Habeas Corpus, Civil Liberties, and Indefinite Detention During Wartime: From *Ex* Parte *Endo* and the Japanese American Internment to the War on Terrorism and Beyond

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I. INTRODUCTION

In 2016, Americans, like the rest of the world, remain concerned about terrorism and terrorist threats. In the wake of the Islamic State of Iraq and the Levant's (ISIL) bombing of a Russian airline, its coordinated terrorist attacks in Paris,[1] and the ISIL-inspired mass shooting in San Bernardino in December,[2] President Obama addressed the nation from the Oval Office about the U.S. government's national security measures taken to keep this country safe from terrorism. He detailed the government's strategy to destroy ISIL, which involved the military tracking down terrorist plotters in any country, continuing to provide training and equipment to Iraqi and Syrian forces fighting ISIL, cutting off financing and curtailing the recruitment of fighters, and encouraging a ceasefire and political resolution to the Syrian War.[3] Just as in 2004, national security is once again an important issue in the 2016 presidential debates.[4] Yet noticeably

1. *See* Massimo Calabresi, *Abu Bakr al-Baghdadi: The Head of ISIS Exports Extreme Violence and Twisted Religion Around the Globe*, TIME (Dec. 21, 2015), http://time.com/time-person-of-the-year-2015-runner-up-abu-bakr-al-baghdadi/ (on file with *The University of the Pacific Law Review*) (discussing the downing of a St. Petersburg-bound Metrojet over the Sinai peninsula and the November 13, 2015 Paris attacks organized by individuals with close ties to ISIS leadership); Michael Morell, *What Comes Next, and How Do We Handle It?*, TIME, Nov. 30, 2015, at 60 (on file with *The University of the Pacific Law Review*) ("The attacks in Paris were the first manifestation of an effort by ISIS to put together an attack capability in Europe").

2. Calabresi, *supra* note 1.

3. President Barack Obama, Oval Office Address on Keeping the American People Safe (Dec. 6, 2015), *available at* https://www.whitehouse.gov/blog/2015/12/05/president-obama-addresses-nation-keeping-american -people-safe (on file with *The University of the Pacific Law Review*); *see also* Michael R. Gordon & Helene Cooper, *Mideast Allies Urged to Step Up ISIS Fight*, N.Y. TIMES, Dec. 15, 2015, at A12 (on file with *The University of the Pacific Law Review*) (reporting on Obama's calling on Middle East allies to make military contributions in the fight against ISIS).

4. *See, e.g.*, Richard Wolf & David Jackson, *Terrorism is Top Debate Topic After Paris, California*, USA TODAY, Dec. 16, 2015, at 2A (on file with *The University of the Pacific Law Review*) ("Terrorism and national security took center stage in Las Vegas on Tuesday night with Donald Trump and a dozen other Republicans seeking their party's nomination for president"); Patrick O'Connor & Janet Hook, *Terror Tops the Agenda During Republican Debate*, WALL ST. J., Dec. 16, 2015, at A1 (on file with *The University of the Pacific Law Review*) ("Republican presidential contenders clashed Tuesday over how to protect the country from a future terrorist attack . . . ."); Reid J. Epstein & Rebecca Ballhaus, *Long-Shots Emphasize Security*, WALL ST. J., Dec. 16, 2015, at A4 (on file with *The University of the Pacific Law Review*) ("Four Republican long-shot presidential candidates engaged in a detailed discussion Tuesday of how they would take on Islamic State

absent from these discussions is the thorny issue of how to close the Naval Detention Center on Guantanamo Bay, Cuba. Without doubt, at the dawn of a new year, Guantanamo Bay will continue to be a political hot potato for the new president in 2017, as it was for Obama.

Weeks before his presidential address, Obama decided to postpone plans to close the U.S. military prison at Guantanamo Bay,[5] even though he has repeatedly expressed his desire to close the prison because it is "counterproductive to our offers to defeat terrorism around the world. Guantanamo is one of the première mechanisms for jihadists to recruit."[6] Guantanamo remains a quagmire since congressional opposition and legal impediments have thwarted President Obama's January 2009 pledge to close the U.S. detention center.[7] Action should be taken since approximately one-half of the remaining 107 prisoners have been cleared for transfer to other countries willing to accept them by the U.S. government.[8] Many prisoners have no

militants and try to protect Americans in the wake of recent terror attacks in Paris and California."); Laura Meckler, *Clinton Lays Out Strategy On Terror*, WALL ST. J., Dec. 16, 2015, at A4 (on file with *The University of the Pacific Law Review*) ("Former Secretary of State Hilary Clinton said Tuesday that protecting the nation from homegrown terrorism requires shutting down recruitment and training, while empowering Muslim Americans to be front-line allies in the fight against radicalization.").

5. *See* Bryan Bender & Nahal Toosi, *Obama Administration Delays Gitmo Closure Plan*, POLITICO (Nov. 18, 2015), http://www.politico.com/story/2015/11/guantanamo-gitmo-cuba-216030 (on file with *The University of the Pacific Law Review*); *see also* JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 156 (2014) (discussing Obama's remarks about closing the U.S. naval prison on Guantanamo Bay during the presidential campaign, Obama's January 22, 2009 executive order to close the prison, the obstacles the president faced in achieving that goal in the form of careful time-consuming review of each individual case, and the reluctance of foreign countries to accept nationals who were linked to terrorism).

6. President Barack Obama, Remarks by the President at Veto Signing of National Defense Authorization Act (Oct. 22, 2015), *available at* www.whitehouse.gov/the-press-office/2015/10/22/remarks-president-veto-signing-national-defense-authorization-act (on file with *The University of the Pacific Law Review*); *see also* Matthew Ivey, *A Framework for Closing Guantanamo Bay*, 32 B.C. INT'L & COMP. L. REV. 353, 353 (2009) (suggesting "the global outcry for the closing of the military prison at Guantanamo Bay had been enormous").

7. *See* Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 604 (2010) ("After President Obama came into office in January of 2009, he issued an Executive Order aimed at closing Guantanamo within a year. But, thereafter, a concerted effort by opponents depicted the detainees as too threatening to confine on the mainland"); *see also* Charlie Savage, *Obama Team is Divided on Anti-Terror Tactics*, N.Y. TIMES (Mar. 28, 2010) http://www.nytimes.com/2010/ 03/29/us/politics/29force.html?_r=0 (on file with *The University of the Pacific Law Review*) ("In March 2009, the Obama legal team adopted a new position about who was detainable in the war on terrorism-one that showed a greater deference to the international laws of war, including the Geneva Conventions, than Mr. Bush had").

8. *See* Jack Healy, *Prison Town Doesn't Want Guantanamo Inmates*, N.Y. TIMES, (Nov. 17, 2015) http://
www.nytimes.com/2015/11/17/us/coloradotownhometo11prisonsdoesntwantguantanamodetainees.html?_r=0
(on file with *The University of the Pacific Law Review*) (describing the Colorado town being considered to house at least sixty-one Guantanamo inmates despite congressional efforts to prevent prisoner transfers onto American soil).

intelligence value, some are awaiting military trials, and the remainder wait in limbo, either because the government lacks sufficient evidence to prosecute or they are considered too dangerous for release.[9] Even if the prisoners were released, aside from the actual threat to public safety, no town in America wants terrorists housed in its community because of the perceived dangerousness.[10] In spite of these issues, many Republicans see Guantanamo as essential for detaining suspected foreign militants.[11] Professor Gregory Maggs bluntly opines that in hindsight, the U.S. should not have these prisoners in its custody.[12]

Looking forward, habeas corpus petitions for Guantanamo detainees are practically the only judicial remedy available for challenging their confinements.[13] Generally, habeas corpus, guaranteed by the Constitution, is a means for prisoners to claim that they have been wrongfully convicted and unlawfully detained.[14] Detainees can challenge their conviction by filing a petition for a writ of habeas corpus in federal court, and argue that their arrest, trial, or sentence violated federal law.[15] The federal habeas petition provides for claims based on federal law.[16] The reviewing court, which has the power to order the inmate's immediate release, a new trial, or a new sentencing hearing, will review the petition to decide whether the conviction or sentence is illegal.[17]

Specifically, as to the war on terrorism, the courts are tasked with reviewing the government's incapacitation of terrorism suspects and striking an important balance between national security and civil liberties. Judge Forrest reminds us that, "striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat . . . It is during our most challenging and uncertain moments that our Nation's commitment to due process is most

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9. Resnik, *supra* note 7, at 603–04.

10. *See* Healy, *supra* note 8 (discussing how a Colorado town had public image and targeted threat concerns when considered as a possible place to house remaining Guantanamo detainees).

11. *See* Patricia Zengerle & Doina Chiacu, *Obama to Sign Defense Bill with Guantanamo Restrictions*, REUTERS (Nov. 10, 2015), http://www.reuters.com/article/2015/11/10us-usa-defense-congress-isUSKCNOSZ20151110#BditpgwXUXExPes9.97 (on file with *The University of the Pacific Law Review*).

12. *See* Gregory E. Maggs, *Responses to the Ten Questions*, 35 WM. MITCHELL L. REV. 5079, 5079 (2009) (suggesting that the U.S. should have never taken prisoners in the war on terror, and noting the great financial costs for building and maintaining detention facilities and the protracted and endless litigation involved).

13. See Resnik, *supra* note 7, at 581 ("Thus far, habeas corpus has provided the principal jurisdictional predicate that has enabled individuals detained before judges who were not directly commissioned by the Department of Defense").

14. 28 U.S.C. §§ 2241–66 (2015); *see also* JONATHAN HAFERTZ, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM 6 (2011) [hereinafter HAFERTZ, HABEAS] (describing habeas corpus as "a safeguard of individual liberty against illegal government action. Despite its limitations, habeas remains the single most important check against arbitrary and unlawful detention, torture, and other abuses").

15. 28 U.S.C. §§ 2241–66 (2015).

16. *Id.*

17. *Id.*

severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." [18] While federal cases proceed slowly, habeas petitions often move at a snail's pace.[19] As this article points out, for Guantanamo detainees, the idea of indefinite detention has become a harsh reality as the government has sought ways to avoid judicial oversight and to hold individuals without a criminal trial in federal courts.[20]

Best understood in their proper historical, political, and sociological contexts, the litigation in internment cases, like the Guantanamo Bay litigation, illustrates how civil procedure can be used for political goals. These cases show that an individual habeas corpus petition is an inadequate remedy to challenge broad-based indefinite detentions. A Japanese American subject to an exclusion order during World War II and a detainee in Guantanamo Bay today were, and are not, afforded the most basic procedural safeguards afforded to criminal defendants in federal court.[21] Detainees can contest their detention using a writ of habeas corpus, which requires timely access to a hearing,[22] but as discussed in this article, it may be an exercise in futility due to the length of time a detainee must wait for a judicial decision and the myriad of difficulties in persuading a court that they are entitled to relief.

This article explores the relationship between the U.S. Supreme Court's reasoning in *Ex Parte Endo*[23] and the Guantanamo Bay habeas cases. In the process, it discusses four themes: (1) racial prejudice can consciously and unconsciously affect policy and lawmaking; (2) the Japanese-American internment experience during World War II and the Guantanamo Bay litigation during the war on terror showcase how executive power can be extended considerably during war time; (3) the executive branch can attempt to strategically skirt the Constitution by crafting national security policies to satisfy its agenda; and (4) courts can choose to stand strong against political and government pressure, or not.

The first four sections of this article are descriptive. Part II explores the internment of Japanese Americans and specifically focuses on *Endo*, one of the lesser known internment cases that reached the Supreme Court in 1944 that

18. Hedges v. Obama, 809 F. Supp. 2d 424. 469 (S.D. N.Y. 2012).

19. *See* Caroline Wells Stanton, *Rights and Remedies: Meaningful Habeas Corpus in Guantanamo*, 23 GEO. J. LEGAL ETHICS 891, 898–900 (2010) (describing how courts interpret habeas for Guantanamo detainees in such a way to keep them detained longer, drawing out the petition process when compared to traditional habeas or federal jurisdiction cases).

20. *See* HAFERTZ, HABEAS, *supra* note 14, at 5–6.

21. KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 21 (2007) (drawing an analogy between the civil liberties of Japanese citizens and noncitizens during World War II and the harsh measures directed at noncitizens and U.S. citizens during the war on terror).

22. 28 U.S.C. § 2243 (2015).

23. 323 U.S. 283 (1944).

played a significant role in the Guantanamo cases the Court heard.[24] Part One discusses the roles race, racism, and loyalty played after the bombing of Pearl Harbor on December 7, 1941, and how the military and Court minimized the mass civil liberties deprivation of 120,000 individuals of Japanese descent.[25] Part III discusses the Bush Administration's vast expansion of executive authority after September 11, 2001 and the Court's analysis of five key Supreme Court Guantanamo Bay cases of the last decade.[26] Part IV examines the D.C. Circuit's current practice of denying habeas relief in all Guantanamo Bay cases on its docket.[27] Part V analyzes the National Defense Authorization Act of 2012 and discusses the possibility of indefinitely detaining U.S. citizens in this country in the future.[28] The article then takes a prescriptive turn in Part VI by offering pragmatic recommendations for reform.[29]

II. THE INTERNMENT OF JAPANESE AMERICANS AND *ENDO*: IT WAS ABOUT RACE DESPITE THE GOVERNMENT AND SUPREME COURT INSISTENCE THAT IT WAS ABOUT "MILITARY NECESSITY"

Under the shadows of the Japanese Navy's bombing of Pearl Harbor on December 7, 1941, the War Relocation Authority (WRA) oversaw the removal, relocation, and supervision of persons pursuant to Executive Order No. 9066, which empowered the military to exclude person from designated areas.[30] The government considered approximately 120,000 individuals of Japanese ancestry disloyal based on responses to dubious questionnaires. [31] They were uprooted and shipped off like cattle on trains to relocation centers and camps located in the

24. *See infra* Part I.

25. *See infra* Part I.

26. *See infra* Part II.

27. *See infra* Part III.

28. *See infra* Part IV.

29. *See infra* Part V.

30. *See* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN 99 (2d. ed. 2013); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 1001 (2012) ("With the outbreak of war, the military forcibly removed thousands of American citizens of Japanese descent from their homes and transported them to "relocation camps" for long-term preventive detention."); Sarah A. Whalin, *National Security Versus Due Process:* Korematsu *Raises Its Ugly Head Sixty Years Later in* Hamdi *and* Padilla, 22 GA. ST. U. L. REV. 711, 713 (2005); *see also* Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489, 502 (1954) (stating that the government "developed a system for the indefinite . . . detention of Japanese aliens and citizens of Japanese descent, without charges or trial, without term, and without visible promise of relief.").

