into numerous Directorates General.⁴⁶ The Council of the European Union consists of more political members and has a representative from each member state, along with a president who holds office for six months, with the office rotating among all the member states.⁴⁷ The European Council consists of a head of state or government from each of the member states, and the members of the European Parliament are allocated among the different member states. In addition

⁴¹ *Id.*

⁴² *Id.* at 53-58.

⁴³ PAUL CRAIG AND GRÁINNE DE BÚRCA, EU LAW: TEXT, CASE, AND MATERIALS 24 (Oxford University Press 1998).

⁴⁴ *Id.* at 32-33.

⁴⁵ *Id.*

⁴⁶ *Id.* at 50-56.

⁴⁷ *Id.* at 57-58.

to there being a variety of special EU boards or institutions, there is the Court of First Instance and the European Court of Justice ("ECJ"). The ECJ is available to adjudicate legal disputes between member states and communities, disputes over EU treaty interpretation, and employee/employer disputes, among other issues.⁴⁸

The governance and structure of the EU has been criticized as suffering from a "democratic deficit."⁴⁹ In addition, when the original European Community ("EC") treaties were signed in the 1950's, they contained no express provisions for the protection of human rights.⁵⁰ The ECJ has ruled that the EC could not accede to the European Convention of Human Rights ("ECHR").⁵¹ However, the Court of Justice has used its power to create a series of fundamental rights⁵² which it has used on occasion to annul community laws.⁵³ Among the rights created or recognized by the ECJ are the protection of property rights,⁵⁴ legal certainty,⁵⁵ a right to a hearing,⁵⁶ and equal treatment for men and women.⁵⁷ The origin of these rights is found in the "constitutional traditions common to the Member States."⁵⁸

Far more important than ECJ construction of fundamental rights, the ECHR provides for protection of individual rights in Europe since all member states of the EU are also parties to it.⁵⁹ Among its major provisions are a ban on torture and inhuman treatment,⁶⁰ a right to liberty

⁴⁸ *Id.* at 79-81.

⁴⁹ See STIJN SMISMANS, LAW, LEGITIMACY, AND EUROPEAN GOVERNANCE: FUNCTIONAL PARTICIPATION IN SOCIAL REGULATION 10-15 (2005) (summarizing the criticism of the EU as not being sufficiently democratic and accountable to its members or the people). See also, WALTER VAN GERVEN, THE EUROPEAN UNION: A POLITY OF STATES AND PEOPLES (2005) for similar discussions of the democratic deficit.

⁵⁰ CRAIG AND DE BÚRCA, EU LAW: TEXT, CASE, AND MATERIALS at 296.

⁵¹ See Opinion 2/94, Re: Accession of the Community to the European Convention on Human Rights, 1996 E.C.R. I-1759.

⁵² CRAIG AND DE BÚRCA, EU LAW: TEXT, CASE, AND MATERIALS at 298-301.

⁵³ See, e.g., Case 11/70, Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel, 1970 E.C.R. 1125.

⁵⁴ Case 44/79, Hauer v. Land Rheinland-Pfalz 1979 E.C.R. 3727.

⁵⁵ Case 100/63, Kalsbeek v. Sociale Verzekeringsbank, 1964 E.C.R. 565.

⁵⁶ Case 17/74, Transocean Marine Paint Association v. Commission, 1974 E.C.R. 1063.

⁵⁷ Case 43/75, Defrenne v. Sabena, 1976 E.C.R. 455.

⁵⁸ Case 4/73, Nord v. Commission 1974 E.C.R. 491. Compare, STIJN SMISMANS, LAW, LEGITIMACY, AND EUROPEAN GOVERNANCE: FUNCTIONAL PARTICIPATION IN SOCIAL REGULATION 11 (2005) (denying that a common set of European values exist to hold the European Union together).

⁵⁹ T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 138 (Oxford University Press 1998).

⁶⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 220, available at

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and security of person,⁶¹ and a right to a public hearing and other procedural protections if accused and charged with a crime.⁶² Overall, between the EU and the ECHR, individuals in the EU have fundamental rights to be protected against an arbitrary deprivation of liberty.

D. INTERNATIONAL LAW

International law is composed of a host of traditions, conventions, treaties, and other documents and practices.⁶³ International law, especially international humanitarian and human rights law, also affords protections to individuals against inhumane treatment, including torture and illegal detention.⁶⁴ Among sources of international law that apply to torture and the treatment of prisoners of war are the 1994 Convention against Torture and the various Geneva Conventions governing the treatment of combatants and noncombatants.⁶⁵ Finally, countries, such as Israel, have had their highest courts declare torture to be illegal under any circumstances.⁶⁶

E. SUMMARY

The United States, the United Kingdom, and the European Union share a set of values committed to limited government, protection of individual rights, and the rule of law as basic precepts of governance.⁶⁷ The source of these values lies in domestic and transnational law, traditions, and customs. They serve as a cornerstone for democratic societies that place limits on the ability of a government, or an individual in the government, to claim absolute or unchecked authority to act in disregard of these values. In the post 9-11 world, choices made to enhance security and to fight the war on terrorism challenged these values in the United States and, to a lesser extent, in the United Kingdom and across the European Union.

<http://conventions.coe.int/Treaty/en/Treaties/html/005.htm>.

⁶¹ *Id.* at art. 5.

⁶² *Id.* at art. 6.

⁶³ HELEN DUFFY, THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW, 4-7 (2005).

⁶⁴ *Id.* at 214, 217.

⁶⁵ *Id.* at 282-92.

⁶⁶ HCJ 5100/94 The Public Committee Against Torture in Israel v. Government of Israel [1999] IsrSC, 53(4) 817.

⁶⁷ See ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989) and 1-2 GIOVANNI SARTORI, THE THEORY OF DEMOCRACY REVISITED (1987) for good summaries of the shared values of western European style democracies.

II. PRESIDENT BUSH AND THE UNITED STATES

After 9-11, President Bush faced two choices. First, he could have responded to the terrorist attacks as criminal acts or as acts of war. Second, he could have acted within the law or asserted claims of extra-constitutional authority. In respect to the first choice, were he to have chosen the criminal law route, his options could have included using the United Nations, international law, the International Court of Justice, and perhaps even the International Criminal Court as forums and bodies to deal with terrorism and al-Qaeda, whose members could have been prosecuted for various crimes including crimes against humanity.⁶⁸

President Bush, however, chose war in two ways. The first was a war on al-Qaeda and the Taliban, the second was a war at home to uncover intelligence about terrorists. First, in a speech of September 20, 2001, President Bush coined the phrase “war on terror” to describe his response to the events of 9-11, as well as to his efforts to combat terrorism around the world,⁶⁹ and then on October 7, 2001, in another speech, he announced the commencement of military strikes against al-Qaeda in Afghanistan.⁷⁰ Second, Bush opted not to respond to the events of 9-11 within the law. Instead, in a series of memoranda⁷¹ his administration offered a theory of a unitary presidency and claims of extra constitutional presidential authority to support his militarized response to terrorism. But the responses did not end there.

Within a short period of time after 9-11, Congress acted by passing two major pieces of legislation. The first was an act creating the Department of Homeland Security, and the second was the Patriot Act.⁷² Less visible or known responses at the time included several presidential orders, including those related to the classification and treatment of captured or suspected terrorists, and those ordering the National Security Agency to wire tap phone calls.⁷³

⁶⁸ DUFFY, THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW at 76-93.

⁶⁹ See President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

⁷⁰ See President George W. Bush, Presidential Address to the Nation (Oct. 7, 2001), <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> (announcing the commencement of air strikes against the Taliban and al-Qaeda).

⁷¹ See Part II.

⁷² USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

⁷³ James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

While President Bush vowed to vanquish terrorism, he also declared the lines demarcating victory. First, victory would not be achieved until “every terrorist group of global reach has been found, stopped, and defeated.”⁷⁴ Second, victory could not come at the price of America compromising its basic values:

The object of terrorism is to try to force us to change our way of life, is to force us to retreat, is to force us to be what we’re not. And that’s—they’re going to fail. They’re simply going to fail. I want to assure my fellow Americans that our determination—I say “our,” I’m talking about Republicans and Democrats here in Washington—has never been stronger to succeed in bringing terrorists to justice, protecting our homeland. Because what we do today will affect our children and grandchildren.⁷⁵

Exactly what the President meant by “our way of life” was unclear, but possibly it included respect for the Constitution and Bill of Rights, the rule of law, and individual rights and liberties.

A. THE BUSH PRESIDENCY AND THE WAR ON DEMOCRACY

For many, the “way of life” that Bush wished to preserve did not seem to include a respect for democracy and constitutionalism, assuming both terms incorporated protection for individual rights and liberties. The American Civil Liberties Union (“ACLU”), for one, has been sharply critical of the Bush Administration, stating: “Throughout U.S. history ‘national security’ has often been used as a pretext for massive violations of individual rights. The terrorist attacks on September 11 mobilized our country in the fight against terrorism. However, the attacks also launched a serious civil liberties crisis.”⁷⁶ People for the American Way condemned the Patriot Act as launching a “war on terror [that] could become a war on all American citizens” because of its failure to provide “meaningful judicial review and respect due individual rights and liberties.”⁷⁷ Amnesty International has criticized the Bush

⁷⁴ See President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

⁷⁵ See President George W. Bush, Presidential Address to the Nation (Oct. 7, 2001), <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> (announcing the commencement of air strikes against the Taliban and al-Qaeda).

⁷⁶ American Civil Liberties Union, <http://www.aclu.org/natsec/index.html> (last visited May 13, 2008).

⁷⁷ People for the American Way, USA Patriot Act: What’s at Stake?, <http://www.pfaw.org/pfaw/general/default.aspx?oid=9391> (last visited May 13, 2008).

Administration for its prolonged detention of individuals at Guantanamo Bay,⁷⁸ and the International Red Cross has decried the treatment of 9-11 detainees by the United States as a violation of international human rights law.⁷⁹

To describe the full scope of civil liberties criticisms of Bush's war on terrorism would take significant space. The criticisms are directed at both international actions of the Bush Administration, as well as steps taken internally. Internationally, the Bush Administration is criticized for disregarding international humanitarian law. The criticism is rooted in the Administration's refusal to afford captured al Qaeda and Taliban fighters prisoner of war status.⁸⁰ Criticism has also been directed at the Administration's failure to respect international conventions that ban torture,⁸¹ and thereby encouraging mistreatment of prisoners at Abu Ghraib and Guantanamo Bay.⁸² In addition, the United States has refused to confirm or deny that the Central Intelligence Agency ("CIA") has held alleged terrorists in secret prisons in Eastern Europe where they have been tortured.⁸³ Other reports have suggested that the United States has targeted journalists and that, in fact, Bush suggested to Prime Minister Tony Blair that they target Al Jazeera reporters and stations.⁸⁴

Domestically, many, such as the ACLU and People for the American Way, as noted above, have criticized the Patriot Act as an assault on individual rights and privacy. For example, an American Library Association study reports that the Federal Bureau of Investigation ("FBI") has made at least 200 inquiries to libraries regarding reading material and patrons.⁸⁵ Prior to this study the

⁷⁸ Amnesty International, *Guantánamo detainees: 4 years without justice*, <http://web.amnesty.org/pages/usa-100106-action-eng> (last visited May 13, 2008).

⁷⁹ International Committee of Red Cross, *US detention related to the events of 11 September 2001 and its aftermath*, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/usa-detention-update-121205?OpenDocument> (last visited May 13, 2008).

⁸⁰ See, e.g. HELEN DUFFY, *THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW*, 249-71 (2005).

⁸¹ See, e.g., *id.* at 348-73.

⁸² *Id.* at 348-73, 382-85.

⁸³ Stephen Grey and Doreen Carvajal, *Secret Prisons in 2 Countries Held Qaeda Suspects, Report Says*, N.Y. TIMES, June 8, 2007, at A14; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1. See also Lisbeth Kirk, *European Courts May Challenge US Terror Renditions*, EU OBSERVER, Nov. 14, 2005, <http://euobserver.com/9/20314??print=1>; Craig Whitlock, *Europe Wants Answers on CIA Camps*, WASH. POST, Nov. 4, 2005, at A1 (noting European criticism that the CIA torture camps are illegal and may violate the European Convention on Human Rights).

⁸⁴ Alan Cowell, *Britain Denies Memo Cited in Bush Treat*, N.Y. TIMES, Jan. 18, 2006, at A6.

⁸⁵ Eric Lichtblau, *Libraries Say Yes, Officials Do Quiz Them About Users*, N.Y. TIMES, June 20, 2005, at A11.