31. *See* Susan Kiyomi Serrano & Dale Minami, Korematsu v. United States: *A "Constant Caution" in a Time of Crisis*, 10 ASIAN L.J. 37, 37–38 (stating how the Court upheld the internment of 120,000 Japanese-Americans based on a collection of "innocent facts, half-truths, and stereotypes" without any evidence of espionage or disloyalty).

deserts and swamplands of California, Idaho, Utah, Arizona, Wyoming, Colorado, and Arkansas.[32]

Leaving behind their homes, businesses, and personal belongings, Japanese Americans were confined to spartan, prison-like internment camps.[33] Internees were exposed to extreme seasonal temperature changes while living in communal facilities, dealing with poor health care, and a shortage of teachers, textbooks, and supplies for students.[34] Held without any individual determination that they were a threat to national security, internees were fenced in by barbed wire and closely watched by the Army.[35] Some internees were even shot and killed for alleged escape attempts.[36] As an additional affront to their dignity, many internees were asked to complete loyalty questionnaires implying that they were loyal to Japan and disloyal to the U.S. These questionnaires asked internees if they would forswear their allegiance to the Emperor of Japan, and asked about their willingness to join the Auxiliary Corps and fight for the United States.[37]

The treatment of the Japanese American internees was consistent with America's historical animus against Asians. Social scientist Lisa Lowe suggests that Asians have been perceived as "immigrant" and "foreign-within" even when born in the United States with a familial lineage spanning multiple generations in America.[38] Asians were not considered real Americans.[39] Lowe asserts that Japanese Americans were "recognized as citizens . . . recruited into the U.S. military, yet were dispossessed of freedom and properties [and] condemned as 'racial enemies'" placed in internment camps.[40] Simply put, other than their skin color, the Japanese and Japanese American internees were just like other

32. *See* YAMAMOTO ET AL., *supra* note 30, at 169; *see also* Erwin Chemerinsky, *Detentions Without Due Process of Law Following September 11th*, 20 TOURO L. REV. 809, 891 (2005); Whalin, *supra* note 30, at 713; Donald Tamaki, *Foreword: Sixty Years After the Internment: Civil Rights, Identity Politics, and Racial Profiling*, 11 ASIAN AM. L.J. 147, 147 (2004); Serrano & Minami, *supra* note 31, at 37; Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the Racing of Arab Americans as Terrorists*, 8 ASIAN AM. L.J. 1, 4 (2001); Eric K. Yamamoto, Korematsu *Revisited - Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1, 1 (1986).

33. *See* YAMAMOTO ET AL., *supra* note 30, at 169; *see also* Rostow *supra* note 30, at 502 (finding "the camps were in fact concentration camps, where the humiliation of evacuation which ignored citizens' rights, and the amenities which might have made the relocation palatable").

34. *See* YAMAMOTO ET AL., *supra* note 30, at 173–74.

35. *See id.* at 175.

36. *See id.*

37. *See* Neil Gotanda, *Race, Citizenship, and the Search for Political Community among "We the People," A Review Essay on Citizenship without Consent*, 76 OREGON L. REV. 233, 243 (1997).

38. LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS 5–6 (1996).

39. *See id.* at 5–8 (describing the historical influence of Asian immigrants on American society despite being categorized as "others," as exemplified in the World War II internment of Japanese-Americans).

40. *See id.* at 8.

Americans, but to the government and the courts, they were presumptively disloyal.[41]

It was politically prudent to support the internment. Even Earl Warren, then-Governor of California, who later became known as a great guardian of civil rights and civil liberties.[42] At a June 11, 1943 press conference in Sacramento, he insisted, "The evacuation of the Japanese saved our state from terrible disorders and sabotage."[43] Incredibly, by treating Japanese Americans as foreigners, the government and Court skirted any equal protection analysis. As one scholar suggests, "[t]he racialized identification of Japanese Americans as foreign—regardless of their citizenship—allowed for otherwise unlawful actions to be taken against United States citizens."[44]

The internment was an egregious example of how laws may be used as an instrument of racism, and how racist laws may be defended by claims that they are not based on race.[45] Today, the internment is considered one of the twentieth century's most prominent mass trampling of civil liberties, and it has been widely condemned as racist governmental and judicial conduct toward the Japanese and Japanese Americans.[46] There has been a longstanding denunciation by scholars and jurists about the Court's internment case rulings, which paid great deference for the Government's claims of military necessity and upheld the detention of Japanese Americans.[47] Ninth Circuit Judge Wallace Tashima, who as a young

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41. *See* Masumi Izumi, *Alienable Citizenship: Race, Loyalty, and the Law in the Age of 'American Concentration Camps,' 1941–1971*, 13 ASIAN AM. L.J. 1, 18 (2006) ("During World War II, the government failed to distinguish between the loyal and the disloyal among the Japanese American population.").

42. *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 157 (1997). Warren would later regret his advocacy of the removal order, which he conceded was brought "without evidence of disloyalty." *Id.* at 159.

43. *See id.*

44. Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN AM. L. J. 71, 76 (1997).

45. *See* Rostow *supra* note 30, at 496 (arguing that the evacuation of all persons of Japanese ancestry from the West Coast was not based on a military justification, but rather on "attitudes of racial" prejudice).

46. *See e.g.*, YAMAMOTO ET AL., *supra* note 30, at 237 ("The government of the United States could not have interned the Japanese-Americans were it not for the tradition of anti-Asian prejudice in the country in general and on the West Coast in particular. Although historically the bias was predominantly anti-Chinese, there was no hesitation in deploying stereotypes of the shifty, untrustworthy Oriental onto both first-and second-generation Americans of Japanese origin."); Tyler, *supra* note 30, at 1002 ("The World War II detention of Japanese Americans on the West Coast stands entirely at odds with everything that the Founders thought they were accomplishing in adopting the Suspension Clause."); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 1004 (2004) ("The Judiciary aided and abetted the internment of Japanese Americans . . . . It did so not only in terms of substance, by agreeing with racial profiling justification based on faint evidence, but also in terms of procedure—by delaying, framing, segmenting, did not deciding what was centrally at issue."); NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010).

47. *See* YAMAMOTO ET AL., *supra* note 30; *see also* Beverly E. Bashor, *The Liberty/Safety Paradigm: The United States' Struggle to Discourage Violations of Civil Liberties in Times of War*, 41 W. ST. U. L. REV. 617, 618 (2014) (characterizing the Japanese American internment as "one of the largest violations of civil

boy was an internee himself at Poston, Arizona, remarked, "[The internment] happened, at least in part, because the federal courts, which were supposed to be the bulwark protecting the Constitution from an overzealous [e]xecutive, failed in fulfilling their mandate under Article III of the Constitution."[48]

A. The Three Internment Cases Leading Up to Endo

A brief review of the three other internment cases heard by the Court is necessary to illustrate the expansion of executive power through political maneuvering. The first two cases challenged military orders imposing a night curfew on Japanese Americans were decided quickly in 1943, during the middle of World War II, when victory for the allies was far from certain.[49] In *Hirabayashi v. United States*,[50] Gordon Hirabayashi was convicted for violating Public Proclamation No. 3,[51] which imposed a curfew on all enemy aliens and citizens of Japanese descent.[52] Hirabayashi was born and raised in Seattle, Washington, and had never been to Japan.[53] Like all Japanese Americans, Hirabayashi was subject to General John L. DeWitt's curfew order, requiring him to be at home each night from 8:00 p.m. until 6:00 a.m.[54] Hirabayashi wanted to challenge the exclusion orders and turned himself in at F.B.I. headquarters. [55] He was convicted in a Seattle jury trial of two separate counts: intentionally violating the evacuation order and the curfew order.[56] Disappointingly, when *Hirabayashi* reached the Court, it avoided the difficult issues of evacuation and internment, and instead simply upheld Hirabayashi's conviction for violating the curfew. [57]

Next, in *Yasui v. United States*,[58] Minoru Yasui was a U.S. citizen, educated as a lawyer, employed in a Japanese consular office, and actively involved in the

liberties in the nation's history"); Robert J. Pushaw, Jr., *Explaining Korematsu: A Response to Dean Chemerinsky*, 39 PEPP. L. REV. 173, 175 (2013) ("[T]he Court reacted the way it always has in a major war: by deferring to a strong and popular President who . . . had taken an action that he deemed militarily necessary, despite infringements of constitutional rights"); YAMAMOTO ET AL., *supra* note 30, at 141 (arguing that in Korematsu, "the Court deferred to the government's unexamined assertion of military necessity and thereby sanction[s] the tragic and justified deprivation of personal liberty").

48. A. Wallace Tashima, *Play It Again, Uncle Sam*, 68 LAW & CONTEMP. PROB. 7, 9 (2005) [hereinafter Tashima *Play It Again*].

49. *See* YAMAMOTO ET AL., *supra* note 30, at 126.

50. 320 U.S. 81 (1943).

51. Public Proclamation No. 3, 7 Fed. Reg. 2543 (Apr. 2, 1942).

52. *Hirabayashi*, 320 U.S. at 88.

53. *Id.* at 84.

54. *Id.* at 83–84.

55. *See* YAMAMOTO ET AL., *supra* note 30, at 105.

56. *Id.* at 105, 107.

57. *Id.* at 298.

58. 320 U.S. 115 (1943).

Japanese Americans Citizens League.[59] He and his family were ordered to leave their home and report for internment.[60] Intending to be a test case to challenge the evacuation orders, Yasui turned himself in at a police station. [61] He waived his right to a jury trial, and was found guilty after a bench trial. [62] Decided the same day as *Hirabayashi*, Yasui's conviction was sustained for the same reasons.[63] The Court again avoided the legality of the mass internment of an entire racial group by (mis)characterizing the case as a "curfew" case.[64]

In 1943, War Relocation Authority officials, working with the War Department and the Office of Naval Intelligence, attempted to determine the loyalty of incarcerated men they hoped to recruit into military service.[65] By late 1944, Americans were confident about their domestic security and winning the war.[66] That same year, the government passed the Renunciation Act of 1944, which enabled and encouraged Japanese Americans, who were desperate for their freedom, to renounce their American citizenship and move to Japan—far away from America's shores.[67] Having few options, many Japanese Americans only renounced their citizenship so that they could keep their families intact at Tule Lake and avoid the draft that would require them to fight for the same military that imprisoned them.[68] Renouncing their citizenship was the equivalent of waiving their due process rights, including the right to counsel, notice of factual basis for charges, and a fair opportunity to rebut the government's allegations before a fair natural decision-maker.[69] After World War II, many internees who wanted their U.S. citizenship back argued that their renunciations were void due to duress and intimidation.[70] Here, politics again played a role; when the renunciations increased, the Justice Department coldheartedly rejected them.[71]

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59. *See* YAMAMOTO ET AL., *supra* note 30, at 126.

60. *Id.* at 127.

61. *See id.* at 128.

62. *See id.*

63. Yasui, 320 U.S. at 117.

64. *See* YAMAMOTO ET AL., *supra* note 30, at 155.

65. *See* Gotanda, *supra* note 37, at 243–44.

66. *See* YAMAMOTO ET AL., *supra* note 30, at 102 (explaining that the U.S. government had reason to believe country was at the risk of attack at the time the President signed the order, although that fear did not exist at the time the Court heard the case). If the U.S. and its allies were not winning in 1944, would the Court have still ruled the way it did in *Endo*?

67. *See* Gotanda, *supra* note 37, at 244.

68. *See id.* at 234 (describing how internees feared violence if they left the camps and believed that renouncing would allow them to stay in Tule Lake with their families and avoid the draft).

69. *See id.* at 244.

70. *Id.* at 245.

71. *Id.* at 233.

Soon after, a presidential proclamation followed designating denunciates as "enemy aliens" deportable under the Alien Act of 1798.[72]

The politics of the internment machinery reached a pinnacle when the last of the camp rulings came down a day after the Roosevelt Administration announced the closure of the camps on Sunday, December 17, 1944.[73] Justice Frankfurter, who maintained a line of communication with the Roosevelt Administration, likely tipped off the White House about the Court's forthcoming decisions.[74] Some cynical scholars further suggest that the cases were also delayed and ruled upon on the same day—after the presidential election—so that any political backlash would be minimized.[75] In *Korematsu v. United States*,[76] the most well-known of the cases, Fred Korematsu was apprehended by the San Leandro police while walking down the street.[77] Korematsu waived his right to a jury trial, and was found guilty after a bench trial.[78] Not surprisingly, the Court construed this matter as a "curfew" case and restricted its holding to the question of the evacuation alone, avoiding the issue of the internment's constitutionality for the third time.[79] Sounding almost like a broken record, the majority upheld the exclusion and denied that the case was about race.[80] Together, the three cases underscore the Court's reluctance to second-guess military judgment, and to give complete deference to detain Japanese Americans.

B. Endo's Petition for Writ of Habeas Corpus and Justice Douglas' Avoidance of the Constitutional Issues

Endo, while not as famous as *Korematsu*, is a civil rights case just as politically significant. *Endo* was the only internment case that did not challenge

72. Later, San Francisco civil rights attorney Wayne Collins was able to block large-scale deportations just prior to their scheduled departure. *See id.* at 244–45.

73. *See id.* at 243–44 (describing internees' conflicted feelings on how to act followed the Supreme Court's late December decision in *Endo*).

74. FELDMAN, *supra* note 46, at 964.

75. *See* YAMAMOTO ET AL., *supra* note 30, at 174.

76. 323 U.S. 214 (1944).

77. YAMAMOTO ET AL., *supra* note 30 at 125.

78. *See id,* at 138–39.

79. See *id.* at 155; Eugene Gressman, Korematsu*: A Mélange of Military Imperatives*, 60 LAW & CONTEMP. PROB. 15, 19 (2005) (finding that "[w]hen it comes to testing the constitutionality of the Korematsu exclusion order, Justice Black makes no effort to apply of the standards of review that the had set forth in the opening passages of his Korematsu opinion.").

80. *See* Gotanda, *supra* note 37, at 231; *see also* YAMAMOTO ET AL., *supra* note 30 ("The U.S. Supreme Court's differential approach, in Korematsu afforded almost completed autonomy to the military in its detention of Japanese Americans and signaled a hands off role in reviewing alleged government war power excesses, including those detrimental to the most fundamental of democratic liberties."); Owen Fiss, *Law is Everywhere*, 117 YALE L. J. 258, 277 (2008) ("Korematsu gave constitutional legitimacy to the mass relocation program, it nevertheless deferred to the government's assessment of the need for such a policy and, furthermore, never considered whether less harmful alternatives were available.").

a criminal conviction, but involved filing a petition for writ of habeas corpus[81] Endo, a twenty-two-year-old American citizen of Japanese ancestry, worked as a stenographer for the California Department of Motor Vehicles in Sacramento.[82] She had never been to Japan and did not speak or read Japanese.[83] Endo's brother served in the Army, and she was also the only female litigant in the internment litigation.[84]

After Pearl Harbor, Endo was dismissed from her job and housed at the Tanforan Assembly Center, a converted racetrack near San Francisco surrounded by armed guard towers and the stench of horse manure.[85] She was later removed to the Tule Lake War Relocation Center—temporary military-style camps in California near the Oregon border[86]—which housed inmates whose questionnaire answers suggested they were disloyal.[87]

Although the War Relocation Authority considered Endo loyal and offered to release her on the condition that she would not return to California, Endo courageously refused the offer, and opted to pursue her request for judicial relief.[88] With the assistance of James Purcell, a San Francisco Attorney, Endo filed a habeas corpus petition in the Northern District Court for the District of California. Endo requested release and argued that she was a loyal and law-abiding American citizen being held unlawfully against her will because no formal charges were brought against her.[89] Endo waited more than two years for adjudication.[90] She filed her petition in district court in July 1942, but it was held in abeyance until *Hirabayashi* and *Yasui* were decided.[91] Her petition was denied in July 1943, and the appeal was certified to the Ninth Circuit the following month.[92] Afterwards, Endo was transferred to the Central Utah Relocation Center.[93]

On October 12, 1944, oral argument was heard before the Supreme Court and a ruling was issued on December 18, 1944.[94] But just like the other cases, the *Endo* Court avoided determining the constitutionality of internment by basing its

81. Fiss, *supra* note 80, at 285.
82. Feldman, *supra* note 46, at 236.
83. YAMAMOTO ET AL., *supra* note 30, at 167.
84. *Id.*
85. *Id.*
86. *Id.*
87. *See* Gotanda, *supra* note 37, at 233.
88. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 185 (2010).
89. *See* YAMAMOTO ET AL., *supra* note 30, at 173.
90. *Ex parte Endo*, 323 U.S. at 285.
91. YAMAMOTO ET AL., *supra* note 30, at 156.
92. *Ex parte Endo*, 323 U.S. at 285.
93. *Id.* at 284–85.
94. *Id. at* 283.

ruling on administrative law grounds to shield the Executive Branch from accountability.[95]

Justice Douglas, a Roosevelt loyalist who maintained presidential aspirations and who was well aware of the political implications of the case, wrote the unanimous opinion.[96] As a practical matter, the internees would eventually be released, despite strong West Coast political support for the internment program.[97] Seemingly wearing color-blind goggles, Douglas viewed exclusion as an issue of loyalty, not race.[98] With the release of Japanese American internees, he thought justice would be served, and integrity of the Roosevelt Administration's detention policy would be maintained.[99]

Within the administrative law framework, two-thirds of the opinion was devoted to the origins of relevant executive orders and legislative acts.[100] At the outset, Executive Order 9066 delegated power to the military to bar access to military areas.[101] The opinion then explained that the Military Commander of the

95. *See, e.g.*, Jennifer K. Elsea, *Citizens as Enemy Combatants*, CONG. RES. SERV. REP. FOR CONG., Feb. 24, 2005, at 23 ("The Court avoided the question of whether internment of citizens would be constitutionally permissible where loyalty were at issue or where Congress explicitly authorized it, but the Court's use of them 'concededly loyal' to limit the scope of the finding may be read to suggest that there is a Fifth Amendment guarantee of due process applicable to determination of loyalty or dangerousness."); Izumi, *supra* note 41, at 18 ("By shifting the discourse from race to loyalty, the Supreme Court avoided rendering an opinion on the constitutionality of internment . . . by discussing loyalty in assessing the constitutionality of citizens' detention, the Court brought the matter of loyalty into the analysis of the reasonableness of restrictions on civil liberties."); Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 L. & CONTEMP. PROB. 260, 271 (2005) ("There was no holding that the executive and legislative branches of government had deprived Mitsuye Endo, an American citizen, of her constitutional rights; rather, the Court decided the case on administrative law grounds."). Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 KANSAS L. REV. 307 (2006) ("The Court ultimately resolved Endo's claims through legislative interpretation rather than constitutional analysis.").*But see* Patrick O. Gudridge, *Remember ENDO?* 116 HARV. L. REV. 1933, 1939 (2003) (analyzing the constitutional references in the opinion and concluding that Endo was a constitutional law case just like Korematsu).

96. *See* Feldman, *supra* note 46 at 241. During that Supreme Court term Lucile Lomen served as the first female Supreme Court law clerk. She started clerking for Douglas in September 1944 amidst a great deal of press coverage. *See* Jennie Berry Chandra, *Lucile Lomen: The First Female United States Supreme Court Law Clerk*, *in* CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 206 (Todd C. Peppers & Artemus Ward eds., 2012). While Lomen clerked, the role of Supreme Court law clerks expanded, and clerks made substantive contributions in decisions. Lomen did just this in *Ex Parte Endo*. *Id.* at 207–08. The ruling was perhaps influenced by Lomen's memoranda, which briefed Justice Douglas on the duty of the Court to construe a statute, if possible, so as to avoid a conclusion that is unconstitutional, including incarcerating an entire race of people. *Id.* at 207. At the end of the term, Douglas had such a good experience with Lomen as his clerk that he was more responsive to hiring a female clerk in later years. *Id.* at 209–10. After leaving her clerkship, Lomen went on to serve in the Washington State Attorney General's Office and to represent General Electric in a number of legal positions. *Id.* at 210–15.

97. Feldman, *supra* note 46 at 247.

98. *Id.*

99. *Id.* at 246-47.

100. *Ex Parte Endo*, 323 U.S. at 284.

101. EXEC. OFF. OF THE PRES., EXECUTIVE ORDER 9066: AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS, 7 Fed. Reg. 1407 (Feb. 19, 1942).

Western Defense Command was to carry out duties, and it was DeWitt who issued Civilian Exclusion Orders, the WRA, and Civil Restrictive Orders.[102] Douglas determined that the President and Congress did not authorize detention because neither Order 9066, Executive Order 9012, which created the WRA, nor Public Law 503, which created criminal penalties for violating military regulations, made any mention of detention.[103] Therefore, he concluded that the WRA was never authorized to detain Endo.[104]

With regard to the Court's framing of these issues, Professor Jerry Kang argues that "[i]n *Endo*, the Supreme Court manipulated the question of executive and congressional authorization to deny accountability. By finding that the full-blown internment had never been authorized by the President and Congress, the suffering of Japanese Americans was never attributed to the actors in fact responsible."[105] Kang adds, "Douglas provides political cover to Congress and President Roosevelt by explaining that no assumption should be made that Congress and the President intended that the discriminatory action should be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country."[106]

The thrust of the opinion is found in Douglas' lengthy discussion of loyalty. The U.S. government could not continue to detain Endo, a citizen who was "concededly loyal" to the United States:

> It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge or that she is even suspected of disloyalty. Moreover, they do not contend that she may be held any longer in the Relocation Center.[107] They concede that it is beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than that necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation.[108]

Nevertheless, Douglas insisted that evacuation was justified because it was an "espionage and sabotage measure," while downplaying any discriminatory

102. *Ex Parte Endo*, 323 U.S. at 288–291.
103. *Id.* at 297.
104. *See* YAMAMOTO ET AL., *supra* note 30, at 174.
105. *See* Kang, *supra* note 96, at 268.
106. *Id.* at 304.
107. *Id.* at 294–95.
108. *Id.* at 295.

intent behind the evacuation.[109] Here, Douglas announced the constitutional basis for challenging the detention:

> We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. . . . the Fifth Amendment provides that no person shall be deprived of liberty (as well as life or property) without due process of law. Moreover, as a further safeguard against invasion of the basic civil rights of the individual it is provided in Art. 1, § 9 of the Constitution that 'The Privilege of the Writ of Habeas Corpus shall not be suspected, unless when it Cases of Rebellion or Invasion the public Safety may require it.'[110]

The Justice then declined to apply it:

> We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution.[111]

Douglas' avoidance of the constitutional issue was strongly criticized in separate concurrences by Murphy and Roberts.[112] The divergent opinions were reflective of the debates in conference. First, Justice Murphy insisted that Endo's detention and internment were based on race, and "racial discrimination . . . bears no reasonable relation to military necessity and is utterly foreign to the ideals and tradition of the American people."[113] Second, Justice Roberts criticized the majority's avoidance of the underlying constitutional issues: "The opinion . . . attempts to show that neither the executive nor the legislative arm of the Government authorized the detention."[114] In his view, the issues were much more important and Endo posed "a serious constitutional question—whether the relator's detention violated the guarantees of the Bill of Rights of the federal Constitution and especially the guarantee of due process of law."[115]

Further, in an issue that would be pivotal sixty years later in the Guantanamo Bay litigation, Douglas addressed the jurisdictional issue of whether the district court had justification to grant the writ of habeas corpus for Endo's relocation

109. *Ex Parte Endo*, 323 U.S. at 302–04.
110. *Id. at*, 297–99.
111. *Id.* at 299.
112. *Id. at* 308.
113. *Id.* at 307–08.
114. *Id.* at 308.
115. *Id.* at 310.

from Tule Lake to Utah.[116] Endo's relocation did not destroy jurisdiction because there was not a proper respondent in the Northern District of California due to the fact that no one in that district was responsible for Endo's detention.[117] According to Douglas, jurisdiction existed because the Secretary of the Interior or any WRA official could oblige the court's issuance of a writ.[118] Douglas acknowledged that Endo was never served with process, nor did she appear in the proceedings.[119] In the end, Endo's victory rang hollow. Even if Endo lost at the high court, she would have eventually been released following the War Department's announcement of the forthwith release of internees.[120]

C. Commission on Wartime Relocation and Internment of Civilians and Coram Nobis *Litigation: Vindication at Last*

Korematsu, Hirabayashi, and Yasui would eventually find judicial redemption. Almost forty years after *Endo*, Congress established the Commission on Wartime Relocation and Internment of Civilians[121] to review the facts and circumstances surrounding Executive Order 9066.[122] The Commission examined the effects of the order on American citizens and permanent residents, and reviewed U.S. military directives requiring the relocation and detention of Japanese Americans. Its findings and conclusions were unanimous: "the record does not permit the conclusion that the military necessity warranted the exclusion of ethnic Japanese from the West Coast."[123]

The *coram nobis* litigation arose in the mid-1980s, when litigants reopened the internment cases and revealed that during World War II, the Departments of Justice and War suppressed and altered exculpatory evidence showing that military evacuation and internment was unnecessary.[124] The truth was that the

116. *Id.* at 305.

117. *Id.* at 305.

118. *Id.* at 305.

119. *Id.* at 285.

120. *See* CRAY, *supra* note 42, at 159.

121. *See* PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION OF WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 1 (1982) (a federal agency Congress created in 1980 to investigate the Japanese Americans internment and explore potential redress).

122. EXEC. OFF. OF THE PRES., EXECUTIVE ORDER 9066: AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS, 7 Fed. Reg. 1407 (Feb. 19, 1942).

123. *See* PERSONAL JUSTICE DENIED, *supra* note 121, at 8 (1982); *see also* Rostow, *supra* note 30, at 496 ("There was no sabotage on the part of persons of Japanese ancestry, either in Hawaii or on the West Coast.").

124. YAMAMOTO ET AL., *supra* note 30, at 294–309; Saito, *supra* note 32, at 6; *see also* Erwin Chemerinsky, *Post 9/11 Civil Rights: Are Americans Sacrificing Freedom for Security?*, 81 DENVER U. L. REV. 759, 760 (2004) ("Not one Japanese-American was ever accused, indicted or convicted of espionage or any crime implicating national security"). Serrano & Minami, *supra* note 31, at 42–45; Saito, *supra* note 32 at 73–74 ("The coram nobis petitions were based on the 1981 discovery of evidence that the War Department had knowingly concealed information about the danger (or lack thereof) posed by Japanese Americans").

government withheld information from internal investigative reports, misled the Court, and the internment was motivated by racial bias.[125]

Korematsu, Hirabayashi, and Yasui, through *coram nobis* petitions, successfully sought to vacate their wartime convictions on grounds of government prosecutorial misconduct and lack of military necessity.[126] The three men were later awarded the Presidential Medal of Freedom.[127] Since *Endo* was the only "successful" internment case, there was no need for Endo to file a *coram nobis* petition. Showing that many still remember Endo's courageous act, there has been a push for her to receive a Presidential Medal of Freedom posthumously as well.[128]

III. NATIONAL SECURITY IS THE NEW MILITARY NECESSITY: THE BUSH ADMINISTRATION AND THE SUPREME COURT GUANTANAMO BAY CASES

The actions of the government in holding enemy combatants without meaningful judicial review strike at the heart of the rule of law. The government has claimed that its actions, no matter how egregious or how violative of the law, cannot be reviewed in any court.[129]

A. September 11, 2001 and the Influence of Race, Culture, and Religion on Policy and Law-Making

A week after terrorist attacks on the World Trade Center and Pentagon killed nearly three thousand people, Congress passed the 2001 Authorization of Use of Military Force (AUMF).[130] The AUMF 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" or

125. *See* YAMAMOTO ET AL., *supra* note 30, at 285; Whalin, *supra* note 30, at 719.

126. *See* YAMAMOTO ET AL., *supra* note 30, at 280–81.

127. Most recently, Minoru Yasui posthumously received the Presidential Medal of Freedom on November 16, 2015. *See White House: Office of the Press Secretary, President Obama Names Recipients of the Presidential Medal of Freedom* (Nov. 16, 2015) https//www.whitehouse.gov/the-press-office/2015/11/16/president-obama-names-recipients-presidential-medal-freedom (on file with *The University of the Pacific Law Review*).

128. *See* Frances Kai-Hwa Wang, *Supporters for Misuye Endo's Presidential Medal of Freedom* (July 14, 2015), http://www.nbc.com/news/asian-america/supporters-recommend-presidential-medal-freedom-mitsuye-endo-n391736 (on file with *The University of the Pacific Law Review*) ("California State Senate and U.S. Representatives Dori Matsui, Mike Honda, Mark Takai, and Mark Takano have joined the growing list of supporters for Mitsuye Endo (1920–2006) to be posthumously awarded the Presidential Medal of Freedom, the nation's highest civilian honor, for challenging the incarceration of Japanese Americans during World War II.").

129. Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, J. OF NAT'L SEC. L. & POLICY 73, 87 (2005).

130. *See* Authorization for Use of Military Force, 50 U.S.C. §1541(a) (2001).

"harbored such organizations or persons, in order to prevent any future acts of intentional terrorism against the United States by such nations, organizations or persons."[131] Unlike the Japanese Empire during World War II, the new enemy did not represent a government, did not wear uniforms, and targeted civilians.[132]

Congress also passed the USA Patriot Act,[133] authorizing the federal government to issue warrantless searches and seizures, intercept electronic communications, including wiretaps,[134] and expand the grounds upon which noncitizens could be removed from the country.[135] Emboldened with this authority, the U.S. government implemented special registration of Arab and Muslim noncitizens, indefinitely held "enemy combatants," and engaged in selective deportation campaigns based on national origin.[136]

Next, the government enacted immigration laws, not to remove unlawful or undocumented immigration, but to detain suspected terrorists.[137] Immigration policy and criminal laws allowed for lengthy detention and delay of deportations spanning months, if not years.[138] These individuals were prosecuted on the basis of citizenship statutes rather than criminal charges and were not afforded constitutional protections traditionally afforded to defendants, such as requiring

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131. Authorization for the Use of Military, 50 U.S.C. §1541 (2001) [hereinafter AUMF].

132. *See* Sarah Lohmann & Chad Austin, *When the War Doesn't End, Detainees in Legal Limbo*, 92 DENV. U.L. REV. ONLINE 1, 7 (2014).

133. USA Patriot Act, 50 U.S.C. § 1531 (2001).

134. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 115 (2007).

135. JOHNSON, *supra* note 21; Jennifer M. Chacon, *The Security Myth: Punishing Immigration in the Name of National Security Power*, *in* GOVERNING IMMIGRATION THROUGH CRIME: A READER 77 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013) ("Since September 11 . . . the rationale of 'national security' has provided the primary justification for more vigorous immigration law enforcement").

136. Chacon, *supra* note 135. ("Immigration law has been ground zero of the U.S. government's so-called war on terror"); *see also* Gotanda, *supra* note 37, at 663 ("[T]here was widespread use of ethnic profiling aimed at individuals who 'look Arab' immediately after 9-11. Such profiling is based upon a presumption that someone who 'looks Arab' is potentially disloyal.").