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government had not admitted to querying libraries, and, because the Patriot Act prevents libraries from divulging whether they had been contacted by law enforcement officials, little was known about how frequently this authority to query libraries was invoked.⁸⁶ In addition, several states passed resolutions critical of the Act's impact on civil liberties,⁸⁷ and critics in Congress, including Senators Russ Feingold, Patrick Leahy, and Arlen Specter, were successful at the end of December 2005, in preventing a reauthorization of sixteen expiring provisions of the law,⁸⁸ although eventually the Patriot Act was reauthorized,⁸⁹ supposedly after several problems in the original Act were addressed. Among concern of many in Congress was that the law allowed for spying on Americans without warrants.⁹⁰

Other criticisms of the Bush Administration grow out of a December 16, 2005, *New York Times* story reporting that soon after the 9-11 attacks, President Bush issued an order authorizing the National Security Agency to monitor international telephone conversations and e-mails by Americans in an effort to uncover links to al Qaeda and other terrorist groups.⁹¹ This monitoring or wiretapping was done without court-approved warrants, as apparently required by the Foreign Intelligence Surveillance Act of 1978. In response to this surveillance, the ACLU⁹² and the Center for Constitutional Rights⁹³ filed suits, challenging these actions, alleging, among other things, that they violated the First Amendment rights of their members and that the President lacked authority to order this electronic monitoring. Efforts within the Justice Department to examine this issue were also blocked by the President.⁹⁴ While many in Congress expressed outrage to this surveillance, in the summer of 2007 they authorized this activity.⁹⁵

⁸⁶ Eric Lichtblau, *F.B.I., Using Patriot Act, demands Library's Records*, N.Y. TIMES, Aug. 26, 2005, at A12. (noting that at least one lawsuit challenging these queries, as well as the ban on their disclosure by libraries, was filed on August 9, 2005 by the ACLU).

⁸⁷ Gary Fields and Ann Marie Squeo, *Bipartisan Fix for Patriot Act Takes Shape*, WALL ST. J., Apr. 6, 2005, at A4.

⁸⁸ Gary Fields and Ann Marie Squeo, *Senate Blocks Patriot Act Renewals*, WALL ST. J., Dec. 17-18, 2005, at A3.

⁸⁹ P.L. 109-170, 120 Stat. 3 (2006).

⁹⁰ *Id.*

⁹¹ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

⁹² Complaint, *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp 2d 754 (E.D.Mich. 2006).

⁹³ Complaint, *Ctr. for Const. Rights v. Bush*, No.1:06-cv-313 (S.D.N.Y. Jan. 17, 2006).

⁹⁴ Neil A. Lewis, *Bush Blocked Ethics Inquiry, Official Says*, N.Y. TIMES, July 19, 2006, at A14.

⁹⁵ Carl Hulse & Edmund L. Andrew, *Democrats Feel Pressure on Spy Program*, N.Y.

The Bush Administration also had a secret program examining bank records of potentially millions of Americans.⁹⁶ His administration has been criticized for orders authorizing the detaining of both American citizens and non-citizens suspected of being terrorists, when those individuals are either denied access to attorneys (or have their conversations with them monitored) or civil courts.⁹⁷ Finally, *The New York Times* reported that the FBI monitored numerous advocacy groups after 9-11 without suspected terrorist connections, including Greenpeace and People for the Ethical Treatment of Animals.⁹⁸

President, Bush's approach to civil liberties can best be captured by his September 20, 2001 speech to Congress when he first declared the war on terrorism: "Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."⁹⁹ Bush's declaration of the war on terrorism, as well as his divisive you-are-with-us-or-the-enemy statement, divided the world between good and evil, posturing himself into the position of McCarthyizing any who would oppose him or his measures. The cost of this McCarthyism is the war on democracy and civil liberties.

B. PATRIOT ACT

The war on terrorism breached a wall traditionally distinguishing foreign policy, national security, and intelligence gathering from domestic law enforcement.¹⁰⁰ Domestic law enforcement is a policy area

TIMES, Aug. 5, 2007, at A1.

⁹⁶ Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

⁹⁷ Att'y. Gen. Order No. 2529-2001, 66 Fed. Reg. 55,062 (Oct. 31, 2001).

⁹⁸ Eric Lichtblau, *F.B.I. Watched Activist Groups, New Files Show*, N.Y. TIMES, Dec. 20, 2005, at A1.

⁹⁹ President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

¹⁰⁰ See, e.g., NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (authorized ed., W.W. Norton & Co. 2004) [hereinafter 9/11 COMM'N REPORT] (stating that "[a] central provision" of the Administration proposal that became the Patriot Act "was the removal of 'the wall' on information sharing between the intelligence and law enforcement communities"). See also Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 DUQ. L. REV. 663, 688 (2004); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1038 (2004); Peter Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1327 (2004) (describing the goal of the Patriot Act as tearing down the wall between law enforcement and foreign intelligence gathering).

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that must respect the constitutional protections and due process rights of those suspected of committing crimes. These requirements include the Fourth Amendment warrant and search and seizure requirements,¹⁰¹ the Fifth Amendment rights to remain silent,¹⁰² and the Sixth Amendment right to counsel,¹⁰³ among other rights. However, foreign intelligence gathering is generally exempt from a rigid application of these protections.¹⁰⁴ As a result, if domestic law enforcement need only follow the legal standards of foreign intelligence gathering, individual rights and due process protections stand a good chance of being sacrificed.¹⁰⁵ One of the first instances of how the Bush Administration subsumed crime control under national security imperatives was in the Patriot Act.

Signed into law by President Bush on October 26, 2001, the Patriot Act¹⁰⁶ was described by President Bush as an important tool in the war on terrorism. The law was meant to overcome difficulties in investigating acts of domestic terrorism by enhancing the capacity of criminal justice officials to draw upon intelligence information. One analyst has summarized the statute as follows:

The Act grants federal officials greater powers to trace and intercept terrorists' communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in effect to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close

¹⁰¹ See generally, *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that the Fourth Amendment bars the use of illegally obtained evidence (without a search warrant) to convict an individual of a crime); *Weeks v. United States*, 232 U.S. 383 (1914).

¹⁰² See generally *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that the Fifth Amendment recognizes the right of a suspect in custody to remain silent); *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁰³ See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that individuals charged with a felony have a right to counsel, included an appointed one if indigent, under the Sixth Amendment).

¹⁰⁴ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (stating that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens," foreclosed any claim by respondent to Fourth Amendment rights. More broadly, he viewed the Constitution as a "compact" among the people of the United States, and the protections of the Fourth Amendment were expressly limited to "the people"); *United States v. Verdugo-Urquidez* 494 U.S. 259, 266 ("The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory").

¹⁰⁵ See, e.g., Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1626 (2004).

¹⁰⁶ USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2002), (codified at 18 U.S.C. §§ 1-1016 (2008 Westlaw)).

our borders to foreign terrorists and to expel those amongst us. Finally it creates a few new federal crimes, such as the one outlawing terrorists' attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.¹⁰⁷

Among the major provisions of the Act's more than 300 pages are ten separate sections that revise intelligence gathering, immigration, criminal justice, and money laundering laws as they relate to fighting terrorism.¹⁰⁸ One sees in the Act a consolidation of crime control into foreign intelligence gathering with the centralization of some domestic investigations under the director of the CIA.¹⁰⁹

More specifically, among the major provisions of the Patriot Act, section II amended the Foreign Intelligence Surveillance Act of 1978, including authorization of disclosure or sharing of grand jury information containing foreign intelligence to federal officials.¹¹⁰ It also enhanced the ability of the federal government to use pen registers to intercept electronic communications, including the Internet, and for roving surveillance of devices such as cell phones.¹¹¹ This information could now be shared with the CIA director.¹¹² Another provision of Part II provided delayed notification of required notices of execution of warrants (the so called "sneak and peak" provision).¹¹³ Among the more controversial features of the Act, it makes it possible to search many private records, including medical and library information, without having to show reasonable suspicion as required under the Fourth Amendment.¹¹⁴ The Act also permitted the searching of library records and a ban of disclosure of such searches or inquiries.¹¹⁵ Overall, the Patriot Act has been criticized by many as threatening civil liberties and individual rights because it has unnecessarily conflated national security

¹⁰⁷ CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, THE USA PATRIOT ACT: A LEGAL ANALYSIS 54-57 (Apr. 15, 2002).

¹⁰⁸ Jennifer C. Evans, *Hijacking Civil Liberties: the USA Patriot Act of 2001*, 33 LOY. U. CHI. L.J. 933, 965 (2002).

¹⁰⁹ 50 U.S.C.A. § 403-3(c)(6) (Supp. 2002). See also John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act the Justice Department's Anti-terrorism Initiatives* 51 AM. U. L. REV. 1081, 1091 (2002).

¹¹⁰ 18 U.S.C.A § 203 (Westlaw 2008).

¹¹¹ 18 U.S.C.A §§ 204-09 (Westlaw 2008). Section 206 allows for wire tapping of specific individuals and not just devices such as telephones.

¹¹² 18 U.S.C.A § 203(b) (Westlaw 2008).

¹¹³ 18 U.S.C.A § 213 (Westlaw 2008).

¹¹⁴ 18 U.S.C.A § 218 (Westlaw 2008).

¹¹⁵ 18 U.S.C.A § 215 (Westlaw 2008).

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and domestic law enforcement standards.¹¹⁶

C. ASSERTION OF PRESIDENTIAL WAR POWERS AND A UNIFIED EXECUTIVE

Congress, through the Patriot Act, putatively gave the President the authority to engage in increased domestic surveillance by way of congressional fiat. In addition, a congressional joint resolution, the Authorization to Use Military Force ("AUMF") of September 18, 2001, authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."¹¹⁷ It has been interpreted as granting the President extensive power to respond to the terrorist attacks.¹¹⁸ However, beyond congressional or legislative authorization, four Justice Department– memoranda also asserted inherent or extra-constitutional presidential power to respond to terrorism. These memoranda include a September 25, 2001 Department of Justice opinion written by John Yoo which describing presidential war making powers ("the Yoo Memorandum"), and a second legal opinion of January 22, 2002 addressing the treatment of al Qaeda and Taliban detainees ("the Detainee Memorandum").¹¹⁹ The third memorandum is from August 1,

¹¹⁶ See, e.g., Jennifer C. Evans, *Hijacking Civil Liberties: the USA Patriot Act of 2001* 33 LOY. U. CHI. L.J. 933, 965 (2002); Jacob R. Lilly, *National Security at What Price?: A Look into Civil Liberty Concerns in the Information Age under the USA Patriot Act of 2001 and a Proposed Constitutional Test for Future Legislation*, 12 CORNELL J.L. & PUB. POL'Y 447 (2003); Rita Shulman, *USA Patriot Act: Granting the U.S. Government the Unprecedented Power to Circumvent American Civil Liberties in the Name of National Security*, 80 U. DET. MERCY L. REV. 427 (2003); John W. Whitehead and Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-terrorism Initiatives* 51 AM. U. L. REV. 1081, 1091 (2002).

¹¹⁷ Authorization for Use of Military Force § 2(a), Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹¹⁸ Despite this resolution authorizing force, Congress also ambiguously stated in section 2 that the statutory authorization to use force arose from the War Powers Resolution and also in section 1 that the president "has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Id.* at §2(b). See also Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 2048, 118 HARV. L. REV. (2005) (discussing the legal implications of this resolution in terms of the scope of presidential power to respond to the events of 9-11).

¹¹⁹ John C. Yoo, Office of Legal Counsel, U.S. Department of Justice, Memorandum Opinion for the Deputy Counsel to the President Re: The President's Constitutional Authority To Conduct Military Operations Against Terrorists And Nations Supporting Them (Sept. 25, 2001) [hereinafter Yoo Memorandum], available at <http://www.usdoj.gov/olc/warpowers925.htm>; Jay S.

2002, reviewing the classification and treatment of al-Qaeda held outside the United States, while the fourth is a January 19, 2006 Department of Justice memorandum supporting President Bush's decision to order the warrantless wiretapping of telephone conversations by the National Security Agency.

These four memoranda, taken together, frame the Bush Administration's arguments for its foreign policy and national security authority post 9-11 by asserting a unitary conception of presidential power that appears to be exempt from congressional oversight or regulation in foreign affairs and in the conduct of war. While such an argument for presidential power may be questionable itself, its combination with the collapse of domestic criminal justice activity into foreign affairs has resulted in a significant broadening of claims of presidential powers in domestic and international affairs such that it threatens basic constitutional norms and a respect for individual rights.

1. *September 25, 2001 Memorandum, the Yoo Memorandum*

The Yoo Memorandum argued that the president has extensive inherent authority to use force against terrorists.¹²⁰ To substantiate this claim, Yoo relied upon the structure of the Constitution, judicial and executive construction of the Constitution, recent practice and tradition, and finally congressional enactments authorizing use of force.¹²¹ First, in terms of the structure of the Constitution, Yoo drew heavily upon the Founders' constitutional intent, especially as glossed by Alexander Hamilton in *The Federalist*.¹²² For example, Yoo argued that:

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to use military force in situations of emergency. Article II, Section 2 states that the "President shall be Commander in

Bybee, Office of Legal Counsel, U.S. Department of Justice, Memorandum for Alberto R. Gonzalez, Counsel to the President, and William J. Haynes, General Counsel of the Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), *available at* <http://news.lp.findlaw.com/hdocs/docs/torture/powtorturememos.html>.