137. JOHNSON, *supra* note 21, at 49 (discussing the targeting of Muslims and Arabs for arrest, detention, and interrogation and arguing "[t]he antiterrorism policies have affected the civil rights of Muslim and Arab immigrants in the U.S."). The government's authority relied on to adopt harsh measures in the war on terror to deport noncitizens can be traced to the Plenary Power Doctrine. *See, e.g.*, Chacon,, *supra* note 135, at 80 ("[the] Plenary Power included the authority to deport noncitizens physically present in the United States . . . The rationale is that immigration is inextricably tied up with foreign policy."); Victor C. Romero, *On Elian and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343, 348–55 (2001); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for Ongoing Abuses of Human Rights*, 10 ASIAN AM. L.J. 13, 14 (2013) (discussing the origins of the plenary power doctrine in United States jurisprudence and observing that "the plenary power doctrine was first articulated in the immigration context in the Chinese exclusion cases').

138. *See* Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, *in* GOVERNING IMMIGRATION THROUGH CRIME: A READER 63 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013).

the government to prove a defendant's guilt beyond a reasonable doubt.[139] In deferential immigration proceedings concerning suspected terrorism, only the Fifth Amendment Due Process Clause is applicable.[140] All told, U.S. law enforcement arrested and interviewed thousands of citizens and the Immigration and Naturalization Service detained 738 individuals indefinitely until they were cleared.[141]

Legal experts on internment suspect that after September 11, 2001, the legislative branch aligned with the executive branch in a collaborative effort to sacrifice fundamental liberties for national security, in a manner similar to the process that led to Japanese American internment.[142] Both Japanese Americans and Muslims were marked by the presumption of racial guilt. During the Japanese American internment, the government advanced a racist lie that persons of Japanese descent in America were traitors because of their race.[143] Whereas, after the September 11th attacks the government engaged in racial scape-goating.[144] This was evident in the federal government's racial and cultural profiling of Arab and Muslim-Americans.[145]

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139. *See id*.; Chacon, *supra* note 135, at 77 (arguing that post-September 11, 2001 "suspects," were "detained on immigration-related charges lower standards of proof then that which would have been required for criminal investigation . . . .many were removed . . . .without public hearings").

140. *See* Chacon, *supra* note 135, at 65.

141. *See id.* at 88.

142. *See* YAMAMOTO ET AL., *supra* note 30, at 406; *see also* Serrano & Minami, *supra* note 31, at 38 ("Korematsu and the national security and civil liberties tension that it embodies have reemerged in the wake of September 11, 2001 . . . .terrorist attacks.").

143. *Ex Parte Endo*, 323 U.S. at 304.

144. *See* YAMAMOTO ET AL., *supra* note 30, at 408.; Liette Gilbert, *Immigration and Local Politics: Re-Borders Immigration Through Deterrence and Incapacitation*, *in* GOVERNING IMMIGRATION THROUGH CRIME: A READER 185 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013) ("The Department of Homeland Security's discretionary power of detention on national grounds of security has been particularly controversial given the conflation of immigrants and terrorists, and the racial and religious profiling of communities."); JOHNSON, *supra* note 21, at 2 (asserting "Measures taken by the federal government against Arab and Muslim noncitizens after September 11, 2001, to arrest, detain and remove them, based on tenuous connections to terrorism); Saito, *supra* note 137 ("the immigration-related justifications for the post-September 11 surveillance, questioning, and detention of noncitizens seems to be pretextual"); Saito, *supra* note 32, at 15 ("In this new war, Arab Americans and Muslims have quickly become the most visible 'enemy'").

145. *See e.g*., Eric L. Miller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 573 (2002); David Cole, *The Priority of Morality: The Emergency Constitution's Blindspot*, 113 YALE L. J. 1753, 1787 (2004) ("The Justice Department's targeting of Arabs and Muslims in the wake of September 11 has identified few terrorists, but it has alienated large segments of the Arab and Muslim communities, both here and abroad . . . suspicionless preventive detention has no more than a random change of furthering security, and poses a significant likelihood of actually undermining security."); Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO STATE J. OF CRIM. L. 103, 123 (2003) ("In the weeks after September 11, 2001, law enforcement agents arrested hundreds of mostly Arab and Muslim aliens and hold them, often for long periods and in oppressive conditions, on immigration charges that would not have been brought before the September 11 attacks of on criminal charges unrelated to terrorism."); *see also* Kirk Semple, *Muslim Youths in U.S. Feel Strain of Suspicion*, N.Y. TIMES, Dec. 15, 2015, at A1 (discussing anti-Muslim animus and suspicion of Muslim youth in the United States following recent terrorist

On this issue, Professor Lisa Marie Cacho argues that Muslims were racially profiled and portrayed as threats, which "subjected [them] to lawlessness and unregulated state violence."[146] As an aside, she argues that this particular social construction was enabled by President Bush's post-9/11 speeches equating the war against "evil-doers" with war against "terrorists."[147] In effect, these speeches invoked a racialized image of terrorists and their national origins and religious connotations.[148] As a result, approximately five hundred people were detained by the Justice Department and held on suspicion of immigration law violations and criminal charges unrelated to terrorism, and some were held as "material witnesses."[149] The Justice Department invited more than five thousand young aliens of mostly Arab and Muslim countries to voluntary interview under the auspices of information-gathering purposes about al Qaeda and other foreign-based terrorist organizations.[150]

B. The War on Terrorism: An Unprecedented Expansion of Executive Power

Within the government-manufactured framework of the "war on terrorism" an unprecedented expansion of executive power began.[151] On November 13, 2001, President Bush issued a military order directing the Secretary of Defense to

attacks in Paris and San Bernardino). Interesting, the attitudes of Americans about racial profiling changed after September 11, 2001. Americans seemingly were more accepting of racial profiling as it relates to national security.

146. Lisa Marie Cacho, SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED 22 (2012).

147. *See id.* at 97.

148. *Id.* at 103; *see also* David Manuel Hernandez, *Pursuant to Deportation: Latinos and Immigrant Detention*, *in* GOVERNING IMMIGRATION THROUGH CRIME: A READER 201 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013) ("The post 9/11 'war on terror' contributed to the ongoing history of racial discrimination against noncitizens, initiating a variety of legal and administrative changes directly affecting U.S. immigration policy.").

149. *See* Miller, *supra* note 145, at 573; *see also* YAMAMOTO ET AL., *supra* note 30, at 395 ("Since the 9/11 attacks, the federal government has detained dozens of individuals under the pretext of using them as material witnesses. . . . Although they are only permitted to be held for the time required to testify or be deposed, the government has repeatedly held individuals as material witnesses, at times for longer than six months, without deposing them or calling them to testify."); Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1377 (2007) ("After September 11, 2001, the U.S. government took a variety of immigration-related measures in the name of national security because non citizens were involved in the terrorist attacks."); SHARON L. DAVIES, PROFILING TERROR IN THE FOURTH AMENDMENT: SEARCHES AND SEIZURES 184 (2011).

150. Miller, *supra* note 145, at 574; *see also* DAVIS, *supra* note 134, at 117; YAMAMOTO ET AL., *supra* note 30, at 395.

151. *See* YAMAMOTO ET AL., *supra* note 30, at 391; Tashima *Play It Again*, *supra* note 48 ("Since the Attack on the World Trade Center on September 11, 2001, we had an administration and an attorney general determined to expand the constitutional limits of the President's war-making powers, no against a foreign enemy, but here at home against our own citizens and residents.").

create military tribunals and establish detention authority.[152] He also convinced Congress that denial of habeas corpus rights to alleged Guantanamo enemy combatants was necessary.[153] The American naval base on Guantanamo Bay began housing detainees indefinitely in the weeks after September 11, 2001. Choosing the detention centers on Guantanamo Bay and Bagram Air Base in Afghanistan was a legal strategy to prevent federal courts from establishing and reviewing jurisdiction.[154] As a mantra, the White House argued that the military could indefinitely detain individuals arrested on U.S. soil without charge and due process.[155] The prison would eventually house 775 detainees.[156] Obviously, there were dangerous and violent men detained, but the overwhelming majority of Guantanamo detainees—all foreign citizens—have not been convicted of any criminal offense. However, they are still indefinitely detained as illegal enemy combatants.[157] In 2008, Judge Tashima wrote that most of the Guantanamo detainees captured since 2002 "have languished in Guantanamo without hearings to determine their status."[158] An especially extreme example is Abu Baydah, who

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152. *See* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L. J. 1259, 1259–60 (2002).

153. *Id.*

154. *See e.g.*, JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 328 (2009) ("The administration had chosen Guantanamo as a site for terrorism-related prisoners in large measure because it assumed it would be considered outside the jurisdiction of federal courts."); Jonathan Hafertz, *Military Detention in the "War on Terrorism": Normalizing the Exceptional After 9/11*, 112 COLUMBIA L. REV. SIDEBAR, 31, 32 (2012) [hereinafter Hafertz, *Military*]; Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 260 (2009); Ralph Wilde, *Legal "Blackhole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. J 739 (2005).

155. *See e.g.*, JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 332 (2005) ("The Bush administration claimed that the president had sweeping power to imprison indefinitely anyone picked up in the war zone in connection with those or other military activities and to designate those individuals 'enemy combatants'."); A. Wallace Tashima, *The War of Terror and the Rule of Law*, 15 ASIAN AM. L. J. 245, 246 (2008) [hereinafter Tashima *War*] ("Since September 11, 2001, the Administration has been detaining suspected terrorists without criminal charges and without designation as prisoners of war, opting instead to label these suspects as 'enemy combatants' or 'unlawful combatants'."); Neal Devins, *Congress, The Supreme Court, and Enemy Combatants: How Lawmakers Buoyed Judicial Supremacy by Placing Limits*, 91 MINN. L. REV. 1582 (2007) ("Throughout its prosecution of the war on terror, the Bush Administration has sought to limit, if not nullify, judicial checks on the executive."); Jesselyn A. Ralack, *United States Citizen Detained as "Enemy Combatants": The Right to Counsel as a Matter of Ethics*, 12 WM. & MARY BILL RTS. J. 221, 241 (2003) ("If American citizens can be locked away without any sort of counsel or meaningful review for as long as the United States remains at war with al Qaeda, the liberty of all Americans effectively become the hostage of Presidential whim."); Chemerinsky, *supra* note 124, at 761 (arguing the White House and Justice Department embraced the proposition that executive authority allows for the suspension of the Fourth, Fifth, and Sixth Amendments). Chemerinsky asserted that with regard to the indefinite detention of enemy combatants, "President Bush has said they can be held until the end of the war on terrorism, which can go beyond any of our lives." *Id.* at 763.

156. *See* YAMAMOTO ET AL., *supra* note 30, at 402.

157. *See* Fiss, *supra* note 80, at 265.

158. Tashima *War*, *supra* note 155, at 262.

was seized during a raid in Pakistan in 2002, taken to secret sites, and subjected to "enhanced interrogation" involving physical punishment and sleep deprivation.[159] He remains in custody today.[160]

C. Circumventing the Constitution in the Name of National Security

From the start, the Bush Administration construed terrorism as an armed conflict rather than criminal activity to circumvent any access to meaningful due process of law.[161] The Bush Administration intended to have detainees tried in military commissions, where there is a significantly lower evidentiary burden for the government's prosecutors to satisfy.[162] Additionally, unlike in civilian courts, hearsay evidence and statements made in secret interrogations are admissible.[163]

The government attempted to shield the President's administration from accountability by withholding substantive judicial review.[164] As discussed below, unlike the internment cases where the Court turned a blind eye towards the racial reality of camps, the Court in five Guantanamo Bay cases rejected the President's claim that he could detain prisoners without legal protections or hold them indefinitely without judicial review simply by imprisoning them outside the United States.[165] Instead, the Court indicated the importance of habeas by upholding the right of Guantanamo detainees to have access to federal courts and honoring the fidelity of the Constitution.

159. *See* Raymond Bonner*, Incommunicado' Forever: Gitmo Detainee's Case Stalled for 2,477 Days and Counting*, PROPUBLICA (May 12, 2015), http://www.propublica.org/article/guantanammo-detainee-case-stalled-for-2477-days-and -counting (on file with *The University of the Pacific Law Review*).

160. *Id.*

161. *See* HAFERTZ, HABEAS, *supra* note 14, at 3 ("In the years after the 9/11 attacks, Mr. Bush claimed virtually unlimited power as commander in chief to detain those he deemed a threat").

162. Hafertz, *Military*, *supra* note 154, at 40.

163. *Id.*; *see also* Jonathan Hafertz, *Reconceptualizing Federal Courts in the War on Terror*, 56 ST. LOUIS L. J. 1055, 1094 (2012) [hereinafter Hafertz, *Reconceptualizing*] ("The D.C. Circuit has also upheld the use of hearsay evidence and rejected efforts by detainees to invoke rights under the Constitution's Confrontation Clause").

164. *See* YAMAMOTO ET AL., *supra* note 30; Hafertz, *Military*, *supra* note 154, at 32.

165. *See* David Cole, *Against Citizenship as a Predicate for Basic Rights*, 75 FORDHAM L. REV. 2541, 2547 (2007) (reporting that the Court rejected the Bush Administration's "claim of unfettered executive power" in Rasul and Hamdi); HAFERTZ, HABEAS, *supra* note 14, at 2.

D. Judicial Review of Petitions for Writ of Habeas Corpus Filed by Guantanamo Detainees

1. 2004: The Supreme Court Addresses the Issues Posed by Guantanamo Bay Detainees Rasul, Hamdi, and Padilla

During the 2003–04 Supreme Court term, the Court ruled on its first batch of Guantanamo Bay cases. Petitioners in *Rasul v. Bush* were three British Muslim men—Asif Iqbal, Ruhel Ahmed, and Shafiq Rasul—secretly imprisoned as enemy combatants at Guantanamo Bay for nearly two and a half years and subjected to aggressive interrogation.[166] In 2001, the U.S. military took custody of the men in Afghanistan and treated them as enemy combatants.[167] In 2002, Rasul and Iqbal brought a legal challenge based on a denial of due process. While their case was pending before the Supreme Court, the men were sent back to Britain.[168]

The issue presented was whether the six hundred detainees at the American naval base in Guantanamo Bay could challenge the legality of their detention in U.S. courts on the basis that they were not enemy combatants or terrorists.[169] Petitioners argued that they were humanitarian aid workers who were mistaken as combatants, and claimed: (1) no charges were filed against them; (2) they were not provided counsel; and (3) they were denied access to the court.[170] In a 6–3 decision written by Justice Stevens, the Court held that United States courts have federal jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities.[171] Stevens reasoned that the federal habeas corpus statute confers jurisdiction on the District Court to hear claims of non-citizen detainees held at Guantanamo Bay because the statute makes no distinction between Americans and aliens held in federal custody.[172]

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166. Rasul v. Bush, 542 U.S. 466 (2004).

167. *See* YAMAMOTO ET AL., *supra* note 30, at 401.

168. *See id.*

169. *Rasul*, 542 U.S. 466.

170. *Id*. at 472.

171. *Id.* at 466.

172. *Id.* at 483. Fred Korematsu filed an amicus brief in *Rasul*, and urged that:

> This court should make clear that even in wartime, the United States respects the principle that individuals may not be deprived of their liberty except for appropriate justifications that are demonstrated in fair hearing, in which they can be tested with the assistance of counsel . . . the United States does not constrict fundamental liberties in the absence of convincing military necessity . . . even when such necessity is established, liberties can be restricted only while preserving some avenue for review comporting with the minimum required by due process.