¹²⁰ The arguments found in this memorandum were subsequently elaborated upon in JOHN C. YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

¹²¹ Yoo Memorandum at 1.

¹²² Yoo Memorandum at 2 (citing *THE FEDERALIST* NO. 23, at 122 (Alexander Hamilton) (Charles R. Kesler ed., 1999) (stating regarding presidential war powers, that "the circumstances which may affect the public safety are [not] reducible within certain determinate limits, . . . it must be admitted, as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficiency.")).

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Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” U.S. Const. art. II, § 2, cl. 1. He is further vested with all of “the executive Power” and the duty to execute the laws. U.S. Const. art. II, § 1. These powers give the President broad constitutional authority to use military force in response to threats to the national security and foreign policy of the United States. During the period leading up to the Constitution’s ratification, the power to initiate hostilities and to control the escalation of conflict had been long understood to rest in the hands of the executive branch.¹²³

For Yoo, the text of the Constitution, vests “full control” of military powers in the president to direct military operations, even absent congressional declarations of war.¹²⁴ The basis for this claim rested upon a specific views of the presidency, again attributed to Hamilton, that asserts that the constitutional text creates a unified executive power or presidency.¹²⁵ It is this unified conception of the presidency, along with the conveyance of executive power to the president, and a historical view of war powers and foreign policy activity as an executive function, that gives the president the *exclusive* power that it has in national security and defense issues.¹²⁶

Second, judicial and executive construction, according to the Yoo Memorandum, also endorses a strong view of presidential power in national security issues. In terms of executive construction, part II of the Memorandum outlines numerous occasions where the Attorney General or the Justice Department has supported presidential supremacy if not exclusivity in this policy area. For example, Yoo cites opinions of Attorneys General William Barr, Frank Murphy, and Thomas Gregory as arguing that the president had inherent constitutional authority to commit troops overseas, or to take military action without congressional approval, in anticipation of events that would eventually lead to World Wars I and II.¹²⁷ Furthermore, Yoo argued, the judiciary has endorsed these executive readings of the Constitution.¹²⁸ For example, in *Mitchell v. Laird*,¹²⁹ a district court, in ruling on the constitutionality of the Vietnam War, stated that “there are some types of war which without

¹²³ *Id.* at 3 (footnotes omitted).

¹²⁴ *Id.* at 1-3.

¹²⁵ Yoo Memorandum at 2-3 (quoting THE FEDERALIST NO. 70, at 392, NO. 74, at 415 (Alexander Hamilton) (Charles R. Kesler ed., 1999)).

¹²⁶ Yoo Memorandum at 3-4.

¹²⁷ *Id.* at 6.

¹²⁸ *Id.* at 8.

¹²⁹ *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973).

Congressional approval, the President may begin to wage: for example, he may respond immediately without such approval to a belligerent attack.”¹³⁰

Appeal to practice and tradition is a third argument Yoo offered to support presidential exclusivity in national security matters. Specifically, Yoo cited what he claims are at least 125 times in American history where troops have been committed overseas by the president without congressional approval.¹³¹ This deference to presidential authority is a reflection, for Yoo, of the practical needs of the Constitution to afford flexibility in assigning responsibility in the area of national security.¹³² Finally, Yoo pointed to both the War Powers Resolution and the September 18, 2001 congressional resolution as also demonstrating “Congress’s acceptance of the President’s unilateral war powers in an emergency situation like that created by the September 11 incidents.”¹³³ Invoking Justice Jackson’s famous concurrence in *Youngstown Sheet & Tube Co.* that presidential power in foreign affairs is at its maximum when given legislative support by Congress,¹³⁴ according to Yoo these two acts of Congress clearly endorse that the president has broad if not exclusive and unlimited power to acts in foreign affairs and national security matters.

What are the overall implications of the Yoo Memorandum? First, as asserted in the conclusion of his memorandum, Yoo argued that the president has “plenary constitutional power” to take military action, as he deems appropriate, to respond to terrorist attacks.¹³⁵ This power is inherent, Yoo argued, regardless of what Congress authorized in either the War Powers or AUMF resolutions.¹³⁶ As subsequently articulated in his book, Yoo views the president as having total control over foreign and military powers, with Congress confined merely to either terminating funding or authorization if it disapproves of what the executive branch does.¹³⁷ Third, Yoo’s memorandum sketched out a theory of a unified executive and president with strict separation of powers, again leaving no room for Congress or the courts in the field of national security. Fourth,

¹³⁰ *Id.* at 613.

¹³¹ Yoo Memorandum at 10.

¹³² *Id.*

¹³³ *Id.* at 15.

¹³⁴ *Id.* at 14 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

¹³⁵ Yoo Memorandum at 17.

¹³⁶ *Id.* Yoo also cites the September 18, 2001 resolution as the September 14, 2001 resolution.

¹³⁷ JOHN C. YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 40 (2005).

in the conclusion of the Memorandum Yoo also states that the president can deploy troops not just to retaliate but to prevent future attacks,¹³⁸ thereby providing the rationale for the Bush Administration's claim of "anticipatory self-defense" and the invasions of Afghanistan and Iraq. Finally, the Memorandum seemed to suggest, and actually did state, that there appears to be no limit to presidential power in the field of national security, thereby setting the stage for expansion of chief executive authority to make claims for expanded capacity to act beyond the text of the Constitution.

2. *January 22, 2002 Memorandum, the Detainee Memo*

A second legal opinion critical to the Bush Administration's assertion of presidential power to undertake the war on terrorism is the January 22, 2002 memorandum addressing the treatment of al Qaeda and Taliban detainees ("Detainee Memorandum"),¹³⁹ which was drafted for then Counsel to the President Alberto Gonzales by the Department of Justice's Office of Legal Counsel. This memorandum sought to ascertain the application of international treaties, such as the Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III") and federal law to captured members of al Qaeda and the Taliban.¹⁴⁰ This memorandum concluded that Geneva III did not apply to al Qaeda and that the president could also conclude that its protections do not extend to members of the Taliban militia.¹⁴¹

In seeking to analyze the applicability of Geneva III, the Memorandum undertook a historical overview of the type of conflict and participants the Convention was supposed to cover. In doing so, it first noted that Geneva III structures "legal relationships between nation-states, not between nation-States and private, transnational or subnational groups or organizations."¹⁴² Second, in examining the type of conflict Geneva III (and all the other Geneva Conventions) were supposed to cover, the Memorandum asserted that Geneva III is directed to a "condition of civil war, or a large-scale armed conflict between a State

¹³⁸ Yoo Memorandum at 17.

¹³⁹ Jay S. Bybee, Office of Legal Counsel, U.S. Department of Justice, Memorandum for Alberto R. Gonzalez, Counsel to the President, and William J. Haynes, General Counsel of the Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (January 22, 2002) [hereinafter *Detainee Memorandum*], available at <http://news.lp.findlaw.com/hdocs/docs/torture/powtorturememos.html>.

¹⁴⁰ *Id.* at 1.

¹⁴¹ *Id.*

¹⁴² *Id.* at 4.

and an armed movement within its own territory.”¹⁴³ Thus, the framers of the 1949 Geneva Conventions only had in mind armed conflicts between nation-states and civil war within a nation-state.¹⁴⁴ It is in these types of armed conflicts, the memorandum argues, that Geneva III should be read.¹⁴⁵

Having set this context, the Memorandum then reviewed a history of warfare and conflict leading up to the 1949 Accords. It concluded that only “state-centered” types of conflicts were envisioned in the writing of Geneva III, and it is this type of warfare that the United States had in mind when it ratified this treaty.¹⁴⁶ The Memorandum then switches direction slightly, arguing that because state-centered conflict was the type of warfare contemplated by Geneva III, it did not apply to all type of conflicts. Had “state parties . . . intended the Conventions to apply to all (emphasis in the original) forms of armed conflict, they could have used broader, clearer language,” according to the Memorandum.¹⁴⁷ But given the history and context at the time, the Memorandum argued, the Geneva Convention drafters could not have contemplated that it would address conflict between a nation-state and an international terrorist group such as al Qaeda.¹⁴⁸ Therefore, the Memorandum concluded, Geneva III does not apply to al Qaeda and they do not qualify for prisoner of war (“POW”) treatment.¹⁴⁹

Turning to the Taliban, the Memorandum noted that the application of Geneva III to them was a more difficult legal question.¹⁵⁰ To resolve this issue, the Memorandum noted that Article II of the Constitution makes the president both Commander-in-Chief and vests in him the executive power.¹⁵¹ Relying on historical and textual arguments similar to those found in the Yoo Memorandum, the Detainee Memorandum asserted that the Constitution vests in the president independent plenary foreign policy power, including any unenumerated powers that deal with foreign affairs, including those that address treaties.¹⁵² It concludes that if treaty power is an executive function, and if the president has the

¹⁴³ *Id.* at 6.

¹⁴⁴ *Id.* at 7.

¹⁴⁵ Detainee Memorandum at 7.

¹⁴⁶ *Id.* at 8.

¹⁴⁷ *Id.* (emphasis in the original)

¹⁴⁸ *Id.* at 8.

¹⁴⁹ *Id.* at 9.

¹⁵⁰ *Id.* at 10.

¹⁵¹ Detainee Memorandum at 11.

¹⁵² *Id.* at 11.

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power alone to suspend or continue treaties,¹⁵³ then he also has the lesser power of temporarily suspending treaties.¹⁵⁴

Having argued that Geneva III only applies to nation-states and that the president has plenary power to suspend (and, implicitly, to interpret) treaties, the Memorandum argued that the president could conclude that Afghanistan is a “failed state” or a state in which authority has collapsed.¹⁵⁵ If, in fact the president could find that Afghanistan was a failed state,¹⁵⁶ he could then also decide that Geneva III does not apply to the Taliban, and therefore temporarily suspend the treaty obligations towards them. Under such circumstances, the Memorandum argued, while Geneva III is not binding on the United States as a matter of international law,¹⁵⁷ the president might apply it, or lesser standards, as a matter of policy.¹⁵⁸

The significance of the Detainee Memorandum is great. First, it relied on a logic of executive branch power in foreign affairs that parallels the Yoo Memorandum. Second, it argued that POW status, as a matter of law, does not have to be granted to either the al-Qaeda or Taliban detainees. Third, it asserted that is a matter of policy to determine what status al-Qaeda and Taliban captives should be afforded and, therefore, what treatment they should receive. In terms of what status and treatment they should receive, a January 25, 2002 Memorandum from Counsel to the President Alberto Gonzales to the president (“the Application Memorandum”) described the war against terrorism as a “new kind of war.”¹⁵⁹ Because of that, the Application Memorandum argued that the “new paradigm [of conflict] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions” regarding their treatment.¹⁶⁰

¹⁵³ *Id.* at 12 (citing Alexander Hamilton, *Pacificus* No. 1 (1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 39 (Harold C. Syrett et al. eds., 1969) for this proposition).

¹⁵⁴ *Id.* at 12-13.

¹⁵⁵ *Id.* at 15.

¹⁵⁶ *Id.* at 16-22 (discussing historical factors and conclusions, some of which were made by the executive branch, concluding that Afghanistan and the Taliban regime constituted a failed state).

¹⁵⁷ Detainee Memorandum at 23-25 does discuss whether a decision to suspend the treaty would be valid under international law. Two arguments are made. First, any breaches of international law would not be binding on domestic law in the United States. *Id.* Second, nothing in the Geneva Conventions says that they cannot be temporarily suspended and therefore the president may do this. *Id.*

¹⁵⁸ *Id.* at 25.

¹⁵⁹ Alberto R. Gonzales, Counsel to the President, Memorandum to the President Re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002) [hereinafter Application Memorandum], available at <http://news.lp.findlaw.com/hdocs/docs/torture/powtorturememos.html>.

¹⁶⁰ *Id.* at 2.

Finally, were the logic of this memorandum accepted, the president would appear to be able to exempt anyone who tortures from criminal liability anyone who tortures.¹⁶¹ The Detainee and Application Memoranda thus set the putative legal authority of the president to classify both al-Qaeda and Taliban detainees as “enemy combatants” who would be afforded presidentially-designated treatment at Guantanamo Bay and other facilities outside the United States.

3. *August 1, 2002 Memorandum, the Gonzales Memo*

The August 1, 2002 Memorandum prepared by the Department of Justice’s Office of Legal Counsel for Counsel to the President Alberto Gonzales discussed the standard of conduct or treatment for those captured or detained as a result of the war on terrorism.¹⁶² Better known as the “torture memo,” the memorandum examined what type of conduct can be conducted in interrogations outside the United States, consistent with the Convention Against Torture and 18 U.S.C. §§ 2340-2340A.¹⁶³ In summary, the Memorandum concluded that only acts of “extreme nature”—equivalent to that found in death, organ failure, or serious bodily injury—constitute torture and that merely cruel, inhumane, or degrading action does not rise to the level of a violation of either the Convention Against Torture or section 2340A.¹⁶⁴

To reach these conclusions, the Memorandum first turned to 18 U.S.C. § 2340A which makes it a criminal offense for anyone outside the United States to commit, or attempt to commit, torture.¹⁶⁵ Torture is defined in section 2340 as an “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person.”¹⁶⁶ The Memorandum contended that § 2340A applies only if the specific intent was to inflict pain as the defendant’s precise objective.¹⁶⁷ If, however, the defendant acts with the belief that such pain was only reasonably likely as a result of his actions, then there is only general intent and therefore the act does

¹⁶¹ Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L. J. 1145, 1151 (2006).

¹⁶² Jay S. Bybee, Office of Legal Counsel, U.S. Department of Justice, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: *Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A* (Aug. 1, 2002) [hereinafter *Gonzales Memorandum*], available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

¹⁶³ *Id.* at 1.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 2.

¹⁶⁶ *Id.* at 3.

¹⁶⁷ *Id.* at 3-4.

not apply as torture under the law.¹⁶⁸ Thus, if the goal is to inflict serve pain, then it is torture, but if in the course of interrogation pain is inflicted in order to extract information, that does not qualify as torture because inflicting pain was not the goal of the conduct.¹⁶⁹

Second, the Memorandum noted that only “severe pain” is barred by section 2340.¹⁷⁰ In seeking to interpret what severe pain is, the Memorandum drew upon 18 U.S.C. §2340A to conclude that it encompasses only severe mental pain or suffering, threat of imminent death, or the use of drugs which profoundly disrupt the senses or personality.¹⁷¹

The Memorandum next turned to the Convention Against Torture (“CAT”) to ascertain what it prohibits. The Memorandum again noted that the CAT prohibits only severe pain or suffering,¹⁷² but unlike section 2340, does not appear to have a specific intent requirement.¹⁷³ However, to support a reading that CAT only applies to extreme forms of physical or mental harm, the Memorandum appealed to executive branch interpretations of the treaty. It cited Reagan Administration views that the interrogation must use deliberate and calculated techniques “intended to inflict excruciating and agonizing physical or mental pain or suffering.”¹⁷⁴

Finally, after a brief review of how other bodies and states have viewed torture,¹⁷⁵ the Gonzales Memorandum then articulated a similar logic regarding presidential power as found in the Yoo Memorandum. Specifically, the former contended that even if interrogation methods used violated section 2340A, this statute would be unconstitutional because it interfered with the president’s “core war powers.”¹⁷⁶ Because the president enjoys “complete discretion” in terms of how to use his commander-in-chief powers and because executive power is invested in

¹⁶⁸ Gonzales Memorandum at 4.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 5.

¹⁷¹ *Id.* at 7-11.

¹⁷² *Id.* at 14.

¹⁷³ *Id.*

¹⁷⁴ Gonzales Memorandum at 16 (citing S. TREATY DOC. NO. 100-20, at 4-5 (1988)). *See also* Gonzales Memorandum at 20 (dismissing non-executive branch interpretations by stating that beyond “statements of Executive branch officials, the rest of the ratification record is of little weight in interpreting a treaty”). Presumably this statement encompasses Senate debate on the Convention Against Torture.

¹⁷⁵ Gonzales Memorandum at 27-31 (noting also how such international decisions are not binding on the United States).

¹⁷⁶ *Id.* at 31. *See also id.* at 38 (arguing that “capturing, detaining, and interrogating members of the enemy” is a core function of the Commander in Chief).

the president,¹⁷⁷ laws, including section 2340A, the memorandum argues, must be read so as not to interfere with his constitutional authority.¹⁷⁸

To summarize, the memorandum argues that section 2340A only applies to severe physical or mental suffering if the specific intent is to inflict this type of pain. Additionally, presidential interpretations of CAT only bar this type of infliction of pain. Third, even if section 2340A does apply, it would be unconstitutional if it also interfered with presidential war-making powers. How do we know if it does interfere? It seems mere presidential declaration that it does is sufficient.

4. *January 19, 2006 Memorandum, the Wiretapping Memo*

The fourth memorandum that frames the Bush Administration's legal justification for the war on terrorism is the January 19, 2006 Memorandum defending the president's ability to order wiretapping of telephone conversations without a warrant ("Wiretapping Memorandum").¹⁷⁹

On December 16, 2005, the *New York Times* broke a story reporting that soon after the 9-11 attacks, President Bush issued an order authorizing the National Security Agency ("NSA") to monitor international telephone conversations and e-mails by Americans in an effort to uncover links to al Qaeda and other terrorist groups.¹⁸⁰ This monitoring or wiretapping was done without court-approved warrants, as apparently required by the Foreign Intelligence Surveillance Act of 1978.¹⁸¹ Subsequently, on December 17, President Bush acknowledged that he ordered the spying,¹⁸² with the exact scope of the number of individuals or communication spied on unknown.¹⁸³ Significant

¹⁷⁷ *Id.* at 33.

¹⁷⁸ *Id.* at 34.

¹⁷⁹ U.S. Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (January 19, 2006) [hereinafter Wiretapping Memorandum], available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

¹⁸⁰ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005 at A1.

¹⁸¹ *Id.* See also Foreign Intelligence Surveillance Act ("FISA") as amended, 50 U.S.C.A. §§ 1801-1862 (2000 & Supp. II 2002). Passed in light of revelations that Richard Nixon had ordered domestic spying on personal enemies and reporters, FISA constructed a process whereby the president could obtain a warrant from a special federal court to place wiretaps telephones and other communication devices, if needed for national security and intelligence gathering reasons. In some cases, the wiretaps could be authorized prior to a warrant being issued, but one had to be obtained from the special court within three days.

¹⁸² David E. Sanger, *In Speech, Bush Says He Ordered Domestic Spying*, N.Y. TIMES, Dec. 18, 2005, at A1.

¹⁸³ James Risen & Eric Lichtblau, *Spy Agency Mined Vast Data Trove, Officials Report*,

controversy followed this revelations of spying, with members of Congress, such as Senator Arlen Specter, contending that the president had violated FISA. This forced the president to defend the program numerous times, culminating in the January 19, 2006 memorandum.

The Wiretapping Memorandum retraced similar ground as the other three memoranda in terms of assertions of presidential power. It too cited the Article II vesting of the executive and commander-in-chief powers in the president as creating a unitary chief executive who is preeminent in the field of national security and defense.¹⁸⁴ In addition to again relying heavily upon Alexander Hamilton's views on executive power,¹⁸⁵ the Wiretapping Memorandum also relied upon dicta in *United States v. Curtiss-Wright Export Corporation*¹⁸⁶ describing the president as the "sole organ of the nation in its external relations."¹⁸⁷

The Memorandum then concluded that because of his preeminent authority in national affairs, "a consistent understanding has developed that the President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes."¹⁸⁸ To support this conclusion, the Memorandum cited legal opinions by previous attorneys general¹⁸⁹ as well as lower federal court opinions¹⁹⁰ and Supreme Court dicta.¹⁹¹ After asserting this inherent presidential power, the Wiretapping Memorandum, like the other three Memoranda, cited the September 18, congressional Authorization to Use Military Force as additional support for the president to order warrantless wiretaps. More importantly, it is this congressional authorization that was viewed by the Memorandum as providing the legal justification to bypass FISA.¹⁹²

According to the Wiretapping Memorandum, FISA regulates electronic surveillance when it is in the context of gathering foreign

N.Y. TIMES, Dec. 24, 2005, at A1.

¹⁸⁴ Wiretapping Memorandum at 6-7.

¹⁸⁵ *Id.* at 7.

¹⁸⁶ 299 U.S. 304 (1936).

¹⁸⁷ 299 U.S. at 319; Wiretapping Memorandum at 6.

¹⁸⁸ Wiretapping Memorandum at 7.

¹⁸⁹ *Id.* at 8.

¹⁹⁰ *Id.* See also *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980).

¹⁹¹ *United States v. U.S. District Court*, 407 U.S. 297 (1972) (holding that the Fourth Amendment warrant requirement applies to investigations of domestic threats to security). The Wiretapping Memorandum at 8, argues that because the Court had not ruled on the President's authority to conduct foreign intelligence surveillance without a warrant and that subsequently lower courts had concluded the president could do this, therefore he did have this authority.

¹⁹² Wiretapping Memorandum at 2.

intelligence information.¹⁹³ The Act requires the Attorney General to obtain a warrant from a special court of Article III judges if it wishes to engage in electronic surveillance. In addition, FISA requires that the warrant application must show probable cause to believe the person or agent targeted is a foreign power or agent of a foreign power. The NSA must also certify that the information sought is foreign intelligence and that it cannot be obtained by normal domestic means.¹⁹⁴ According to the Wiretapping Memorandum, Congress did not intend FISA either to limit presidential power in time of war, or to prohibit him from engaging in all forms of electronic surveillance.¹⁹⁵ Instead, section 109 of FISA only prohibits such surveillance “*except as authorized by statute.*”¹⁹⁶ The September 18, 2001 congressional AUMF resolution, according to the Memorandum, is then described as a “statute” authorizing electronic surveillance within the meaning of section 109 of FISA.”¹⁹⁷ Finally, the Memorandum argued that even if there are questions about whether FISA or the Fourth Amendment¹⁹⁸ barred the wiretapping, the interpretive rule of seeking to avoid constitutional questions should weigh on the side of the president’s authority.¹⁹⁹

In sum, the surveillance of telephone and e-mail communications is legal because: 1) the president has inherent power to act in national affairs; or 2) FISA does not prevent it;²⁰⁰ or 3) FISA allows for some exceptions and Congress authorized it with its September 18 resolution; or 4) the Fourth Amendment does not apply to foreign intelligence gathering or NSA activities; or 5) the rule of constitutional avoidance should weigh in favor of executive authority.

¹⁹³ *Id.* at 18.

¹⁹⁴ *Id.*; See also 50 U.S.C.A. §§ 1803-1805 (Westlaw 2008).

¹⁹⁵ Wiretapping Memorandum at 19-20.

¹⁹⁶ *Id.* at 20 (*italics in the original*).

¹⁹⁷ *Id.* at 23.

¹⁹⁸ *Id.* at 36-38 (dismissing Fourth Amendment objections by asserting that the courts have affirmed presidential authority to gather foreign intelligence without a warrant, or that the warrant requirement does not apply to activities of the NSA).

¹⁹⁹ *Id.* at 28.

²⁰⁰ Compare, Foreign Intelligence Surveillance Act (“FISA”) as amended, 50 U.S.C.A. §204 (2000 & Supp. II 2002) (stating that “nothing in code provisions regarding pen registers shall be deemed to affect the acquisition by the Government of specified foreign intelligence information, and that procedures under FISA shall be the *exclusive means* by which electronic surveillance and the interception of domestic wire and oral (current law) and electronic communications may be conducted”) (*italics added*).

5. *Presidential Signing Statements*

Presidential signing statements have been tactically used by the Bush Administration to reinforce executive power, especially in the areas of foreign policy and military affairs. These statements, issued at the time when the president signs a bill, have been around since the early days of the republic.²⁰¹ However, it was Attorney General Edwin Meese during the Reagan presidency who pushed the idea of using signing statements as a way of interjecting the intent or understanding of the president regarding what a particular law meant. The hope was to then have this interpretation of the law guide judicial construction of it in court.²⁰² Yet the Bush presidency has transformed the signing statements into a major tool to defend its conception of presidential power as articulated in the four Memoranda.

Since taking office, the Bush Administration has used these signing statements to claim authority to disobey or ignore the law in more than 750 situations.²⁰³ In an earlier statistical analysis of these signing statements, Phillip Cooper found that of the 505 signing statements, eighty-two regarded authority to supervise a unitary executive, seventy-seven pertained to exclusivity of presidential power in foreign affairs, forty-eight dealt with presidential power to classify national security information and withhold information, and thirty-seven addressed commander-in-chief issues.²⁰⁴ Not surprisingly, the signing statements clumped around foreign policy and defense issues. Among the more prominent signing statements, is one indicating that the president did not have to comply with the McCain Amendment²⁰⁵ that barred U.S. officials from using torture, cruel, and inhuman treatment against prisoners.²⁰⁶

These signing statements echo many of the themes addressed in the memoranda defending presidential exclusivity and supremacy in foreign policy and defense matters.²⁰⁷ For example, in his signing statement addressing the McCain Amendment, Bush asserted:

²⁰¹ Phillip J. Cooper, *George W. Bush, Edgar Allen Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRES. STUDIES Q. 515, 516-20 (2005).

²⁰² *Id.*

²⁰³ See Charles Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1.

²⁰⁴ Cooper, 35 PRES. STUDIES Q. at 522.

²⁰⁵ 42 U.S.C.A. §§ 2000dd, 2000dd-1 (Westlaw 2008).