Geoffrey R. Stone et al., *Brief of Amicus Curiae Fred Korematsu in Support of Petitioner,* Rasul v. Bush *and* Al Odah v. United States, 29 REV. OF L. & SOC. CHANGE 613, 630 (2005).

In a companion case, the Court affirmed the President's power to indefinitely detain members of Al Qaeda and the Taliban. In *Hamdi v. Rumsfeld*, Yasser Esam Hamdi, a dual citizen of the United States and the Kingdom of Arabia, maintained that he had been mislabeled as a Taliban fighter and was denied due process.[173] Hamdi was born in Louisiana in 1980.[174] As a child, he and his family moved to Saudi Arabia.[175] He resided in Afghanistan when he was seized by the Northern Alliance and turned over to the U.S. military.[176] After an initial interrogation, Hamdi was removed from Afghanistan to the U.S. Naval Base in Guantanamo Bay in January 2002.[177] Hamdi's father, as next friend, filed his habeas petition under 28 U.S.C. § 2241 in the Eastern District of Virginia, alleging that his son, an American citizen, had no access to legal counsel or notice of charges pending against him, in violation of the Fifth and Fourteenth Amendments.[178] The District Court appointed a federal public defender as counsel to Hamdi and held that a sole declaration from Michael Mobbs, a Defense Department official standing alone, could not support Hamdi's detention.[179] On appeal, the Fourth Circuit reversed and held that no factual inquiry or evidentiary hearing was necessary for *Hamdi* since he was captured in an active combat zone.[180]

Justice O'Connor wrote the plurality opinion, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, holding that Hamdi must be afforded due process, including judicial notice and a fair and meaningful opportunity to contest his detention.[181] O'Connor emphasized the importance of the basic constitutional due process guarantee to prisoners and reasoned that Hamdi must be granted the same right and allowed to contest the government's basis for his designation as an enemy combatant.[182] Importantly, the Court explicitly rejected the administration's position that enemy combatants are not entitled to traditional legal rights: "28 U.S.C. § 2241 makes clear that Congress envisions that habeas petitioner should have some opportunity to present and

173. 542 U.S. 507 (2004).

174. *Hamdi*, 542 U.S. at 510; *see also* David A. Harris, *On the Contemporary Meaning of Korematsu: "Liberty Lies in the Hearts of Men and Women,"* 76 MO. L. REV. 1, 28 (2011) ("Hamdi actually allows the executive to hold American citizens indefinitely, without charges or trial, as enemy combatants."); Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization*, 91 CORNELL L. REV. 411, 412 (2006) ("[T]he divisions that [Hamdi] produced, combined with recent changes in the Court's personnel, suggest that the Court has not yet reached a point of stability in this area.").

175. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

176. *Id.*

177. *Id.* at 510

178. *Id.* at 511.

179. *Id.* at 511–12.

180. *Id.* at 508.

181. *Id.*

182. *Id.*

rebut facts and that courts have discretion to vary the ways that is accomplished."[183] Likewise, it rejected the government's claim that providing due process to enemy combatants would be a significant distraction to military officers on the battlefield.[184]

In his concurrence joined by Justice Ginsburg, Justice Souter specifically argued that Hamdi was entitled to release under the Non-Detention Act of 1971, which states, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[185] Here, the Japanese internment was prominent on Justice Souter's mind. He devoted several passages to discussing the internment case decisions and made several key points about the requirement of a clear statement from Congress with respect to detention of U.S. citizens in a time of war.[186] According to Souter, "Congress repealed the [emergency Detention Act of 1950] and adopted § 4001(a) for the purpose of avoiding another *Korematsu*, it intended to preclude reliance on vague constitutional authority . . . for detention or imprisonment at the discretion of the [e]xecutive . . . Congress necessarily meant to require a congressional enactment that clearly authorized detention or imprisonment."[187]

Hamdi's callback to *Endo* continues beyond the Court's opinion. Following the ruling, the Justice Department agreed to release Hamdi after more than two years of detention, during which time no charges were filed and lawyers were withheld.[188] Hamdi was released and returned to Saudi Arabia, conditioned on him giving up his U.S. citizenship, renouncing terrorism, and agreeing not to sue the U.S. government.[189] The renunciation required of Hamdi echoes the experiences of Japanese Americans during World War II. Aside from Hamdi's case and the government's exchange of five Taliban prisoners held in Guantanamo Bay for Sergeant Bowe Bergdahl in 2014, no other detainees have been freed at the time of this writing.[190]

The far-reaching consequence of *Hamdi* is its expansion of Executive Authority because the Court's acceptance of the enemy combatant category

183. *Id.* at 526; *see also* BISKUPIC, *supra* note 154 at 337 ("[T]he [Hamdi] decision struck the core of the Bush administration system for holding foreign terrorism suspects and, more generally, the president's authority in war-related matters and international obligations.").

184. *Hamdi,* 542 U.S. at 526–28.

185. *Id.* at 541–42 (*citing* 18 U.S.C. § 4001(a)).

186. *Id.* at 539–54.

187. *Id.* at 544–45.

188. *See* Richard B. Schmitt, *U.S. Will Free Louisiana-Born "Enemy Combatant,"* L.A. TIMES, Sept. 23, 2004, at A25 (on file with *The University of the Pacific Law Review*).

189. *See* Abigail Lauer, Note, *The Easy Way Out?: The Yaser Hamdi Release Agreement and the United States' Treatment of the Citizen Enemy Combatant Dilemma*, 91 CORNELL L. REV. 927, 936–40 (2006).

190. Bergdahl who walked off his post in Afghanistan in 2009 and was captured by Taliban insurgents. *See* Jim Michaels, *Bergdahl, Faces Highest Court-Martial*, USA TODAY, Dec. 15, 2015, at 1A (on file with *The University of the Pacific Law Review*).

permits the government to exercise expansive military detention power.[191] After *Hamdi*, both an enemy combatant apprehended on the battlefield and an alleged supporter of al Qaeda arrested in the United States can be detained under the *Hamdi* rationale.[192]

Endo appeared again in *Rumsfeld v. Padilla,*[193] which was decided on the same day as *Rasul* and *Hamdi*.[194] Jose Padilla is a U.S citizen who was detained by the Department of Defense pursuant to the President's determination that he is an "enemy combatant" who conspired with al Qaeda to carry out terrorist attacks in the United States. Padilla was apprehended by F.B.I. agents as he flew from Pakistan to Chicago O'Hare International Airport on May 8, 2002, on the basis of a material witness warrant in connection with a grand jury investigation of the September 11th terrorist attacks.[195] Padilla's counsel moved to vacate the warrant. While that was pending, Bush issued an order to Secretary of Defense Donald Rumsfeld designating Padilla as an "enemy combatant" and directing the Secretary to detain him in military custody.[196] Padilla was moved to South Carolina two days before Padilla's counsel, as next friend, filed a habeas corpus petition in the Southern District under 28 U.S.C. § 2241, claiming that his client's military detention violated the Fourth, Fifth, and Sixth Amendments and the Suspension Clause of the U.S. Constitution.[197] The petition named President Bush, Secretary Rumsfeld, and Melanie Marr, Commander of the consolidated Naval Brig, as respondents.[198]

The district court held that: (1) Rumsfeld was a proper respondent and jurisdiction over him existed under New York's long-arm statute because of his "personal involvement" in Padilla's military custody; and (2) The President has authority to detain an enemy combatant captured on American soil during a time of war.[199] In reversing that decision, the Second Circuit held that the President and AUMF lacked authority to detain Padilla militarily.[200] On appeal, the Court limited its analysis to the procedural issues and avoided addressing the merits of

191. *See* Hafertz, *Military*, *supra* note 154, at 38.

192. *Id.*; Elsea, *supra* note 95, at 50 ("Although *Hamdi* may be read to apply due process rights only in the case of U.S. citizens, legislation that applies in a different way to non-resident aliens, for example without mandating any sort of hearing at all, may raise constitutional issues."). *But see* Chemerinsky, *supra* note 129, at 74 ("In *Hamdi* and *Padilla*] the Court should have concluded that the President has no authority to detain American citizens as enemy combatants.").

193. 542 U.S. 426 (2004).

194. *Id.*; Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

195. *Padilla*, 542 U.S. at 430.

196. *Id.*

197. U.S. CONST. art. I, § 9, cl. 2.

198. *Padilla*, 542 U.S. at 430.

199. *Id*. at 432–33.

200. *Id*. at 434.

Padilla's case.[201] Reminiscent of the camp cases, the Court held that the (1) District Court of South Carolina, not the Southern District of New York, had jurisdiction over Padilla's habeas petition; and (2) that Melanie A. Marr, Commander in North Carolina, not Secretary Rumsfeld, was the proper respondent in the petition.[202]

Endo was interpreted in varying ways. First, Padilla cited *Endo* in his petition, arguing that the Southern District of New York had maintained jurisdiction over him.[203] This argument was rejected in the majority opinion written by Chief Justice Rehnquist when it interpreted *Endo* as the narrow exception to the "immediate physical custodian" rule.[204] From the Court's vantage point, *Endo* might appear to support Padilla's argument that Secretary Rumsfeld is the proper respondent because he exercises the "legal reality of control." However, "*Endo* does not fit in the analysis because it did not pose the issue of whether a petitioner may properly name as respondent someone who is not the immediate physical custodian."[205] Rehnquist explained that *Endo* only stands for the limited proposition that, "when the government moves a habeas petitioner after he properly files a petition naming her immediate custodian, the district court retains justification and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner release."[206] Rehnquist insisted that in Padilla's case, he was moved from New York to South Carolina before the habeas petition was filed and, thus, the Southern District never had jurisdiction over Padilla's petition.[207] He construed Padilla's argument as a request for a new exception to the immediate custodian rule based upon Padilla's "unique facts." He then determined that there were no unique facts and, therefore, no departure from the rule was necessary.[208]

However, Justice Stevens' dissent, joined by Justices Souter, Ginsburg, and Breyer, countered the majority. Stevens explained that the case was exceptional and raised "questions of profound importance."[209] Stevens cited *Endo* for the proposition that, under a functional interpretation, the focus should be placed on Secretary Rumsfeld, who is the person with the power to produce the body because it was he who determined Padilla's location pursuant to the President's order.[210] As a practical matter, Stevens asserted that the Southern District of New

201. Padilla v. Hanft, 423 F.3d 386, 390–91 (2005).
202. *Id.* at 434.
203. *Id.* at 395.
204. *Padilla*, 542 U.S. at 435.
205. *Id.* at 442.
206. *Id*. at 441.
207. *Id*. at 448–49.
208. *Id*.
209. *Id*. at 455 (Stevens, J., dissenting).
210. *Id.* at 461.

York was the more appropriate place to litigate Padilla's petition because, (1) the government initially selected that court when it sought the material witness warrant, and (2) the judge and counsel in New York had greater familiarity with the case.[211]

After the Court's ruling, Padilla's downward spiral continued on remand. This time, Padilla filed his petition for writ of habeas corpus in the district of South Carolina.[212] After the district court held that the President lacked authority for Padilla's' detention and that he must be criminally charged or released, the government appealed to the Fourth Circuit. This Court reversed the district court's ruling and held that detention of Padilla was authorized by the AUMF, as interpreted in *Hamdi*.[213] The Fourth Circuit rejected Padilla's *Endo*-based claim that a clear Congressional statement authorizing his detention was needed and that AUMF alone was not a clear statement.[214] Interpreting *Endo*, the panel reasoned that "if a wartime statute was silent on detention, it did not mean that power to detain was lacking." [215]

Following these Supreme Court rulings, many detainees received judicial hearings though federal courts, which evaluated the legitimacy of their detentions.[216] Coinciding with the unconditional release of many detainees, an unrelenting Bush administration created "a rigged system of military status tribunals intended to ratify prior determinations that prisoners were 'enemy combatants' and to prevent habeas hearings from going forward in federal courts, where the administration's allegations might be carefully scrutinized."[217] Congress then codified the CSRT process in the Detainee Treatment Act of 2005 (DTA),[218] which purportedly prohibited courts and judges from considering writs of habeas filed by aliens detained in Guantanamo Bay,[219] and permitted

211. *Id*. at 461.

212. Padilla v. Hanft, 423 F.3d 386, 396 (2005).

213. *Id*.

214. *Id*. at 395.

215. *Id*. at 395.

216. *See* YAMAMOTO, *supra* note 30, at 406.

217. *See* HAFERTZ, HABEAS, *supra* note 14, at 5; *see also* Richard H. Fallon, *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 354 (2010) ("The Court's Decision in *Rasul v. Bush* and *Hamdan v. Rumsfeld* each provoked Congress to enact a statute purporting to withdraw federal habeas corpus jurisdiction to review the lawfulness of the detentions of noncitizens held by the United States as enemy combatants.").

218. Detainee Treatment Act, 119 U.S.C. § 2739 (2005) (providing procedures for review of detainees' status).

219. *Id*.; *see also* Linda Greenhouse, *The Mystery of Guantanamo Bay: Jefferson Lecture University of California, Berkeley, September 17, 2008*, 27 BERKELEY J. OF INT'L LAW 1, 12 (2009) (explaining that Section 1005(e)(c) of the DTA was a "jurisdiction-stripping provision, which had been sponsored by one of the Administration's strongest allies in the Senate, Lindsey Graham of South Carolina, purported to apply to pending petitions as well as future ones. The Administration moved immediately to dismiss all the petitions then pending in district court—some 180 petitions on behalf of 300 detainees, roughly half of 300 detainees, roughly half the population of Guantanamo prison.").

Combatant Status Review Tribunals (CSRTs) to determine whether Guantanamo detainees were enemy combatants.[220] In the following year, Congress, through the Military Commissions Act (MCA), added that the DTA applied retroactively.[221]

2. 2006–08: The Last Guantanamo Bay Detainees to Reach the Supreme Court: Hamdan and Boumediene

Fast forward to the last two Guantanamo cases to reach the Supreme Court's docket. In *Hamdan v. Rumsfeld*,[222] the Court held that the Executive is bound to comply with the rule of law and the authorization for the military to use this special military commission to try Hamdan.[223] Petitioner Salim Ahmed Hamdan, a Yemeni national and one-time driver and bodyguard for Osama bin Laden, had been detained at Guantanamo Bay since 2002.[224] On July 3, 2003, President Bush determined that Hamdan and five other detainees at Guantanamo Bay were eligible for trial by military commission, and Hamdan was charged with one count of conspiracy to commit offense triable by military commission.[225] A year later, Military counsel was subsequently appointed to represent Hamdan.[226] Two months later, counsel filed demands for charges and a speedy trial.[227] The legal adviser to the Appointing Authority denied the applications, ruling that Hamdan was not entitled to any protections of the Uniform Code of Military Justice.[228] Eventually, the Government charged him with the offense.[229]

Hamdan filed petitions for writs of habeas corpus and mandamus to challenge the Executive Branch's means of prosecuting his charge, arguing that the Military Commission lacked authority to try him because: (1) neither congressional Act nor the common law of war supported trial by this commission

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220. An enemy combatant was defined by the Department of Defense as "an individual who was part of or supporting Taliban or al Qaeda forces, or associate forces that are engaged in hostilities against the United States or its coalition partners. This includes "any person who has committed a belligerent acts or has directly supported hostilities in aid of enemy armed forces." Memorandum from Deputy of Defense Paul Wolfowitz Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defense.gov/news/July 2004/d200407007review.pdf (on file with *The University of the Pacific Law Review*). *But see* Tashima *War*, *supra* note 155, at 245 ("To circumvent *Rasul*, the Administration designed the CSRT system to deprive detainees of all procedural rights inherent in our legal system.").