²⁰⁶ AMERICAN BAR ASSOCIATION, RECOMMENDATION AND REPORT OF TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 16 (Aug. 8, 24, 2006).

²⁰⁷ *Id.*

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks. Further, in light of the principles enunciated by the Supreme Court of the United States in 2001 in *Alexander v. Sandoval*, and noting that the text and structure of Title X do not create a private right of action to enforce Title X, the executive branch shall construe Title X not to create a private right of action. Finally, given the decision of the Congress reflected in subsections 1005(e) and 1005(h) that the amendments made to section 2241 of title 28, United States Code, shall apply to past, present, and future actions, including applications for writs of habeas corpus, described in that section, and noting that section 1005 does not confer any constitutional right upon an alien detained abroad as an enemy combatant, the executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005.²⁰⁸

Within this statement is an assertion of a unitary presidency and of presidential supremacy within foreign and military affairs. In effect, the statement indicates a willingness to disregard the Amendment. Thus, characteristic of the Bush signing statements that distinguish them from previous presidents is that they are not merely ceremonial, rather they envision a decision not to comply with the law.²⁰⁹

Legally, there are several problems with these statements. As the American Bar Association points out, there is no constitutional authorization for these statements in the sense that they create new authority for the president. Either the president can sign or veto a bill, but there is no authority to sign and then issue a statement indicating unwillingness to comply.²¹⁰ A second issue is that even if the president can issue these statements, what effect should they be given when the courts construe a statute? According to Neil Kinkopf, in Supreme Court decisions dating back to John Marshall, a "President's interpretation of

²⁰⁸ President's Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

²⁰⁹ AMERICAN BAR ASSOCIATION, RECOMMENDATION AND REPORT OF TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE at 7-10.

²¹⁰ *Id.*, at 5, 9, 19.

his own authority was not entitled to deference and was to be given no weight in construing a statute.”²¹¹ Kinkopf, also points out that historically, the Court has interpreted presidential power in foreign affairs against a background of international law.²¹² This interpretive strategy is contrary to the understanding of executive power asserted in the memoranda. Finally, the authority asserted by Bush in these signing statements is contrary to what the Court stated in *Cooper v. Aaron*²¹³ in reference to *Marbury v. Madison*: “This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”²¹⁴ Whatever the Bush administration may think, its interpretation of the law through these signing statements is neither definitive nor controlling upon the judiciary.

D. SUMMARY

Overall, the four memoranda discussed above and the signing statements rest upon a conception of presidential power that appears to place the office beyond congressional or judicial limits or control when it comes to national defense or security. Collectively, they give the president near unlimited authority to interpret treaties, deploy troops, or take any other action to protect national security. As a result of this assertion of presidential power, it set the stage not simply for a war on terrorism, but one on democracy, constitutionalism, and international law.

How accurate is this sketch of presidential power which is described as the unitary executive theory? There is no question that it offers a wooden theory of the presidency that emphasizes a strict separation of powers model of government. The subsequent Yoo book concludes that the War Powers Act is unconstitutional for the same reason. But more troubling are several of Yoo’s assumptions. For one, as later articulated in his book, Yoo draws questionable conclusions based upon silence. For example, he asserts: “If we think of the allocation of war powers among

²¹¹ Neil Kinkopf, *The Statutory Commander in Chief*, 81 INDIANA L. J. 1169, 1190-91 (2006) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Talbot v. Seeman*, 5 U.S. 1 Cranch 1, 10 (1801)).

²¹² Kinkopf, 81 INDIANA L. J. at 1192 (citing *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118).

²¹³ *Cooper v. Aaron*, 358 U.S. 1 (1958).

²¹⁴ *Cooper*, 358 U.S. at 18 (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, (1803)).

the British and colonial governments as the background on which state constitutions were drawn, state silence suggests an acceptance of the British approach.”²¹⁵ Inferring from silence is always a precarious move, and too much of the reasoning of the book does that.

Another problem with Yoo’s analysis is its effort to freeze and unfreeze the meaning of the Constitutional text at the same time. Yoo starts with questionable discussions of how Hamilton (who barely attended the Constitutional Convention and whose views on presidential power were not taken seriously even by the framers) viewed the Constitution. He then moves to how the ratifiers viewed foreign affairs and national security. He then argues that he will not rely as much on subsequent case law (which does not consistently support him) to show how foreign policy power must be vested in plenary fashion in the president while decision making remains open to contemporary demands. Each of these steps contains questionable history and dubious logic.

In addition, one is left asking if the Constitution’s meaning on national security issues fixed or open, and if open, why does it seem to consistently favor the presidency over Congress? In supporting his view of presidential power, Yoo consistently relies upon questionable executive department self-interested assertions of authority, with such articulations bearing little weight in law or objectivity. Moreover, no thought is given either to how American conceptions of constitutionalism differed from British views by 1787, or how the Constitution of 1787 and its augmentation of power was rebalanced by the subsequent adoption of the Bill of Rights in 1791 and future amendments. Overall, as aptly stated by Justices Scalia and Stevens dissenting in *Hamdi v. Rumsfeld*²¹⁶ after reviewing the historical efforts in England to limit monarchical power and in the American colonies to address the abuses of King George III, “A view of the Constitution that gives the Executive authority to use military force rather than the force of law . . . flies in the face of the mistrust that engendered these provisions.”²¹⁷

Conversely, one can invoke text, framers’ intent, scholarly commentary, and history to refute Yoo. For example, the plain language of the text of the Constitution argues against Yoo’s claim that Congress has a minimal role in foreign policy and war activities. Article I, section

²¹⁵ John C. Yoo, Office of Legal Counsel, U.S. Department of Justice, Memorandum Opinion for the Deputy Counsel to the President Re: The President’s Constitutional Authority To Conduct Military Operations Against Terrorists And Nations Supporting Them (Sept. 25, 2001) [hereinafter Yoo Memorandum], at 62, available at <http://www.usdoj.gov/olc/warpowers925.htm>.

²¹⁶ 542 U.S. 507 (2004).

²¹⁷ *Id.* at 569 (Scalia, J. dissenting).

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8 contains no less than ten clauses that recognize Congress' authority in these activities, including the power to declare war. Article II, section 2 only vests in the president three powers in these areas — serve as commander-in-chief, and make treaties and appoint ambassadors — with the latter requiring concurrent Senate approval.²¹⁸

The Framers' intent also speaks against Yoo's interpretations. For example, Alexander Hamilton argued at the constitutional convention for extensive presidential powers in war making, but even here he noted that the executive would have the power "to make war or peace, *with the advise of the senate*."²¹⁹ But later in *Federalist No. 69* he downplayed presidential power, stating that he would be commander-in-chief "*when called into actual service of the United States*."²²⁰ Neither of these statements seem to support the idea that even Hamilton supported giving presidents the power Yoo asserts. Others, moreover, at the convention²²¹ and in ratification debates,²²² also expressed skepticism and concern about vesting war making power in the president.

Both scholarly analysis and history argue against Yoo's positions. For example, Fisher argues that while the Framers knew of the British model to vest war making and military power in the king, they firmly rejected doing that both in the Articles of Confederation and in the Constitution.²²³ In fact, Fisher notes how Article 9 of the Articles of Confederation transferred all war and foreign policy power to Congress, thereby representing the sharpest indication of their desire to break with the British model.²²⁴ Thus, by the time the new Constitution came about, executive power in this area was already limited, subject to whatever the Convention decided to give back to the president. Moreover, when it comes to the phrase "commander-in-chief," both Louis Fisher and Louis Henkin contend that this phrase was meant to do no more than to ensure that the military remained under civilian control during wars that would

²¹⁸ See generally U.S. CONST. art. II, § 2.

²¹⁹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 300 (Max Farrand ed., rev. ed. 1966) (emphasis added).

²²⁰ THE FEDERALIST NO. 69, at 447 (Modern Library 1937) (emphasis added).

²²¹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 65 (quoting James Madison indicating that John Rutledge, while preferring a single president, did not want to give him the "power of war and peace"); and JAMES MADISON, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION OF 1787 476 (Adrienne Koch ed., Norton Library 1969) (quoting Roger Sherman: "The Executive should be able to repel and not to commence war"). Note also that the convention delegates vote to reject giving the president war making power. *Id.*

²²² Patrick Henry and James Madison Debate Constructive Rights and the Use of the Militia, in 2 THE DEBATE ON THE CONSTITUTION, 701-03 (Bernard Bailyn ed., 1993) (describing how only Congress could call out the militia).

²²³ LOUIS FISHER, PRESIDENTIAL WAR POWER 2 (2004).

²²⁴ *Id.* at 2.

be initiated by Congress, and after they authorized the troops.²²⁵ Whatever history Yoo offers to support his views, recent events such as the passage of the War Powers Act and the Foreign Intelligence Surveillance Act, indicate that past acquiescence to giving presidents broad leeway in military and foreign policy arenas has met legislative disapproval in Congress.

Finally, one can respond to Yoo and the memoranda by appealing to the core values of democracy, constitutionalism, and liberalism. As Dyzenhaus argues, there are moral principles operating in the law that cover situations similar to what Ronald Dworkin proposed when criticizing legal positivism.²²⁶ What this means for Dyzenhaus is that emergencies do not create constitutional black holes devoid of legal or moral guidance.²²⁷ Instead, the exercise of authority, even by the president in times of emergencies, should still respect rule of law, the concept of checks and balances, and respect for rights. In is inconceivable that assertions of a unitary executive unchecked by the legislative and judicial branches, and able to disregard rights, are compatible with the core values of democracy, constitutionalism, and Liberalism. At their core, these values stand for limits on power, regardless of who is acting and for what reason. The constitutional framers created a president, not a king or dictator, and it is unlikely that they would have endorsed this assertion of executive power. Instead, as the constitutional provision for the suspension of the writ of habeas corpus demonstrates, the Constitution seems to anticipate emergencies and incorporates them into how it operates. Nowhere does the Constitution either explicitly or implicitly endorse the idea that its provisions operate only in times of peace and tranquility.

In sum, the four memoranda of the Bush Administration, as well as the ideas implicit in the signing statements, rest on very weak foundations. They mythologize presidential authority, foisting an image of executive power in conflict with democratic, liberal, and constitutional values that support limited government, rule of law, and respect for individual rights.

III. AMERICAN DEMOCRACY ON TRIAL AND THE COURTS' RESPONSE

The Bush Administration's war on terrorism can be judged on two

²²⁵ *Id.* at 12-14; LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS, 23 (1990).

²²⁶ DAVID DYZENHAUS, THE CONSTITUTION OF LAW 61-62 (2006). *See also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 27 (1978).

²²⁷ DYZENHAUS, THE CONSTITUTION OF LAW at 61-62, 196-200.

fronts. First, one can ask if the terrorists have won. President Bush said that the object of the terrorists was to “force us to change our way of life, is to force us to retreat, is to force us to be what we’re not.”²²⁸ Has the war on terrorism precipitated a war on democracy, including basic civil liberties? Taken together, the Patriot Act and the presidential assertions of power do threaten American democracy, and the Supreme Court has responded, although not directly, with a mixed record of rejecting many of Bush’s claims.

Second, one can judge the war on democracy in terms of success. Have President Bush’s efforts led to the capture and conviction of terrorists? For the most part, the war on terrorism has not produced the capture or conviction of major al Qaeda or Taliban principals, and it has also thwarted international cooperation in securing the same.

Thus far the United States Supreme Court has ruled in four cases addressing legal issues stemming from the war on terrorism and the president’s assertion of presidential power. In the first three, the Court has generally rejected Bush’s broad claims of presidential authority, although a majority of the Justices have been unwilling to directly challenge assertions of a unitary president and supremacy in foreign affairs and war making powers. In addition to the Supreme Court, several lower courts have also heard various challenges to legal claims arising out of the war on terror, yielding few victories for President Bush.²²⁹

A. *HAMDI V. RUMSFELD*

In *Hamdi v. Rumsfeld*²³⁰ the Supreme Court ruled that an American citizen could not be held indefinitely on American soil without a right to habeas corpus review. The decision limited the ability of the President to detain American citizens in the war on terrorism after September 11, 2001, and it reaffirmed the basic right of Americans to have a judge determine whether they have been illegally detained.

Yaser Hamdi, an American citizen, was captured in Afghanistan, and was classified as an “enemy combatant” because he had supposedly

²²⁸ See President’s Remarks Prior to a Meeting With Congressional Leaders and an Exchange With Reporters, 37 WEEKLY COMP. PRES. DOC. 1538 (Oct. 23, 2001), available at <http://www.whitehouse.gov/news/releases/2001/10/20011023-33.html>.

²²⁹ American Civil Liberties Union v. National Sec. Agency, 438 F. Supp. 2d 754, 782 (D. Mich. 2006) (ruling unconstitutional the president’s warrant less electronic surveillance program, finding that it violated both the First and Fourth Amendments). The decision was later vacated on standing reasons by the Sixth Circuit in 2007. American Civil Liberties Union v. National Sec. Agency, 493 F.3d 644, 648 (6th Cir. 2007).

²³⁰ 542 U.S. 507 (2004).

taken up arms against the United States.²³¹ Hamdi was placed in indefinite detention in a naval brig in South Carolina, and denied access to legal counsel. Hamdi's father sought habeas corpus review for his son in federal court, claiming that the incarceration violated the Fifth and Fourteenth Amendments.²³² The district court ruled in favor of Hamdi, ordering him released, and the Fourth Circuit Court of Appeals reversed. The Supreme Court reversed, holding that Hamdi was entitled to a hearing before a neutral decision maker to determine the factual basis for why he was being held and remanded for such a hearing.²³³

Justice O'Connor wrote for a four person plurality that also included Chief Justice Rehnquist and Justices Kennedy and Breyer. In this opinion O'Connor first stated that: "The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants.""²³⁴ O'Connor indicated the president asserted that he has inherent Article II authority to detain individuals, but the Court decided not to address this issue, instead it focused on whether the detention is permitted, pursuant to the September 18 congressional Authorization to Use Military Force ("AUMF").²³⁵ Citing *Ex parte Quirin*²³⁶ for the proposition that American citizens may be held as enemy combatants,²³⁷ the plurality stated that Congress could not do this indefinitely.²³⁸ Moreover, even recognizing the power of Congress to fight the war on terrorism and authorize the detention of those considered to be enemy combatants, the opinion noted that the basic principles of federal habeas corpus law grant American citizens being detained on American soil—even though captured on foreign soil during combat—some right to contest the factual basis for why they are being incarcerated.²³⁹

Justice O'Connor also addressed a second claim made by the president that the courts should not second guess him when it comes to decisions made regarding military matters. While acknowledging the important separation of powers argument here and the respect that the courts ought to afford the president when it comes to sensitive foreign

²³¹ *Id.* at 510.

²³² 542 *Id.* at 510-11.

²³³ *Id.* at 509.

²³⁴ *Id.* at 516.

²³⁵ *Id.* at 516-17 (noting how Congress did authorize Hamdi's detention with the AUMF).

²³⁶ 317 U.S. 1, 20 (1942).

²³⁷ *Hamdi*, 542 U.S. at 519.

²³⁸ *Id.* at 520-23.

²³⁹ *Id.* at 525.

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policy and military matters,²⁴⁰ O'Connor stated that the interest Hamdi had in the protection of his rights outweighed the interest the government had in detaining him without granting access to the courts.²⁴¹ In short, O'Connor and the four person plurality opinion did not see judicial review of Hamdi's detention as posing a major threat or having a "dire impact" upon the government's war making functions.²⁴²

In sum, Justice O'Connor's opinion rejected many of the separation of powers arguments made by President Bush, including those related to minimal questioning of an expansive presidential power by the courts:

[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube*, 343 U.S., at 587, 72 S.Ct. 863. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.²⁴³

For the plurality, the "war power does not remove constitutional limitations safeguarding essential liberties,"²⁴⁴ thereby placing a limit on any congressional authority to detain Hamdi.

In a separate concurrence, Justices Souter and Ginsburg generally agreed with the O'Connor opinion, but they also questioned whether the congressional resolution authorized Hamdi's detention.²⁴⁵ Specifically, they cite the Non-Detention Act²⁴⁶ (18 U.S.C. § 4001(a)) which places limits upon the ability of Congress to authorize the detention of American citizens.²⁴⁷ This act, passed in response to the internment of

²⁴⁰ *Id.* at 527 (describing the Bush Administration's position as the "most extreme rendition" of a separation of powers argument).

²⁴¹ *Id.* at 533.

²⁴² *Id.*

²⁴³ *Hamdi*, 542 U.S. at 535-36.

²⁴⁴ *Id.* at 536.

²⁴⁵ *Id.* at 541.

²⁴⁶ 18 U.S.C.A. § 4001(a) (Westlaw 2008).

²⁴⁷ *Hamdi*, 542 U.S. at 542.

Japanese-Americans during World War II, requires very clear and manifest authority by Congress before the president could detain American citizens. In this case, Souter and Ginsburg did not see that clear authority in the AUMF.²⁴⁸

Finally, in dissent, Justices Scalia and Stevens take an even stronger position than the plurality and concurring opinions when it comes to the constitutionality of Hamdi being held without review. For Scalia and Stevens, each writing their own concurrence, a trial for treason is the traditional way to try citizens who have waged war against the United States.²⁴⁹ If this option is not selected, then every citizen is entitled to a habeas corpus review of the reasons of detention, unless Congress has suspended that right.²⁵⁰ Given that Congress had not suspended the writ of habeas corpus, the dissent concluded that the AUMF cannot permit an indefinite detention of an American citizen.²⁵¹ Moreover, the Scalia dissent also rejects the contention that the president, even in wartime, has the power to order an indefinite detention of a citizen.²⁵²

B. *RASUL V. BUSH*

The *Hamdi* opinion was issued the same day that *Rasul v. Bush*²⁵³ was decided. In *Rasul v. Bush* the United States Supreme Court ruled that aliens being held in confinement at the American military base in Guantanamo Bay, Cuba were entitled to have a federal court hear challenges to their detention under the federal habeas corpus statute.

As a result of United States military action after 9-11 in Afghanistan against al Qaeda and the Taliban, approximately 640 non-Americans were captured and then relocated to the United States military base at Guantanamo Bay, Cuba where they were held indefinitely, and without access to legal counsel and the federal courts.²⁵⁴ Among those detained, claiming innocence, and wishing to be freed, were Shafiq Rasul and Fawzi Khallid Abdullah Fahad Al Odah, neither of whom were United States citizens.²⁵⁵

Relatives of these two individuals filed actions in U.S. District

²⁴⁸ *Id.* at 547-48.

²⁴⁹ *Id.* at 554.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 573-74.

²⁵² *Id.* at 568 (stating that the “proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders’ general mistrust of military power permanently at the Executive’s disposal”).

²⁵³ 542 U.S. 466 (2004).

²⁵⁴ *Id.* at 470-72.

²⁵⁵ *Id.*

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Court for the District of Columbia, challenging the detentions. First the federal district court and then the Court of Appeals for the District of Columbia dismissed the cases, claiming that the courts lacked jurisdiction to hear the challenges. In both of these cases relatives of the detainees sought habeas corpus review, but it was denied.²⁵⁶

Writing for the Court, Justice Stevens ruled that these detainees were entitled to a review of their detention. Stevens first noted that habeas corpus is the constitutional right of individuals to have a judge review the reasons why a person has been detained.²⁵⁷ Habeas corpus is the legal means individuals may use to challenge what they think may be an illegal imprisonment by requesting that the person holding them explain to a judge the reasons for their confinement. Both Article I, Section 9, Clause 2 of the Constitution, as well as 28 U.S.C. § 2241 provide for habeas corpus review.²⁵⁸ While the law is well established that American citizens being held in the United States are entitled to habeas corpus review, there seemed to be some uncertainty regarding whether noncitizens held in Guantanamo Bay, Cuba enjoyed habeas review.²⁵⁹

One issue was the status of Guantanamo Bay Naval Base and whether it was sovereign territory of the United States. In 1934 Cuba granted the United States a lease to Guantánamo Bay so long as the base was being used. In turn, the United States recognized Cuba's sovereignty over Guantanamo Bay.²⁶⁰ Stevens concluded that the control of the base by the United States was so "plenary and exclusive"²⁶¹ that while Guantanamo Bay was not sovereign territory of the United States, it was still under its jurisdiction and therefore the ruling in *Johnson v. Eisentrager*²⁶² did not apply.²⁶³ In *Eisentrager* the Court had ruled that the courts lacked jurisdiction to grant habeas relief to German citizens captured by U.S. forces in China who were tried and convicted of war crimes by an American military commission headquartered in Nanking, and then incarcerated in occupied Germany.²⁶⁴ In distinguishing the facts in that case from *Rasul*, the Court stated:

²⁵⁶ *Id.* at 472-73.

²⁵⁷ *Id.* at 473.

²⁵⁸ *Id.*

²⁵⁹ *Rasul*, 542 U.S. at 475.

²⁶⁰ *Id.* at 480.

²⁶¹ *Id.* at 475.

²⁶² 339 U.S. 763 (1950).

²⁶³ *Rasul*, 542 U.S. at 475-76.

²⁶⁴ *Id.* at 476.

Petitioners here 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 this country; 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.²⁶⁵

This thus meant that habeas review was available to those at Guantánamo Bay and all those detained there were entitled to challenge their detention.

C. *RUMSFELD V. PADILLA*

Rumsfeld v. Padilla was the third of three Supreme Court decisions ruling an individual being held in detention by the United States and suspected as a terrorist must receive a hearing.²⁶⁶ Jose Padilla was an American citizen detained in Chicago by the Bush Administration after he had returned from Pakistan. He was then transported to New York and placed in federal custody under a warrant issued by a grand jury investigating the 9-11 bombings.²⁶⁷ Padilla obtained a lawyer and sought to contest his detention. While his motion was pending, the Bush Administration designated him an enemy combatant and placed him in military custody in South Carolina.²⁶⁸ He was so designated because the government believed that he wished to set off a “dirty bomb” in the United States in cooperation or on behest of al-Qaeda. The Bush Administration justified his detention based both on the president’s power as commander in chief and the congressional AUMF of September 18, 2001.²⁶⁹ Padilla sought habeas review in federal district court in New York City, naming as respondents President Bush, Secretary Rumsfeld, and Navy Commander Melanie A. Marr, commander of the South Carolina facility.²⁷⁰ The government sought dismissal of the petition, claiming both that only Marr was a proper respondent and that the New York court lacked jurisdiction to hear the case.²⁷¹

²⁶⁵ *Id.*

²⁶⁶ 542 U.S. at 426 (2004).

²⁶⁷ *Id.* at 430-1.

²⁶⁸ *Id.* at 430.

²⁶⁹ *Id.* at 431.

²⁷⁰ *Id.* at 433.

²⁷¹ *Id.*

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The district court ruled that the president could detain Padilla and that the court had jurisdiction to hear the habeas petition.²⁷² The Court of Appeals reversed, holding both that the Secretary of Defense was the appropriate respondent for habeas and that the President had no authority to detain Padilla militarily.²⁷³

The Supreme Court reversed, deciding only the jurisdictional issues in the case and not whether the president has the authority to detain Padilla. Writing for the Court, Chief Justice Rehnquist indicated that the federal habeas law was clear in stating that the appropriate respondent is “the person who has custody over [the petitioner].”²⁷⁴ This respondent or person must be the one who could actually produce the detained individual before the court.²⁷⁵ The respondent is also the one who has direct physical control over the person filing the habeas petition.²⁷⁶ Since only Marr had this type of relationship to Padilla, she was the only proper habeas respondent, and not Bush or Rumsfeld.²⁷⁷

Next, having determined that Marr was the proper respondent, Rehnquist then indicated that a court may only grant habeas petitions “within their respective jurisdictions.”²⁷⁸ Jurisdiction for habeas is also fixed to the place where one is physically confined.²⁷⁹ Thus, the proper place for Padilla to bring his petition was in the district court of South Carolina where he was detained, with Marr as the respondent.²⁸⁰ As a result, the Second Circuit opinion was reversed.

After the Supreme Court decision, Padilla refiled for habeas corpus review in South Carolina and the district court ruled that he was detained illegally and that he should be criminally charged or released.²⁸¹ On appeal, the Fourth Circuit reversed.²⁸² Relying upon the Supreme Court’s opinion in *Hamdi*, the Fourth Circuit ruled that the Congress had authorized the president to detain Padilla with its September 18, 2001 AUMF.²⁸³ Padilla then sought review of the Fourth Circuit decision,²⁸⁴ and in response, the government charged Padilla, asked the Fourth

²⁷² *Padilla*, 542 U.S. at 432-33.

²⁷³ *Id.* at 433.

²⁷⁴ *Id.* at 434 (quoting 28 U.S.C. § 2242).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 437-38.

²⁷⁷ *Id.* at 441-442.

²⁷⁸ *Padilla*, 542 U.S. at 442 (quoting 28 U.S.C. § 2241(a)).

²⁷⁹ *Padilla*, 542 U.S. at 442.

²⁸⁰ *Id.* at 451.

²⁸¹ *Padilla v. Hanft*, 389 F.Supp.2d. 678 (D.S.C. 2005).

²⁸² *Padilla v Hanft*, 423 F. 3d. 386 (4th Cir. 2005).

²⁸³ *Padilla*, 423 F. 3d at 391.

²⁸⁴ *Padilla v. Hanft*, 547 U.S. 1062 (2006) *cert. denied*.