221. *See* YAMAMOTO ET AL., *supra* note 30, at 406; Cole, *supra* note 165 (explaining that Congress enacted the Military Commissions Act in response to *Hamdan*).

222. Oregon v. Guzek, 546 U.S. 517, 557 (2006).

223. *Id*. at 591.

224. Hamdan v. Rumsfeld, 548 U.S. 557, 570 (2006).

225. *Id.* at 566.

226. *Id*. at 569.

227. *Id*.

228. *Id*.

229. *Id*. at 567.

for the crime of conspiracy; and (2) the procedures adopted by the President violated the most basic tenants of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.[230] The district court granted Hamdan's writ of habeas.[231] The Court of Appeals reversed.[232] Yet, Hamdan eventually won his case when the Court held that the DTA does not authorize the commission.[233]

The Court also criticized the lack of authority of the commission process. It explained that the commission established by Executive Order was not the proper forum to try Hamdan because it allows hearsay evidence but precludes live testimony.[234] The government alleged Hamdan committed a violation of the law-of-war, but the Court rejected that argument and stated, "The Government has failed even to offer a merely colorable case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission."[235]

Again, there are echoes of *Endo* in *Hamdan*. Writing for the Court, Justice Stevens determined that although Hamdan was accused of making a potentially criminal agreement before the September 11, 2001 attacks and before the AUMF, the offense was not a wartime offense that occurred during battle.[236] In *Endo*, the Court determined that the authorization for internment did not extend to an individual's detention, and in *Hamdan*, the Court reasoned that the AUMF did not authorize military commissions.[237]

Like the earlier detainees decisions, Congress responded to *Hamdan* by enacting the Military Commission Act of 2006,[238] which authorizes the military commission to conduct trials for violations of the law-of-war, and is designed to deny habeas corpus to any noncitizen held as an "enemy combatant," not just those held at Guantanamo Bay.[239] Two years later, in *Boumediene v. Bush,*[240] the Court, in the most significant of the Guantanamo rulings thus far, addressed two issues: (1) whether thirty-seven Guantanamo Bay detainees designated as enemy combatants have the constitutional privilege of habeas corpus, which is a

230. *Id*.

231. *Id*.

232. *Id*.

233. *Id*. at 594.

234. *Id*. at 612.

235. *Id*. at 610.

236. *Id.* at 599–600.

237. *Id*.

238. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

239. *See* HAFERTZ, HABEAS, *supra* note 14, at 5. *But see* Devins, *supra* note 155 ("In eliminating habeas filings, Congress did not intent to pick up a knock-down fight with the courts. Just as the DTA recognized an important judicial role while eliminating habeas filings, the MCA likewise was premised on the view that habeas filings both clogged the courts and 'hampered the war effort.'").

240. Boumediene v. Bush, 128 S. Ct. 2229 (2008).

privilege that cannot be denied unless permitted by the Suspension Clause,[241] and (2) whether the DTA offered an adequate and effective substitute for habeas corpus.[242]

Justice Kennedy, writing for a 5–4 majority, held that the Guantanamo Bay detainees had the right to file petitions for the writ of habeas corpus, and that the DTA was an inadequate substitute for habeas corpus.[243] For the first time, the Court invalidated a statute as a violation of the Suspension Clause.[244] In restricting Congress' power to limit the courts' habeas jurisdiction, the majority boldly professed, "Where a person is detained by executive order, rather than after being tried and convicted in a court, the need for collateral review is most pressing . . . In this context, the need for habeas corpus is most urgent."[245] The Court also noted in *dicta* that sometimes the length of time it takes for the habeas review process is extraordinary:

> In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. There has been no showing that the Executive facts such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to completed DTA review before proceeding with their habeas actions would be to require additional months, if not years, of delay. The first DTA review applications were filed over two years ago, but no decisions on the merits have been issue. The costs of delay can no longer be borne by those who are held in custody, review is most pressing.[246]

Just as important, the Court acknowledged that constitutional protections were not necessarily limited by territory and citizenship and advanced a functional test considering a detainee's citizenship, adequacy of any prior non-judicial process received, and practical obstacles to habeas review.[247] In the Court's view, the DTA's limited judicial review was an inadequate substitute for habeas review because the detainees did not have an opportunity to present evidence.[248] In testimony before Congress, Neal Katyal, counsel to Hamdan,

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241. *Id*. at 2231 (citing Art. 1 § 9, cl. 2).

242. *Id*.

243. *Id*.

244. *See* Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus in the Aftermath of Boumediene*, 57 WAYNE L. REV. 99, 101 (2011) [hereinafter Hafetz *Calling*] ("*Boumediene* marked the first time the Court invalidated a statute because it violated the Suspension Clause.").

245. *Boumediene*, 128 S. Ct. at 2269.

246. *Id*. at 2275.

247. *See also* Fallon, *supra* note 217, at 397 (noting that the Supreme Court was unwilling to interpret the Constitution as allowing the Executive almost total authority to detain anyone it wants based on a claim of national security).

248. *Id*.

added, "After *Boumediene*, detainees held at Guantanamo Bay have a constitutionally protected right to have an Article III court review the legality of their detention in a habeas corpus action."[249] In considering the lack of due process Guantanamo Bay detainees face, Judge Tashima advocated for hearings before an impartial judge that allow meaningful due process and assure detainees (1) the right to counsel, (2) the right to be present at all critical stages of the proceedings, (3) the right to confront witnesses, and (4) that only reliable evidence is considered.[250]

Unfortunately, as analyzed in the next section, seven years later, *Boumediene*'s promise has not been fulfilled by lower courts, in part because of the opinion's failure to explain what the Government had to prove in Guantanamo habeas proceedings.[251]

IV. POST-*BOUMEDIENE* LITIGATION PIPELINE IN THE DISTRICT OF COLUMBIA: WAITING TO LOSE

After *Boumediene* called for meaningful habeas corpus review of detention cases, district judges met in executive session and decided to coordinate proceedings in Guantanamo habeas cases.[252] On November 6, 2008, coordinating Senior Judge Hogan issued a case management order stating that the government should bear the burden of proving by a preponderance of the evidence that a petitioner's detention is lawful.[253] Relying on the order, district courts have issued many release orders for detainees, only to have most of them overturned by the D.C. Circuit.[254]

In over eighty cases from 2008–2010, the D.C. Circuit and district court, having jurisdiction over most detainee cases, have generally held that terrorism

249. *Implications of the Supreme Court's Boumediene Decision for Detainees at Guantanamo Bay, Cuba: Hearing Before the H. Comm. on Armed Services*, 110th Cong. 11 (2008) (statement of Neal Katyal, Prof. of Law, Geo. U.L. Center); *see also* Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1467 (2011) ("A closer reading of *Boumediene* suggest that Guantanamo detainees should receive more process than those who seek to use habeas collaterally to attack state court convictions since either detention does not result from convictions obtained in a court of record."). If there were more terrorist attacks in the U.S. following September 11th, would the Court have ruled the way it did in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*? If there are terrorist attacks in the U.S. on a large scale, would the government attempt to detain masses of people under the auspices of the NDAA, and would courts allow it to?

250. Tashima *War*, *supra* note 155, at 264.

251. *See* Hafertz, *Reconceptualizing*, *supra* note 163, at 1089 ("The Court left it to the lower courts to resolve the various evidentiary and procedural issues presented by the habeas litigation in the first instance.").

252. *See In re* Guantanamo Bay Detainees Litig., 577 F. Supp. 2d 310 (D.D.C. 2008).

253. *Id.*

254. *See* MARK DENBEAUX ET AL., NO HEARING HABEAS: D.C. CIRCUIT RESTRICTS MEANINGFUL REVIEW 1 (2012) ("*Boumedine*'s promise of robust review of the legality of the Guantanamo detainees detention has been effectively negated by decisions of U.S. Court of Appeals for the District Columbia Circuit").

suspects may be held in Guantanamo Bay without trial when the government proves, by a preponderance of evidence, that they are part of, or "purposefully and materially support," al Qaeda, the Taliban, or associated forces.[255] This lower evidentiary threshold makes it easier for the government to prove its case, which in turn makes it more difficult for a detainee to succeed in habeas. Professor Hafertz expounded on this issue: "Subject to habeas review of its factual assertions the government can detain individuals indefinitely based on their loosely defined membership in or provision of unspecified support for al-Qaeda or an associated group regardless of whether they committed a hostile act or engaged in any terrorist plot or activity."[256]

Pivotal to this discussion is *Al-Adahi v. Obama*,[257] which was the first time the Circuit reversed a district court's grant of habeas relief in a post-*Boumediene* case.[258] The Court of Appeals held that Al-Adahi's detention might be legal if the Government has "some evidence" to support captivity of Al-Adahi, who the Court deemed was likely linked to al-Qaeda.[259] Under this preponderance standard, the court denied Al-Adahi's habeas petition.[260]

Al-Adahi's case proceeded at a snail's pace for almost six years before the ruling.[261] The facts of Al-Adahi's case are similar to other Guantanamo cases involving detainees found in Afghanistan who were captured in certain location, and/or who were considered to have been associated with terrorist organizations or figures. Mohammed Al-Adahi, a Yemi security guard, moved to Afghanistan and stayed with a close associate of Usama bin Laden.[262] Al-Adahi moved into a guesthouse used as a staging area for al-Qaeda recruits, and attended al-Qaeda's Al Farouq training camp where September 11th terrorists trained.[263] After sustaining injuries, he crossed the Pakistani border on a bus carrying wounded Arab and Pakistani fighters.[264] In late 2001, Pakistani authorities captured Al-Adahi.[265] In 2004, a CSRT determined, by a preponderance of evidence, that he

255. *See* Hafertz, *Military*, *supra* note 154, at 39.

256. Jonathan Hafertz, *Detention Without End? Reexamining the Indefinite Confinement of Terrorism Suspects Through the Law of Criminal Sentencing*, 61 UCLA L. REV. 326, 363 (2014) [hereinafter Hafertz, *Detention*].

257. Al-Adahi v. Obama, 613 F. 3d 1102 (2010).

258. Hafertz, *Reconceptualizing*, *supra* note 163, at 1093–97 ("Since the D.C. Circuit began reviewing district habeas decision and articulating rules that make it more difficult for a detainee to prevail, district courts have increasingly ruled in the government's favor –a trend that has accelerated sharply with the number of D.C. Circuit decisions.").

259. *Al-Adahi*, 613 F. 3d at 1104.

260. *Id*. at 1111.

261. Habeas Corpus Petition at 2, *Al-Adahi v. Obama* (2009) (No. 05-280).

262. *Id*. at 1102.

263. *Id*.

264. *Id*. at 1102–03.

265. *Id*. at 1103.

was part of al-Qaeda.[266] Al-Adahi filed his habeas corpus petition in 2004, which presented the issue of whether he was part of al-Qaeda and therefore, justifiably detained under the AUMF.[267]

Judge Randolph, writing for the panel, offered a strong critique of District Judge Kessler's analysis and concluded the district court erred in determining there was no reliable evidence that Al-Adahi was a member of al-Qaeda and of the Taliban.[268] The panel determined that Al-Adahi and al-Qaeda's close association made it more likely that he was part of the organization.[269] Judge Randolph wrote that district judges must take a "conditional probability" analysis in reviewing the evidence in order to deduce the following: (1) Al Nebra was in a staging area for al-Qaeda recruits who were in route to the Al Farouq training camp; (2) Al-Adahi was treated as a recruit and was instructed about packing and preparing for training; and (3) he entered Al-Qaeda's al-Farouq training camp, which was the former training grounds for eight of the September 11th hijackers, and is where he received instruction and training in rocket-propelled grenades and weapons.[270] However, the Circuit's analysis conflicts with the intent and spirit of *Hamdi*, wherein the Court stressed:

> The burden of proof standard of "some evidence" is inadequate because any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. It is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut factual assertions before a neutral decision maker.[271]

This is the current law in the D.C. Circuit because certiorari was denied in *Al-Adahi*. Its repercussions were immediately felt. Professors Mark Denbeaux and Jonathan Hafertz provide empirical proof to support the assertion that it is almost impossible for a petitioner to succeed under *Al-Adahi*'s low evidentiary standard. In their study examining the outcomes of habeas review after *Boumedine*, they suggest that since *Al-Adahi,* the D.C. Circuit has consistently denied Guantanamo Bay detainees' habeas petitions.[272] Amazingly, before *Al-Adahi*, fifty-nine percent of the thirty-four habeas petitions were granted. However, after *Al-Adahi*, ninety-two percent of twelve filed habeas petitions

266. *Id*.
267. *Id.*
268. *Id*. at 1105.
269. *Id.*
270. *Id*. at 1107.
271. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004).
272. *See* DENBEAUX ET AL., *supra* note 254, at 1.

were denied.[273] Based on these statistics, they concluded, "judicial deference to the government is the new norm."[274]

Latif v. Obama underscores Denbeaux and Hafertz's thesis.[275] *Latif v. Obama* was the only habeas petition granted after *Al-Adahi*, which further illustrates the court's pattern of deferring to the government.[276] This case allows the government to use a single official report to prove that a petitioner's detention is lawful.[277] In its prosecution, the government relied on a heavily redacted report indicating that Latif traveled to Afghanistan in 2001, received weapons from the Taliban, and was stationed on the front line against the Northern Alliance.[278] Adian Farhan Latif challenged the summation of his testimony and argued that the statements were misunderstood or misattributed to him, and that he left Yemen in 2001 to seek medical treatment for head injuries he sustained in a 1994 car accident.[279]

Judge Rogers Brown, writing for the court, narrowly read *Boumediene* and concluded that, "intelligence documents of the sort at issue here are entitled to a presumption of regularity, and second that neither internal flaws nor external record evidence rebuts that presumption in this case."[280] According to Judge Rogers Brown, a presumption of regularity means that "the government official accurately identified the source and accurately summarized his statement, but it implies nothing about the truth of the underlying non-government source's statement."[281] Therefore, the D.C Circuit reversed the district court's grant of Abdul Latif's habeas petition and held that district courts must presume that government reports regarding interrogations are accurate, even though district courts previously found those reports unreliable.[282]

V. THE NATIONAL DEFENSE AUTHORIZATION ACT OF 2012

This article has discussed how military commissions prosecute war crimes and has explained the difficulties Guantanamo Bay detainees face when petitioning for habeas corpus relief. The following section explores how a person held for aiding al Qaeda, ISIL, or some other terrorist organization, by providing material support for terrorism may be prosecuted in federal court and indefinitely

273. *See id.*
274. *Id.* at 11.
275. 677 F. 3d 1175 (D.C. Cir. 2012).
276. *See* DENBEAUX ET AL., *supra* note 254, at 1.
277. *Latif*, 677 F. 3d at 1175.
278. *Id*. at 1176.
279. *Id*. at 1177.
280. *Id*. at 1179.
281. *Id*. at 1181.
282. *Id*. at 1176.

detained under the AUMF.[283] Significantly, none of the Guantanamo Bay rulings thus far provide a definitive answer to whether the President can indefinitely detain a suspected terrorist who was arrested in the United States.[284]

A. Legal Authority for Indefinitely Detained U.S. Citizens in America

In their article, *Congressional Authorization and the War on Terrorism*,[285] Professors Curtis Bradley and Jack Goldsmith argue that the AUMF applies in the U.S. if the enemy is found in the country. They point out, "The AUMF is silent on what procedures are available for someone detained in the U.S. under the AUMF,"[286] and "due to the silence, an enemy combatant may be detained indefinitely."[287] For guidance in defining a clear rule statement to determine when U.S. citizens' constitutional rights are implicated, the professors relied on *Endo* and reasoned that it could be used as precedent.[288]

Specifically, Bradley and Goldsmith argue that: (1) the text of the AUMF imposes no geographic limitation; (2) the AUMF was passed after the September 11 attacks when there was "strong suspicion that enemy terrorist cells still lurked within the country; and (3) delegation principles and historical practice support the conviction.[289] They claim the historical practice stems from the U.S. detaining Japanese Americans during World War II, which authorizes the President to use all necessary and appropriate force against them.[290] Bradley and Goldsmith reiterate the connection between *Endo* and the Guantanamo cases when they assure readers that petitioners can still use habeas to challenge such a detention after *Hamdi*.[291] However, the scholars overlook the fact that, similar to the Guantanamo Bay detainee cases, habeas relief is an inadequate remedy in cases where American citizens on U.S. soil are detained under the National

283. *See* Stephen I. Vladeck, *Detention After the AUMF*, 12 FORDHAM L. REV. 2189, 2193–94 (2014) (stating that the "AUMF preserves detention authority for current Guantanamo detainees").