Circuit to vacate their decision, and then sought to transfer him from a military to a civilian facility. The Fourth Circuit refused the request to transfer and vacate,²⁸⁵ contending that all this was done simply to avoid Supreme Court review:

We believe that the transfer of Padilla and the withdrawal of our opinion at the government's request while the Supreme Court is reviewing this court's decision of September 9 would compound what is, in the absence of explanation, at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court, and also because we believe that this case presents an issue of such especial national importance as to warrant final consideration by that court, even if only by denial of further review, we deny both the motion and suggestion. If the natural progression of this significant litigation to conclusion is to be pretermitted at this late date under these circumstances, we believe that decision should be made not by this court but, rather, by the Supreme Court of the United States.²⁸⁶

Subsequently, the Supreme Court reversed, granted the transfer, and acknowledged that a petition for a review of the Fourth Circuit habeas decision was still under review.²⁸⁷ Eventually, the Court refused to grant certiorari in the matter, leaving Padilla in the hands of a civilian court to review the charges against him.

D. *HAMDAN V. RUMSFELD*

Of the four Supreme Court opinions thus far testing presidential power to conduct the war on terrorism after 9-11, *Hamdan v. Rumsfeld*²⁸⁸ is the latest and most direct rejection of executive authority to sidestep constitutional protections for individual liberties. In this case Salim Ahmed Hamdan was a Yemeni national who was captured by American armed forces in Afghanistan in November, 2001.²⁸⁹ He was subsequently turned over to the military and in June, 2002 was transferred to Guantanamo Bay for detention. He was held without charges for two years until the the government finally decided to try him for conspiracy before a military commission.²⁹⁰ Hamdan sought habeas

²⁸⁵ Padilla v. Hanft, 432 F.3d 582 (4th Cir. 2005).

²⁸⁶ *Id.*

²⁸⁷ Hanft v. Padilla, 126 S.Ct. 978 (2006).

²⁸⁸ Hamdan v. Rumsfeld, 548 U.S. 557, 126 S. Ct. 2749 (2006).

²⁸⁹ *Id.* at 2759.

²⁹⁰ *Id.* at 2759.

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review to challenge his detention and also mandamus to question his proposed trial.²⁹¹ His arguments were based on two claims: first, that the commission set up to try him was illegal and, second, that the procedures to be used in the trial violated basic rules of military and international law.²⁹² A district court had ruled in his favor, it was reversed by the court of appeals, and upon certiorari to the Supreme Court, Justice Stevens wrote a plurality opinion in favor of Hamdan.

In arguing in favor of both Hamdan's detention and the trial procedures, the government offered several arguments. First, the government contended that a November 13, 2001 presidential order permitted it to detain and try Hamdan in the manner at issue here.²⁹³ This November 13 order allowed the president to detain "any noncitizen for whom the President determines 'there is reason to believe' that he or she (1) 'is or was' a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States," and to have them tried by a military commission created by the Secretary of Defense.²⁹⁴ When Hamdan requested a speedy trial under the Uniform Code of Military Justice ("UCMJ") he was informed that none of the provisions in the UCMJ applied to his detention, pursuant to the November 13 Order.²⁹⁵ This Order is ultimately supported, for the government, by the AUMF.²⁹⁶ The second argument the government used to attack Hamdan's assertions is based upon the Detainee Treatment Act of 2005 ("DTA")²⁹⁷ which it contended removed Court jurisdiction to hear this case.²⁹⁸

The Court first addressed the DTA argument. Subsection (e) of section 1005 of the DTA states that: "Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider — (1) 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."²⁹⁹ On its face, subsection (e) appeared to preclude the court from reviewing Hamdan's habeas petition. However, Justice Stevens, in his majority opinion,

²⁹¹ *Id.*

²⁹² *Id.* at 2759.

²⁹³ Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed.Reg. 57833 (Nov. 13, 2001).

²⁹⁴ *Hamdan*, 126 S.Ct. at 2760 (citing Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed.Reg. at 57834).

²⁹⁵ *Hamdan*, 126 S.Ct. at 2760.

²⁹⁶ *Id.* at 2775.

²⁹⁷ Detainee Treatment Act, Pub.L. 109-148, 119 Stat. 2680 (2005).

²⁹⁸ *Hamdan*, 126 S.Ct. at 2763-4.

²⁹⁹ Detainee Treatment Act §§ 1005(e)(1) (internal quotations omitted).

rejected the use of constitutional claims and instead used statutory construction tools to dismiss the government's position.³⁰⁰ Specifically, he pointed out that while paragraphs two and three of this section of the DTA (which are not directly at issue in this case and which address judicial review of other matters relating to detainees) are governed by the language which make the act take effect immediately upon passage to claims already pending,³⁰¹ there is no language in the act that appears to make the DTA retroactive to claims such as the one Hamdan brought under paragraph one (which is at issue in this case).³⁰² The government's position was that this omission was not significant since the DTA withdrew all jurisdiction from the court regarding the detainees, and therefore there is a presumption here that unless the judiciary was given authority to hear these cases, Congress had taken it away.³⁰³ However, Stevens rejected this in favor of another presumption, the rule against retroactivity, in certain cases, especially those involving alteration of jurisdiction.³⁰⁴ The failure of Congress to expressly state that paragraph one had retroactive effect while saying so for paragraphs two and three was seen as suggesting a clear intent by Congress not to make it apply to cases already in the process, such as Hamden's.³⁰⁵ Thus, the Court turned back the DTA argument as a way to prevent it from hearing this case.

Turning to the November 13 Order, the Court noted that military commissions are not mentioned in the Constitution, but instead are an artifact of military necessity and exigency.³⁰⁶ Yet Justice Stevens stated that: "Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need."³⁰⁷ The Court first raised and then sidestepped whether the president's power as commander-in-chief would provide authorization to create these commissions.³⁰⁸ Instead it argued that Congress has authorized the creation of these commissions through its war-making powers, specifically by enacting the UCMJ.³⁰⁹ In

³⁰⁰ *Hamdan*, 126 S.Ct at 2764.

³⁰¹ *Id.* (citing Detainee Treatment Act § 1005(h)).

³⁰² *Hamdan*, 126 S.Ct at 2763.

³⁰³ *Id.* at 2764.

³⁰⁴ *Id.* at 2764-5.

³⁰⁵ *Id.* at 2765-6.

³⁰⁶ *Id.* at 2772-3.

³⁰⁷ *Id.* at 2773.

³⁰⁸ *Hamdan*, 126 S.Ct at 2774.

³⁰⁹ *Id.*

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addition, even if the president has independent authority to create these commissions, the Court declared that, “[H]e may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”³¹⁰ The government’s position then is that either the DTA or the AUMF have expanded the president’s authority to create commissions, thereby providing the support for his November 13 order.³¹¹ The Court found nothing in either that served to expand the president’s authority beyond that already listed in the UCMJ.³¹²

Having rejected presidential claims of authority to create military tribunals with specified trial procedures, the Court then turned to the charges the commissions will use to try Hamden and other detainees at Guantanamo Bay. It noted that all parties in this case agreed that there is a body of common law that appears to govern procedures governing military commissions,³¹³ and that includes some allegation that the person facing trial has breached some law or rule against the conduct of war.³¹⁴ After a lengthy analysis of the events of and after 9-11 and Hamden’s role in them, the Court concluded that the

Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of “conspiracy” has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war.³¹⁵

The Court rejected examples cited by the government as instances where conspiracy was tried before these type of tribunals,³¹⁶ and it also

³¹⁰ *Id.* at 2774 n.23 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)).

³¹¹ *Hamdan*, 126 S.Ct. at 2775.

³¹² *Id.*

³¹³ *Id.* at 2777.

³¹⁴ *Id.* at 2780-1.

³¹⁵ *Id.*

³¹⁶ *Id.* at 2781-84. Specifically, the Court rejected the government’s contention that *Ex parte Quirin*, 317 U.S. 1 (1942) supported their argument that military commissions may try conspiracy charges because the defendants in that case were charged with that offense. The Court in *Hamdan* responded to this argument by stating that saboteurs were being tried for other offenses in addition to conspiracy and the Court never ruled on the conspiracy issue. 126 S.Ct. at 2782. According to Justice Stevens, “If anything, *Quirin* supports *Hamdan*’s argument that conspiracy is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the completion of an offense; it took seriously the saboteurs’ argument that there can be no violation of a law of war—at

pointed out that there are no treaties or international law that would permit this either.³¹⁷

Finally, Justice Stevens looked at the rules of evidence and trial procedures to be used to try Hamdan. He noted that hearsay may be admitted, the defendant could be denied access to examine this evidence, and that he could be convicted with a two-thirds verdict.³¹⁸ All of these procedural and evidentiary rules are both contrary to what is provided in the UCMJ³¹⁹ and in international covenants such as the Third Geneva Convention of 1949.³²⁰

As a last point, the Court also rejected contentions by the government that the Geneva Convention does not apply to Hamdan because that international agreement applies only to states and not to individuals who are members of al Qaeda, which is not a government.³²¹ Essentially this is the claim that the government made in its Detainee Memorandum. Without directly rejecting this claim, the Court pointed out that some parts of these conventions, known as Common Article 3, apply to everyone, including individuals such as Hamdan, who are not attached to any government.³²² This article, the Court found, precluded Hamdan from being tried by the special commissions the president has created in his November 13 Order because “Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a ‘regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’”³²³ Having found that the commissions authorized by the November 13 Order lacked these minimum guarantees, the Court also refused to recognize the procedures to be used to try Hamdan to be satisfactory.

Overall, the *Hamdan* opinion is to date the most forceful rejection of presidential authority to conduct the war on terrorism. While it does not directly reject inherent presidential powers to act, it suggests clear

least not one triable by military commission—without the actual commission of or attempt to commit a “hostile and warlike act.” *Id.* In several places in *Hamdan* Justice Stevens attacked the *Quirin* precedent as supporting the government’s arguments or uses it against them. *See, e.g.*, 126 S.Ct. at 2773 (citing *Quirin* as supporting the proposition that “Congress and the President, like the courts, possess no power not derived from the Constitution”). *See also* LOUIS FISHER, PRESIDENTIAL WAR POWER, 205-8 (2004) (discussing how *Quirin* is not precedent for Bush’s military tribunals).

³¹⁷ *Hamdan*, 126 S.Ct. at 2784.

³¹⁸ *Id.* at 2786-7.

³¹⁹ *Id.* at 2790 n.47.

³²⁰ *Id.* at 2790-1, 2793.

³²¹ *Id.* at 2795.

³²² *Id.*

³²³ *Hamdan*, 126 S.Ct. at 2796.

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limits to it, both in terms of what AUMF permitted, as well as in terms of international law. The opinion also suggested that like it or not, international law is binding on the United States, and contrary to the assertions made in the four memoranda, the president does not get the last word in terms in war and foreign policy matters.

E. SUMMARY

As a result of the sagas of *Hamdi*, *Rasul*, *Padilla*, and *Hamdaen*, several conclusions can be drawn. First, citizens or non-citizens detained on American soil are entitled to a habeas hearing to contest their confinement. Eight Justices in three opinions in *Hamdi* agreed to this proposition, while six Justices in two opinions (one including a five person majority) in *Rasul* agreed. In *Hamdan*, five Justices in two opinions agreed on this point. Only one Justice (Thomas in *Hamdi*) thus far has ruled on the merits that the president has inherent authority to detain individuals, while five Justices (a four person plurality plus Thomas) in *Hamdi* have held that the AUMF authorizes detention. Conversely, four Justices in two opinions in *Hamdi* reject the theory that the AUMF permits the detention and five Justices in *Hamdan* drew clear limits to what the AUMF authorizes and what the president may do. Overall, the Court seems to be shying away from the inherent presidential power claims raised by the Yoo and other three Department of Justice or White House Counsel memoranda, and is of mixed but skeptical opinion on the congressional authorization claim.

Yet even with the congressional authorization, only Thomas seems prepared to reject judicial review of any detention, with the rest of the Court prepared to argue that the AUMF does not abrogate the constitutional protections individuals have. For now, the Court seems to be siding with protection of individual rights, rejecting Bush's claims. The Court also seems to be unwilling to accept claims that the presidential has unlimited foreign policy and war powers, that he does not get the final say in these matters, that international law is binding, and the Congress and the judiciary still have a role to play after 9-11. For now, the Constitution and federal law still applies and limits presidential power. Finally, the Bush Administration has generally not been successful in other court proceedings related to the war on terrorism. For example, a former professor Sami al-Arian was tried on fifty-one counts related to government claims that he and others were fronting for Palestinian terrorists. A jury acquitted on eight counts and

deadlocked on the others.³²⁴ In addition, since President Bush declared the war on terrorism, no principles have been convicted yet. The sole conviction thus far was Zacarias Moussaoui, the so called “twentieth hijacker” in 9-11 who pled guilty on April 22, 2005 to terrorist charges brought against him. However, while acknowledging ties to al Qaeda, he denied any connection to 9-11, and it does not appear that he was a principle or major player in any terrorist organization.