284. *See* Hafetz *Calling*, *supra* note 244, at 147 (noting the lack of a definitive answer on the issue of Presidential authority to detain a suspect terrorist arrested in the U.S. since there have been only extraterritorial services).

285. Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2118 (2005).

286. *Id*. at 2121.

287. *Id*. at 2124. *But see* Sarah Erickson-Muschko, *Beyond Individual Status: The Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States*, 101 GEO. L. J. 1399, 1400 (2013) ("Congress was unable to agree on whether the provision should apply to U.S. citizens or person arrested on U.S. territory.").

288. *See* Bradley & Goldsmith, *supra* note 285, at 2104; *see also* Erickson-Muschko, *supra* note 287, at 1402 (arguing that court should apply a clear statement principle whenever the NDAA is invoked to detain persons arrested in the U.S.).

289. *See* Bradley & Goldsmith, *supra* note 285, at 2104.

290. *Id*. at 2119.

291. *Id*. at 2122.

Defense Authorization Act of 2012 (NDAA).[292] Even if the petition survives all of the procedural hurdles that must be cleared, it takes too long to get a court to review the substantive issues of the petition. If the merits of the petition are addressed, all the government has to do is meet a preponderance of the evidence standard in courts that pay undue deference to the government.[293] At bottom, if the President chooses to detain an American under the AUMF, a court will have to decide the issue.[294] Acknowledging as much in his response to Bradley and Goldsmith's piece, Professor Mark Tushnet compared the facts of *Endo* with the fictional internment of Arab Americans in the Denzel Washington movie, *The Siege*,[295] to pose the question of whether such action can be authorized by the AUMF:

> Imagine this scenario: After a series of bombings in New York, the President directs U.S. armed forces to round up Arab American males over the age of fifteen in the New York metropolitan area and confine them in a sports stadium, those who the military officers determine pose no continuing threat to domestic security are released back to their communities, a process that predictably will lead to some detentions lasting a month or more.[296]

Tushnet's hypothetical deserves greater consideration because mass detention of Americans in a major U.S. city could actually happen. It has been almost ten years since Bradley, Goldsmith, and Tushnet wrote their analyses of the AUMF, and their concerns about a real *Siege*-like event happening are further encouraged with NDAA's enactment in 2012. What happens if there is a series of large-scale terrorist incidents, close in time, in the United States? Amidst the immediate shock, anger, fear, and outcry, will the President choose to corral individuals or groups under suspicions based on the NDAA, which provides the authority to do so?[297] These concerns about indefinitely holding U.S. citizens, without providing them any due process because the U.S. government deems

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292. National Defense Authorization Act of 2012 (NDAA), P.L. 112-81, 125 Stat. 1298 (2001).

293. *See* Vladeck, *supra* note 249, at 1467 (asserting that "the government is be more likely to prevail with this level of proof requiring only that it "produce 'some evidence' that a detainee has links to terrorist organizations or figures").

294. Diana Cho, *The NDAA, AUMF and Citizens Detained Away from the Theater of War: Sounding a Clarion Call for a Clear Statement Rule*, 48 LOYOLA L. REV. 929, 964 (2015).

295. *The Siege,* (Twentieth Century Fox 1998); *see also* Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the Racing of Arab Americans as Terrorists*, 8 ASIAN AM. L. J. 1, 12 (2001) ("[t]he impossibility that Arab Americans could be interned just as Japanese Americans were lies just below the surface of popular consciousness occasionally emerging as it did in the movie *The Siege*.").

296. Mark V. Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2763 (2005).

297. *See* Harris, *supra* note 174, at 1 (posing the question of whether Korematsu will be extended to the war on terrorism after another terrorist attack in the U.S.).

them to be associated with terrorists, are real. Exacerbating these concerns is the emerging threat of ISIL-inspired terrorists in the United States. As the ISIL-inspired mass shooting in San Bernardino in December 2015 has shown, there is a growing domestic threat here. Since March 2014, seventy-one ISIL followers, most of whom were U.S. citizens or permanent residents, have been arrested.[298]

B. A Closer Look at the NDAA Through Statutory Interpretation

For the first time, Congress attempted to codify a substantive detention standard as part of the NDAA. The 2012 NDAA supports an expansive reading of the 2001 AUMF's detention authority.[299] Since 2009, President Obama, like President Bush before him, has continued to indefinitely detain suspected terrorists without charge based on the AUMF.[300]

The detention clause, Section 1021 of the 566-page Act—which is still in effect—authorizes the United States Armed Forces to detain a covered person pursuant to AUMF.[301] A covered person under this section is:

> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostiles in aid of such enemy forces.[302]

This sweeping language allows for what Professor Hafertz describes as "the potential for an elastic detention power capable of expanding to cover any perceived threat as the U.S. focus shifts from al Qaeda in Afghanistan to different organizations in other parts of the world."[303] Under the AUMF, a prisoner may be held for the duration of hostilities, regardless of the seriousness of his conduct

298. Massimo Calabresi, *Homeland Security, ISIS and the Fight Against Fear*, TIME, Dec. 28, 2015, at 51–52.

299. *See* Oona Hathaway et al., *The Power to Detain Detention of Terrorism Suspects After 9/11*, 8 YALE J. INT'L L. 123, 125 (2013) (asserting that "the 2012 NDAA significantly expands the possible scope of law-of-war detention").

300. *See* Hafertz, *Military*, *supra* note 154, at 41; *see* Hafertz, *Detention*, *supra* note 256, at 41.

301. National Defense Authorization Act of 2012 (NDAA), P.L. 112-81, 125 Stat. 1298 (2001).

302. *Id.*

303. Hafertz, *Military*, *supra* note 154, at 44.

or level of association with a terrorist group.[304] Hafertz argues that measures such as the NDAA "threaten to cement the transformation of post-9/11 military detention powers-created based on the promise of war time exigency—into a permanent, default detention, system for an elastic category of terrorism cases."[305] This means that these belligerent principles could be applied to U.S. citizens.

Looking at this language, the NDAA "requires" that non-U.S. citizens be treated as enemy combatants rather than criminal suspects unless the President issues a waiver in the interests of national security.[306] However, the NDAA does not "require" that U.S. citizens be treated in the same manner as enemy combatants.[307] Instead, Section 1021(e) provides the following vaguely worded protections to U.S. citizens and lawful aliens: "Nothing in this section shall be construed to affect the existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who captured or arrested in the United States."[308]

While the NDAA clearly confirms the AUMF's authority to indefinitely detain individuals without trial, the ambiguities in the NDAA and AUMF make it unclear who the AUMF applies to, and how long the authority lasts.[309] President Obama expressed "serious reservations" about these provisions when he signed the NDAA into law on December 31, 2011.[310] After explaining that he signed the Act primarily because it authorized national defense funding and necessary services for service members and their families, President Obama professed that that he will not exercise the authority to detain U.S. citizens under the NDAA:

> I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens . . . My administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of

304. *See* Hafertz, *Detention*, *supra* note 256, at 337 ("Under the AUMF, there is an absence of any mechanism for calibrating an appropriate length of confinement leading to inaccuracies and arbitrariness, incompatible of the liberty interests at stake and the purposes of law-of-war confinement and meaningful judicial review."); Erickson-Muschko, *supra* note 287, at 1403 (asserting that broad construction of AUMF detention authority ignores rights guaranteed under Due Process Clause).

305. *See Military Detention*, *supra* note 259, at 46.

306. National Defense Authorization Act § 1022.

307. *Id.* § 1021(e).

308. Hedges v. Obama, 724 F. 3d 170 (2nd Cir. 2013).

309. *See* Erickson-Muschko, supra note 287, at 1401–02 (asserting that "existing law or authorities" is both ambiguous and troubling); Colby P. Horowitz, *Creating a More Meaningful Detention Statute: Lessons Learned from* Hedges v. Obama, 81 FORDHAM L. REV. 2853, 2855 (2013) (criticizing Section 1021 of the NDAA for failing to detain and limit the executive's detention authority).

310. Statement by the President on H.R. 1540, Off. of the Press Sec'y, WHITE HOUSE (Dec. 31, 2011), https://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540 (on file with *The University of the Pacific Law Review*).

> war, and all other applicable law . . . . [U]nder no circumstances will my Administration accept or adhere to a rigid across-the-board requirement for military detention.[311]

C. Hedges v. Obama *Raises Offers More Questions than Answers*

The NDAA's vagueness formed the motivation for a group of writers, journalists, and activists to seek a permanent injunction enjoining enforcement of Section 1021 of the NDDA in *Hedges v. Obama*.[312] There, District Judge Forrest held that Section 1021 was facially overbroad in violation of the First Amendment and impermissibly vague in violation of the Fifth Amendment.[313]

A broad coalition of private citizens, lawyers, and legislators opposing Section 1021 formed the plaintiffs in *Hedges v. Obama*.[314] Christopher Hedges, a foreign correspondent and Pulitzer Prize winning journalist, has traveled to the Middle East, the Balkans, Africa, and Latin America, interviewed detained al-Qaeda members, and reported on groups regarded as terrorist organizations.[315] Alexa O'Brien, founder of the Section 4001 U.S. of Day of Rage, wrote articles published on Wikileaks' release of U.S. State Department cables and about Guantanamo Bay detainees.[316] Kai Wargalla, an organizer and activist based in London, is Deputy Director of the organization, Revolution Truth, which facilitates international speech activities through website forums.[317] Finally, the Honorable Brigitta Jonsdottir is a member of parliament in Iceland, and an activist and WikiLeaks spokesperson.[318]

The government attempted to avoid the constitutional issues by arguing the case should be dismissed for lack of standing and mootness.[319] The government further argued that the district court should be limited to a post-detention habeas review.[320] But Judge Forrest rejected this claim outright because habeas petitions take far too long to resolve and are reviewed under a lesser preponderance of the evidence standard by a single judge rather than a sitting jury.[321] "If only habeas review is available to those detained under Section 1021(b)(2)—even U.S.

311. *Id*.
312. 809 F. Supp. 2d 424 (S.D.N.Y. 2012).
313. *Id*. at 427, 471.
314. *Id*. at 424.
315. *Id*. at 432.
316. *Id*. at 434.
317. *Id*. at 436.
318. *Id*. at 437.
319. *Id*. at 428.
320. *Id*. at 431.
321. *Id*.

citizens on U.S. soil—core constitutional rights available in criminal matters would simply be eliminated."[322]

The government relied on *Ex parte Quirin*[323] as precedent to argue that the Supreme Court has approved of the indefinite detention of a U.S. citizen on U.S. soil.[324] But Judge Forrest found *Quirin* to be inapposite to the instant facts.[325] The term "enemy combatant" originated in *Quirin*, where a U.S. citizen who, together with German nationals, landed on the beaches of Long Island, New York wearing military uniforms and intending to detonate explosive devices.[326] Whereas, in *Hedges*, the groups of plaintiffs were not uniformed, carrying weapons, or working on behalf of a foreign government, but were concerned about possible detention for writing or speaking about enemy forces or for "raising questions regarding the legitimacy of American military forces."[327]

After hearing testimony and weighing evidence, Judge Forrest issued a preliminary injunction blocking the indefinite detention powers of the NDAA on grounds of unconstitutionality.[328] The court held that plaintiffs had standing to bring their facial challenge, and that the NDAA provision was facially overbroad in violation of the First Amendment and impermissibly vague in violation of the Fifth Amendment.[329]

For the most part, Judge Forrest subjected the AUMF and Section 1021(b)(2) to heightened review because they both implicated fundamental liberties.[330] In rejecting the government's position that the AUMF and Section 1021(b)(2) are coextensive, and finding that the government failed to show why Section 1021(b)(2) should not be permanently enjoined, Forrest made several distinct points to support her conclusion. First, Forrest traced the AUMF and case law discussing the President's detention authority under the AUMF to demonstrate that the AUMF set forth detention authority tied directly and only to September 11, 2001.[331] She then decided that the executive branch interpreted its detention more broadly without congressional authorization.[332] Forrest insisted that unlike the AUMF, which is specifically tied to September 11, 2001, Section 1021 is not.[333]

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322. *Id*.

323. *Ex parte* Quirin, 317 U.S. 1 (1942) (allowing for the indefinite military detention and evacuation of an American citizens detained in the U.S.).

324. *Id*. at 447.

325. *Hedges*, 890 F. Supp. 2d at 424.

326. *Id*. at 460.

327. *Id*.

328. *Id*. at 424.

329. *Id*. at 427, 471.

330. *See* YAMAMOTO ET AL., *supra* note 30, at 419.

331. Hedges, 890 F. Supp. 2d at 439.

332. *Id*. at 440.

333. *Id*. at 439.

As for the First Amendment claims, Forrest declared that the two statutes' differences support factual findings that each plaintiff has a reasonable fear that Section 1021(b)(2) presents a new scope for military detentions.[334] Significantly, Judge Forrest cited to Supreme Court precedent illustrating the exception to the injury-in-fact requirement for standing when First Amendment rights might be infringed.[335] She found that the facts supported each plaintiff's standing to bring a pre-enforcement facial challenge with respect to Section 1021(b)(2).[336] She also found that "each plaintiff has engaged in activities in which he or she is associating with, writing about, or speaking about or to al-Qaeda, the Taliban, or other organizations and groups, which have committed terrorists against the United States"—actions that fall under the umbrella of Section 1021(b)(2).[337] In her view, these plaintiffs need not wait until they have been detained and imprisoned to bring a challenge—the penalty is too severe to have to wait.[338] Accordingly, Judge Forrest reasoned that an actual case or controversy remained based on the plaintiffs' awareness of the threat of indefinite military detention under Section 1021.[339]

The court further concluded that there was a Fifth Amendment Due Process violation because Section 1021(b)(2) did not provide fair notice of conduct that was forbidden or required. [340] Plaintiffs testified they did not understand the terms "substantially supported," "directly supported," or "associated forces" in Section 1021(b)(2).[341] Accordingly, Judge Forrest determined that the meanings of the terms were unknown, so the scope of Section 1021(b)(2) is therefore impermissibly vague under the Fifth Amendment.[342]

Finally, the case's importance and its relationship to the Japanese American internment did not escape the court's attention. Judge Forrest stressed the present case posed an important constitutional question and acknowledged "[c]ourts must safeguard core constitutional issues."[343] She cited to *Korematsu* and mentioned that the Supreme Court's deference to the executive and legislative branches during World War II is now generally condemned.[344]

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334. *Id.* at 444–45.
335. *Id.* at 448.
336. *Id.* at 452.
337. *Id.*
338. Id. at 452–53.
339. *Id.* at 429.
340. *Id.* at 466–67.
341. *Id.* at 467.
342. *Id.* at 470–71.
343. *Id.* at 430.
344. *Id.* at 431.

However, the government appealed, and the Second Circuit held that the NDAA affirmed that the President's authority under the AUMF[345] did not apply to citizens, lawful aliens, or individuals captured or arrested in the United States.[346] Therefore, the plaintiffs lacked standing.[347]

The plaintiffs' victory was short-lived. The Second Circuit panel held that: (1) Section 1021(b)(2) affirms the general AUMF authority;[348] (2) Section 1021(b)(2) is Congress' express resolution of an earlier debated question the scope of AUMF's, which does not limit or expand the detention authority;[349] and (3) the text indicates that "captured or arrested in the United States" is meant to modify only "any other persons."[350]

The Court of Appeals opined that the language of Section 1021 could be construed as the AUMF providing the president the authority to detain U.S. citizens without trial or charge, or as a completely opposite interpretation.[351] The thrust of the opinion lies in the panel's analysis of the Section 1021's language and legislative history. Here, unfortunately, the court's interpretation reinforces, rather than explains, the ambiguous nature of the statute's terms:

> [I]n stating that Section 1021 is not intended to limit or expand the scope of the detention authority, under the AUMF, Section 1021(d) mostly made a statement about the original AUMF . . . it only states a limitation about how Section 1021 may be construed to affect that existing authority, whatever that existing authority may be . . . . Section 1021 (e) provides that Section 1021 just does not speak—one way of the other—to the government's authority to detain citizens, lawful resident aliens, or any other persons captured or arrested in the United States.[352]

On the issue of standing, the panel briefly stated that Section 1021 makes no assumptions about the government's authority to detain citizens under the AUMF, because the language of the section states that it does not affect existing law or authorities.[353] The panel acknowledged the constitutional issues posed in the case, but decided to avoid them by addressing only the standing issue.[354] The panel contended that the authorities allow, but do not require, detention and as such, Section 1021 only affirms the President's military authority and can be

345. *See* Authorization for Use of Military Force § 2(a), 115 Stat. 224 (2001).
346. *Hedges*, 724 F.3d at 192.
347. *Id*. at 173–74.
348. *Id*. at 190–191.
349. *Id*. at 191.
350. *Id*. at 192.
351. *Id*.
352. *Id*. at 191.
353. *Id*. at 193.
354. *Id*. at 183.

distinguished from a statute that is penal in nature.[355] "There is nothing in Section 1021 that makes any assumptions about the government's authority to detain citizens under the AUMF."[356] Accordingly, the court concluded that speculation and expressed fears are insufficient to establish standing of enforcement.[357] Here, it appears that the panel's disagreement with the district court's treatment of Section 1021 as a criminal penalty allowed the panel to essentially sidestep the First Amendment issues.

Noticeably, the Second Circuit did not mention *Korematsu* or the Japanese American internment, even though the district court referred to the case and the children of Fred Korematsu, Gordon Hirabayashi, and Minora Yasui, filed an amicus brief with the Second Circuit urging it to affirm Judge Forrest's exacting scrutiny of Section 1021 and injunction.[358] Amici argued, "The NDAA's indefinite detention scheme echoes the indefinite detention that characterized the internment, and, similarly, it is factually unsubstantiated as well as ill-defined and overbroad in scope."[359] They stressed that "[t]he federal courts, especially the Supreme Court, failed to accord the internment of Japanese Americans the exacting scrutiny the government's wholesale deprivation of constitutional liberties demanded."[360] Throughout the brief, amici reminded that the lessons of the internment demonstrate the importance of heightened judicial scrutiny of government national security measures curtailing civil liberties.[361]

Following the Second Circuit's ruling, the plaintiffs filed an emergency application in the Supreme Court, asking it to vacate the Second Circuit's stay.[362] The Court denied the application and certiorari, thereby missing an opportunity to revisit *Korematsu.*[363] Even though the government has yet to use *Korematsu* as judicial precedent to justify indefinite detention in detainee cases, there is no guarantee that it will not do so in the future because it can be interpreted as an existing legal authority.[364]

The Second Circuit's conclusions failed to resolve the controversy. If nothing else, it created more questions. Despite the Second Circuit's ruling, I would argue that the NDAA is also overly broad because, given the statute's wide

355. *Id*. at 200.

356. *Id*. at 193.

357. *Id*. at 203–204.

358. Brief for Karen and Ken Korematsu et al. as Amici Curiae Supporting Plaintiffs-Appellees at 8–9, Hedges v. Obama, 724 F.3d 170 (2d Cir. 2013) (No. 12-3176), *cert. denied*, 134 S. Ct. 1936 (2014).

359. *Id*. at 2.

360. *Id*.

361. *Id*. at 23–25.

362. Plaintiffs-Petitioners' Emergent Application to Vacate Temporary Stay of Permanent Injunction at 20, Hedges v. Obama, *cert. denied,* 134 S. Ct. 1936 (2014) (No. 13-758).

363. Order List, Monday April 28, 2014, at 5, Hedges v. Obama, *cert. denied*, 134 S. Ct. 1936 (2014) (No. 13-758).

364. *See* Lohmann & Austin, *supra* note 132, at 2.

reach, anyone who gives to a charity or expresses opinions about terrorism in writing or in song may be prosecuted.[365] As seen throughout the *Hedges* litigation, government attorneys were unable to define the terms, yet they insist on maintaining authority to do so in the future.[366]

Mindful of this, will federal agents begin to conduct surveillance on individuals who frequent ethnic grocery stores and karate studios? Who rent motels with cash? Who make extreme religious statements or statements about ongoing violent acts? Or any other conduct construed as having substantially supported a "terrorist act" or "belligerent act? Would the conduct of bloggers who make anti-U.S. or cryptic statements endorsing violence against the U.S. on their websites fall under the purview of the NDAA? Could whistleblowers or reporters be detained indefinitely? Would groups like the Tea Party, the Occupy Movement, and Black Lives Matter be considered a terrorist group if they engage in unlawful activity? Would these groups then be considered threats to national security? Based on reasonable fears of indefinite detainment under the NDAA, would Americans abstain from associating with others for fear of prosecution? Would bloggers refrain from writing anything that could be construed as assisting terrorist groups, as defined by the NDDA? Until the terms in the NDAA are better defined by Congress, Americans remain in the dark about exactly what conduct is proscribed.

VI. THREE RECOMMENDATIONS FOR REFORM

Given the current state of habeas review in the D.C. Circuit, and considering the time it takes for a habeas petition filed by a Guantanamo detainee, the possibility of freedom for any detainee in the foreseeable future appears unlikely. In this section, I offer three moderate recommendations for reform: (1) federal courts should apply an alternative scheme for determining if and when detainees should be released; (2) Congress and the courts should determine when the government's detention authority ends; and (3) courts should apply principles adopted from immigration jurisprudence.

First, Congress and the judiciary could corroboratively develop new rules allowing judges to adjudicate and sentence detainees in a way that takes into account their past conduct, behavior while in custody, and future dangerousness correlated to the crimes they have committed. A new framework for reviewing

365. Charlotte Silver, *NDAA: Pre-emptive Prosecution Coming to a Town Near You*, AL JAZEERA (Feb. 18, 2013), http://www.aljazeera.com/indepth/opinion/2013/02/201321710236780782.html (on file with *The University of the Pacific Law Review*); *see* Holder v. Humanitarian Law Project, 561 U.S. 1, 25–26 (2010) (holding that appellant's argument that the government has criminalized his free speech that supported Osama bin Laden is unpersuasive).

366. Brief for the Respondents in Opposition at 17–18, Hedges v. Obama, *cert. denied*, 134 S. Ct. 1936 (2014) (No. 13-758).

habeas petitions is necessary. A suggestion for review should not focus strictly on the perception that all detainees are foreign terrorists. A meaningful, comprehensive court review policy for cases is necessary to honor due process of law. Perhaps a workable framework would include factors to be considered in evaluating the length of detention.

On this issue of detainee release, Professor Hafertz argues that because some individuals are being held for longer than their prior conduct warrants, an alternative review standard based on proportionality and considering an individual's background, prior conduct, as well as future dangerousness in detention review, should be relied upon.[367] Professors Bradley and Goldsmith encourage a determination of whether the detainee possesses a substantial danger of rejoining hostilities based on factors such as pre-detention conduct, conduct in custody, age, and health. Here, the scholars touch upon the improvidence of releasing detainees only after there is an official end of conflict in Afghanistan, which may become a new frontier for Guantanamo Bay litigation.[368] Additionally, diplomatic negotiations should be conducted with the detainee's home country and other nations to accept detainees, consistent with the direction of detention law across the globe.

Second, since hostilities against the U.S. could continue indefinitely, the detainees could be held indefinitely. Courts have focused almost exclusively on the threshold issue of whether a detainee falls within the terms of the AUMF, and absent are any real efforts to determine the issue of when the government's detention authority ends as time passes and circumstances change.[369] In the summer of 2015, the D.C. Circuit addressed who determines the end of hostilities for the purposes of AUMF detention in *Al Warafi v. Obama*.[370] It applied the *Al-Bihani* preponderance of the evidence standard, held that the President's speeches were not law, and denied al Warafi's petition for writ of habeas corpus.[371] Mukhto Yahia Najial al Warafi was captured by the Northern Alliance in Afghanistan in November 2001.[372] The U.S took custody of him and have detained him at Guantanamo since 2002.[373] He filed for a writ of habeas corpus in 2004, which was denied in 2010. He challenged the legality of detention at

367. *See* Hafertz, *Detention*, *supra* note 256, at 332 (explaining how criminal sentencing allows "finely tuned adjustments" to ensure appropriate incapacitation).

368. Bradley & Goldsmith, *supra* note 285, at 2125.

369. *See* Hafertz, *Detention*, *supra* note 256, at 330 (describing the front-end classifications conducted by habeas judges to the detriment of more searching detention-related inquiries); *see also* Gruber, *supra* note 95, at 401 ("The fact is that the War on Terror is vague and may never end, and the Court must construct realistic limits on military detention power that makes sense given current political realities.").

370. No. 09-2368, 2015 U.S. Dist. LEXIS 99781 (D.D.C. Jul. 30, 2015).

371. *Id*. at 20–21.

372. *Id*. at 2.

373. *Id*.

Guantanamo Bay.[374] The court previously denied al Warafi's first challenge of his detention at Guantanamo Bay by finding that the government had shown that al Warafi more likely than not belonged to the Taliban when captured.[375] This time around, the government argued that determining when hostilities have ended is reserved for the political branches, while al Warafi claimed that the President can determine when a conflict is over.[376] He cited to a number of speeches wherein the President stated that America's war in Afghanistan is coming to an end or that it is over, referring to the withdrawal of U.S. troops.[377] He considered the President's stance on the existence of hostilities as being conclusive.[378] Rejecting this argument, the panel concluded that the President's speeches are not dispositive as to the existence of active hostilities.[379] Although not mentioned in *Al Warafi*, terrorism continues across the world and hostilities against the U.S. can go on indefinitely.

Third, while the government has relied on immigration law and policies to detain people, perhaps immigration jurisprudence can assist courts in determining whether judicial review beyond habeas review is called for. A court may apply legal reasoning from deportation jurisprudence as an aid in determining the constitutionality of a prolonged mandatory detention imposed by the government without any possibility of review. For instance, in *Rodriguez v. Robbins*, the Ninth Circuit held that hearings are necessary to ensure that immigrants were not needlessly held.[380] Freedom from physical restraint and imprisonment lies at the heart of the Due Process Clause.[381] Detention should be time-limited. The Guantanamo detainees are indefinitely imprisoned. In *Zadvydas v. Davis*, the Court held that habeas corpus proceedings under 28 U.S.C. § 2241 "remain available as a forum for statutory and constitutional challenges to post-removal-period detention," and indefinite detention of a removable alien after a removal proceeding violates a due process right.[382] In *Zadvydas*, the Court considered the indefinite detention of two long-time resident aliens who were ordered to be removed from the U.S. as a consequence of crimes they committed, but no country was willing to accept either of the individuals once they were ordered removed.[383] The Court concluded that the presumptive period during which an alien's detention is reasonably necessary to effectuate removal is six months, and

374. *Id*. at 2–3.
375. *Id*. at 3.
376. *Id*. at 5–6.
377. *Id*.
378. *Id.* at 14.
379. *Id*.
380. *See* Rodriguez v. Robbins, 715 F.3d 1127, 1132–33 (9th Cir. 2013).
381. *See* Zadvydas v. Davis, 533 U.S. 678, 689–90 (2001).
382. *Id*.
383. *Id*. at 684–86.

that there is "no significant likelihood of removal in the reasonably foreseeable future."[384]

Finally, in *Clark v. Martinez*, the Court held there is no reason why the period of time reasonably necessary to effect removal would be longer for an inadmissible alien, and therefore, the six-month presumptive detention prescribed in *Zadvydas* should be applicable to inadmissible aliens.[385] Such an analysis illustrates how detainee law overlaps with the immigration experience. If courts applied the rationale of *Zadvydas* and *Clark* to Guantanamo detainees' habeas cases, due process of law would be afforded and undue deference to the government could be avoided.

VII. CONCLUSION

As we learned from the experiences of Japanese Americans forced to live in internment camps during World War II, civil liberties should always be protected, even during wartime. We gleaned from the Guantanamo Bay detainee litigation in the D.C. Circuit that detainees face an incredibly high hurdle to clear, and the likelihood of their habeas petition being granted is slim or none. [386] In these habeas proceedings, the government only has to show that a detainee has done anything indicating an association with terrorists.[387] After this minimal standard of proof threshold is met, the detainee will remain in custody in Guantanamo until hostilities against the U.S. end, which could be never. In the end, as much as a writ of habeas corpus was an inadequate remedy for Mitsuye Endo and Japanese Americans during World War II, it remains an inadequate remedy for Guantanamo detainees, and for Americans indefinitely detained under the NDAA.

384. *Id*. at 701.

385. 543 U.S. 371, 386 (2005).

386. *See* Vladeck, *supra* note 249, at 1452 (explaining that "[s]ince the summer of 2004, the D.C. Circuit Courts has exercises a de facto form of exclusive jurisdiction over any claims arising out of Guantanamo").

387. *See* Hafertz, *Military*, *supra* note 154, at 40 ("The D.C. Circuit has construed the government's evidentiary burden as a limited one, freely admitted hearsay, limited to detainee's ability to rebut the government's allegations warned district courts not to scrutinize the government's evidence too closely, citing the danger of interfering with the executive during wartime").