In addition, in *Al-Marri v. Wright* the Fourth Circuit Court of Appeals ruled that the Military Commissions Act which denied habeas to enemy combatants did not apply to the detainee in question.³²⁵ Moreover, and more importantly, the Court rejected claims by the administration that the president had inherent authority to order the seizure and indefinite detention of a civilian. In reaching the merits of Al-Marri’s detention claim the Court dismissed arguments that AUMF authorized the detention.³²⁶ More importantly, the Fourth Circuit directly rejected the claims of inherent presidential powers as commander-in-chief to detain a civilian.³²⁷ In the Court’s words:

To sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the President calls them “enemy combatants,” would have disastrous consequences for the Constitution-and the country. For a court to uphold a claim to such extraordinary power would do more than render lifeless the Suspension Clause, the Due Process Clause, and the rights to criminal process in the Fourth, Fifth, Sixth, and Eighth Amendments; it would effectively undermine all of the freedoms guaranteed by the Constitution. It is that power-were a court to recognize it-that could lead all our laws “to go unexecuted, and the government itself to go to pieces.” We refuse to recognize a claim to power that would so alter the constitutional foundations of our Republic.³²⁸

However, while in *Al-Marri* the Fourth Circuit refused to endorse the denial of habeas, in both *Boumediene v. Bush*³²⁹ and *Al Odah v. United States* the Court of Appeals for the District of Columbia upheld congressional authority under the Military Commissions Act of 2006 to deny jurisdiction to hear habeas petitions for Guantanamo Bay

³²⁴ Eric Lichtblau, *Non Guilt Verdict in Florida Terror Trial are Setbacks for U.S.*, N.Y. TIMES, Dec. 7, 2005, at A1.

³²⁵ 487 F.3d 160 (4th Cir. 2007).

³²⁶ *Id.* at 177-78, 184.

³²⁷ *Id.* at 190-95.

³²⁸ *Id.* at 195.

³²⁹ 476 F.3d 981 (D.C. Cir. 2007), cert. granted 127 S.Ct. 3078 (2007).

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prisoners.³³⁰ Here, the Court did not rule on claims of inherent presidential power or authority under AUMF, but instead ruled that the Military Commissions Act of 2006 did not violate the Suspensions Clause in Article I, Section 9, Clause 2 of the Constitution. In June, 2007, the Supreme Court voted to grant certiorari in the case. Additionally, in June, 2007, a military judge dismissed charges against Hamdan and the only other Guantanamo prisoner facing trial.³³¹

Finally, in *American Civil Liberties Union v. National Security Agency*³³² a Michigan district court struck down as unconstitutional the president's warrantless electronic surveillance program, finding that it violated both the First and Fourth Amendments. More importantly, this case rejected the government's claims that the president has inherent authority to authorize this type of surveillance. However, a Sixth Circuit decision overturned the decision, ruling that the plaintiffs lacked standing because they had failed to demonstrate an injury.³³³

Overall, up to this point while lower courts have rejected the unitary executive theory, the Supreme Court has yet to rule on its merits, opting instead to find other reasons to limit presidential authority. Whether that will continue to be the trend after the Court rules in the *Boumediene* and *Al Odah* cases is open for debate, especially light of the ascension of Justices Roberts and Alito to it.

IV. EUROPE AND THE EUROPEAN UNION

Assessment of the war on terrorism and democracy does not end at the American borders. It also encompasses the United Kingdom, Spain, Germany and the entire European Union. Yet they way each responded varied significantly from the response in the United States.

A. TONY BLAIR AND THE UNITED KINGDOM

After the terrorist attacks of 9-11, Prime Minister Tony Blair appeared to be Bush's biggest ally. He supported the war on terrorism by offering troops to aid the United States in Afghanistan and by urging the ouster of Saddam Hussein from Iraq. His government voted consistently in the United Nations for the enforcement of resolutions to

³³⁰ *Id.*

³³¹ Jess Bravin, *Terror War Legal Edifice Teeters*, WALL ST. J., June 13, 2007, at A4.

³³² 438 F. Supp. 2d 754 (D. Mich. 2006).

³³³ *American Civil Liberties Union v. National Sec. Agency*, 493 F.3d 644, 648 (6th Cir. 2007).

destroy weapons of mass destruction in Iraq, and he provided significant military aid to support Bush's war on terrorism.

One reward for his support for these efforts were a series of terrorist bombings of the London Underground on July 7, 2005 that were linked to al Qaeda.³³⁴ Perhaps in response to the attack, Blair's government proposed changing the law, the Anti-Terrorism, Crime, and Security Act,³³⁵ that then allowed suspected terrorists to be detained without charges for 14 days, to 90 days. His bill also would have made it illegal for some types of "glorification" or incitement or advocacy of terrorist acts.³³⁶ Contrary to what happened in the United States where Congress quickly passed the Patriot Act, Blair lost. His own Labor government refused to support these measures and instead only supported detainment without charges for 28 days.³³⁷

In addition, as in the United States, the British courts also responded to the war on terrorism by rebuking torture and other deprivations of individual rights. In *FC and Others v. Secretary of State for the Home Department* the House of Lords ruled that the common law barred the use of evidence obtained by torture.³³⁸ The Law Lords saw this rule not as evidentiary but constitutional, contending that "from the earliest days the common law of England sets its face firmly against the use of torture."³³⁹ While this decision seemed to place some limits on how suspected terrorists would be treated, in *Secretary of State for the Home Department v. JJ*, a British High Court struck down a government tactic used against terrorists, house arrests without trials.³⁴⁰ At issue was a provision of the Prevention of Terrorism Act 2005 which permitted the house arrest without trial of individuals suspected of being terrorists.³⁴¹ Justice Jeremy Sullivan who presided over this case, ruled that this provision of the Act violated Article 5(1) of the European Convention on Human Rights which provides that "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the

³³⁴ *London rocked by terror attacks*, BBC NEWS, July 7, 2005, <http://news.bbc.co.uk/1/hi/uk/4659093.stm>.

³³⁵ HELEN DUFFY, *THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW* 356 (2005).

³³⁶ BBC News, *Q & A: Blair's terror bill defeat*, BBC NEWS, Nov. 9, 2005, http://news.bbc.co.uk/1/hi/uk_politics/4421726.stm.

³³⁷ *Id.*

³³⁸ [2005] UKHL 71, [2006] 2 A.C. 221 (appeal taken from Eng.) (U.K.).

³³⁹ *Id.* at ¶ 11.

³⁴⁰ *Secretary of State for the Home Department v. JJ*, [2006] EWHC 1623 (Admin) (Q.B.).

³⁴¹ Prevention of Terrorism Act 2005, c. 2 § 3(10) (U.K.).

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following cases and in accordance with a procedure prescribed by law”³⁴²

In *A v. Secretary of State for the Home Department* the House of Lords held that the indefinite detention of aliens under section 23 of the Anti-terrorism, Crime and Security Act 2001 — a detention policy similar to the one George Bush ordered for individuals at Guantanamo Bay — violated the European Convention on Human Rights and the Human Rights Act.³⁴³ However, in the case of all of the policies thus far before the High Court had been presented by the government under an argument similar to the Unitary Executive theory as in the United States. In part this is because of the absence of a separation of powers style government in the United Kingdom. In addition, critical to the reasoning, at least in the case of *A v. Secretary of State for the Home Department*, was international law (Convention on Human Rights) in binding the government.³⁴⁴ Finally, unlike the United States Supreme Court which thus far has been willing to directly confront claims of inherent presidential power, the House of Lords has surprisingly dismissed any parliamentary supremacy claims, finding instead that national or international commitments to human rights bar torture or indefinite detention.

Overall, as in the United States, the British judiciary seems unwilling in some case to let the specter of terrorism equate to an unlimited governmental authority at the expense of individual rights.

B. SPAIN

On March 11, 2004, mere days before national parliamentary elections, terrorists bombed Madrid train stations, killing nearly 200 individuals.³⁴⁵ Originally the Spanish President José Aznar blamed the attacks on Basque Separatists, but soon it was learned that the attacks were also linked to al-Qaeda. Aznar supported Bush’s war on terrorism, voting to support the invasion of Iraq at the United Nations and deploying troops in assistance of that effort. His stance was unpopular in Spain, and Socialist presidential candidate Jose Luis Rodriguez Zapatero pledged to withdraw the troops if elected.³⁴⁶ It was this opposition to the

³⁴² *JJ* at ¶ 11.

³⁴³ [2004] UKHL 56, [2005] 2 A.C. 68 (appeal taken from Eng.) (U.K.). See also Human Rights Act, 1998, c. 42 (U.K.); Anti-terrorism, Crime and Security Act, 2001, c. 24, § 23 (U.K.).

³⁴⁴ *JJ* at ¶ 11.

³⁴⁵ *Scores die in Madrid bomb carnage*, BBC NEWS, Mar. 11, 2004, <http://news.bbc.co.uk/2/hi/europe/3500452.stm>.

³⁴⁶ *Spain threatens Iraq troop pull-out*, BBC NEWS, Mar. 15, 2004, <http://news.bbc.co.uk/>

troop deployment, and the belief that Aznar lied about who was responsible for the Madrid bombings these factors are largely credited with Aznar's defeat and the election of a leftist government.³⁴⁷ As a result, Zapatero and Spain have made no changes in detention or criminal laws to respond to the war on terrorism.

C. GERMANY

The only trial thus far that had resulted in the conviction of a terrorist definitely linked to al Qaeda and perhaps 9-11 events occurred in Germany.³⁴⁸ However, the German Federal Court of Justice overturned that conviction, on fair trial grounds.³⁴⁹ The basis of the ruling was that the United States had failed to turn over to the defense exculpatory evidence.³⁵⁰

D. EUROPEAN UNION

Finally, two last events affecting the EU nations in general have arisen as a result of the war on terror that test their commitment to democracy and America's efficacy to defeat al Qaeda. First, allegations surfaced in 2005 that the CIA was possibly operating torture camps in several EU nations, perhaps including Poland or other former Eastern Bloc nations.³⁵¹ Such camps, if they exist, would certainly violate the ECHR.³⁵² Second, EU members, concerned about allegations of torture, and also about the United States' use of the death penalty, increasingly have become more concerned about extraditing suspected terrorists to America.³⁵³

The combined result of the stories about torture, the death penalty,

2/hi/europe/3512144.stm.

³⁴⁷ *Aznar scorns Madrid 'bomb lies'*, BBC NEWS, Nov. 29, 2004, <http://news.bbc.co.uk/2/hi/europe/4050701.stm>.

³⁴⁸ HELEN DUFFY, *THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW* 377 (2005).

³⁴⁹ Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 3, 2004, *Strafbereitiger*, StV 4/2004 (F.R.G.).

³⁵⁰ DUFFY, *THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW* at 377.

³⁵¹ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

³⁵² Craig Whitlock, *Europe Wants Answers on CIA Camps*, WASH. POST, Nov. 4, 2005, at A1 (noting European criticism that the CIA torture camps are illegal and may violate the European Convention on Human Rights).

³⁵³ Lisbeth Kirk, *European Courts May Challenge US Terror Renditions*, EU OBSERVER, Nov. 14, 2005, <http://euobserver.com/9/20314??print=1>.

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and even the failure on the United States to cooperate on the sharing of exculpatory evidence may suggest a toughening of a resolve of EU nations to fight terrorism without sacrificing democracy and individual rights, while at the same time America's approach may hurt both efforts to secure international cooperation to defeat terrorism and uphold democracy.

V. CONCLUSION

The event of 9/11 and subsequent Western responses to terrorism have challenged basic commitments to democracy, constitutionalism, and liberalism in Europe and the United States. Across the states in these areas one such challenge emerged with the decision to collapse law enforcement into foreign policy and confront terrorism by military and not criminal law means. This merger of two traditionally distinct policy areas has come at the sacrifice of individual rights, at least in the United States, with little to show for it. Several years out, no majors or terrorist principals have been convicted, and the mythology of presidential power that Bush has constructed to justify his actions has met with limited judicial support in the United States. In addition, when compared to the responses of other EU nations, his actions have led to a reversal of a conviction in Germany and assertions that the United States is in violation of international law. In England and Spain, two other victims of terrorist attacks, they have generally not sacrificed rights to security, with the House of Lords (sitting as a court) and Parliament rejecting torture and extended detention policies along the lines advocated by the Bush Administration.

Bush's war on terrorism has turned out to be a war on democracy, both in terms of the attack on human rights, and also in assertions of extra-constitutional executive authority. If we judge the efficacy of this war by Bush's own words—"The object of terrorism is to try to force us to change our way of life, is to force us to retreat, is to force us to be what we're not"—then the terrorists may win unless both Congress and the courts reject his theory of the unitary executive and the approach to national security he has articulated.³⁵⁴

³⁵⁴ See also EMANUEL GROSS, *THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM: LESSONS FROM THE UNITED STATES, THE UNITED KINGDOM, AND ISRAEL* 258 (2006) (concluding that: "When the state itself undermines the foundations of its own democratic regime in the name of its war against terror, what just cause can it assert in pursuance of its fight against those who seek the very same result?").