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Detentions, Military Commissions, Terrorism and Domestic Case Precedent

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DETENTIONS, MILITARY COMMISSIONS, TERRORISM, AND DOMESTIC CASE PRECEDENT

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INTRODUCTION

Laura Dickinson's recent article in this journal substantially improves appreciation of how the United States has detained suspects and instituted military commissions as well as of the roles played by the controversial procedure and tribunals when fighting terrorism.[1] She meticulously traces how detentions and the commissions evolved, trenchantly criticizes them, and persuasively shows international tribunals' comparative advantage. Dickinson accords relevant domestic case precedent a somewhat laconic analysis, however. For example, she briefly mentions separation-of-powers concerns and Supreme Court opinions that detentions and military commissions implicate while rather tersely assessing *Ex parte Quirin*, the Second World War decision on which President George W. Bush's Administration has heavily relied to detain suspects, to create the tribunals, and to support numerous antiterrorism initiatives, especially litigation.[2] Dickinson suggests that closer evaluation of these critical rulings is unwarranted because they lack application for her work and others have

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1. *See* Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002).

2. 317 U.S. 1 (1942). *See generally* LOUIS FISHER, NAZI SABOTEURS ON TRIAL (2003) (analyzing the legal and factual background of *Quirin*); EUGENE RACHLIS, THEY CAME TO KILL: THE STORY OF EIGHT NAZI SABOTEURS IN AMERICA (1961) (analyzing the factual background of *Quirin*).

explored the opinions.[3] Dickinson's treatment allows many observers, most prominently cabinet members and federal judges, to overstate *Quirin* and to ignore *Youngstown Sheet & Tube Co. v. Sawyer*.[4]

Dickinson contributes substantially to the ongoing debate over the use of detentions and military commissions in national emergencies. She illuminates myriad complex phenomena and convincingly demonstrates how international tribunals are preferable. Her recommendation may prove superior in terms of theory, policy, and international law. Nonetheless, the very realpolitik that Dickinson so incisively criticizes, and is so clearly exemplified by the Bush Administration's war on terrorism, mandates elaboration of the governing United States case law.

Several reasons now dictate careful scrutiny. Most important, the President and his advisors have profoundly enlarged reliance on *Quirin* since September 11, 2001. For instance, they cite the decision to substantiate the November 2001 Executive Order ("Bush Order") that established the military commissions and the March 2002 Department of Defense ("DOD") regulations that implemented this Order.[5] The Attorney General and the Secretary of Defense as well as additional influential policymakers have invoked the opinion when testifying in support of antiterrorism measures. The Departments of Justice ("DOJ") and Defense have used that ruling to detain individuals suspected of terrorist activities and to pursue crucial terrorism litigation, and some federal courts have adopted the government's perspective. Quite simply, global opinion, the rule of law, civil liberties, and the integrity of the federal government's branches are at stake.

These propositions mean that the applicable domestic cases, namely *Quirin* and *Youngstown*, deserve thorough explication, which this response to Dickinson's valuable article undertakes. I first descriptively assess her significant contribution. My response then analyzes how the Bush

3. In fairness, Dickinson expressly states that many rule-of-law "arguments have been made elsewhere, and so [Part I] is primarily intended as an overview." Dickinson, *supra* note 1, at 1413. Moreover, she affords valuable, albeit compressed, treatment of *Quirin*. *See id.* at 1420–21. The precise realpolitik that she so cogently criticizes, as well as executive and judicial use of *Quirin* to date, shows that relevant precedents warrant scrutiny, however.

4. 343 U.S. 579 (1952). *See generally* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977) (analyzing the legal and factual background of *Youngstown*).

5. *See* Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Bush Order]; DEPARTMENT OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (Mar. 21, 2002), *available at* http://www.dtic.mil/whs/directives/corres/mco/mco1.pdf (last visited July 26, 2003) [hereinafter DOD ORDER]; *infra* notes 27–38, 56–95 and accompanying text.

Administration and federal judges have applied the precedent and why their reliance is misplaced. I find that the government has depended on *Quirin* to establish military tribunals, detain terrorism suspects, and litigate terrorism cases—and several judges have approved of this usage. Part II demonstrates that this decision cannot support the notions for which it has been invoked. Moreover, those dynamics promise to worsen as the war on terrorism broadens. For example, when the war's ambit expands, the United States will detain more people and actually conduct proceedings in military commissions; in turn, these endeavors will generate new litigation, such as direct challenges to tribunals' validity—phenomena that the conflict in Iraq demonstrates. Part III, consequently, proffers recommendations that urge more nuanced treatment of the relevant precedent.

I. DESCRIPTIVE ANALYSIS

Dickinson comprehensively explores numerous, unclear features of the United States' response to the September 11 terrorist attacks.[6] She emphasizes the realist critique, which states that compliance with the letter of international law would undermine national and global security interests, and, therefore, justifies suspending the requirements that normally govern. She ascertains that the terrorist strikes have raised, once again, how the rule of law serves the United States as a country and a people, and how legal process values might facilitate efforts to combat terrorism over the long term.

The article's first part surveys the arguments that the Bush Administration's indefinite secret detentions and military commissions violate the rule of law, first, as a domestic matter, by flouting basic protections in the United States Constitution, and second, internationally, by contravening established international law tenets. Dickinson specifically assesses how detentions now, and the military tribunals contemplated would, jeopardize essential constitutional procedures.[7] She recounts the plethora of ways that commission proceedings would curtail accused individuals' rights vis-à-vis what the Constitution ordinarily guarantees for civilian trials, finding that they could "hardly be called a trial at all" and would afford much less protection "than court-martial trials

6. *See* Dickinson, *supra* note 1, at 1410–11, 1432–35.

7. *See id.* at 1412–21; Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 743–48 (2002).

under the U.S. Uniform Code of Military Justice."[8] She contends that these detentions and tribunals deviate from the scheme that the Constitution envisioned because unilaterally asserted executive power initiated them with no express congressional ratification or judicial approval, and she relies on *Ex parte Milligan* for Supreme Court recognition that the document's checks and balances operate during wars and national crises.[9] Thus, the Constitution requires the tripartite branches to share governmental power, a stricture that the Administration rejects by arguing that the courts should not review detentions, and by excluding them and Congress from instituting military tribunals or scrutinizing commission proceedings—even though the document assigns the legislative, not executive, branch authority to "define and punish . . . Offences against the Law of Nations[.]"[10] She then asserts that military tribunals that so limit procedural protections have been created only when Congress has authorized them or has declared war, and because neither situation presently exists, *Ex parte Quirin* furnishes no support.[11]

Dickinson next reviews international law arguments, which have received less emphasis in public discourse, and finds that the Bush Administration's actions seem to violate major treaties to which the United States is a signatory and integral features of customary international law. For instance, the indefinite secret detentions and suggested military-commission procedures ignore numerous procedural protections in the International Covenant of Civil and Political Rights and may

8. Dickinson, *supra* note 1, at 1415–18 (reviewing the lack of provision for jury trials and for the privilege against self-incrimination, the potential for the proceedings to be closed, the evidentiary rules, and the requirements governing proof and verdicts). *See also* 10 U.S.C. §§ 801–946 (1994) (Uniform Code of Military Justice); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 978–85 (2002) (discussing various military orders and the procedures); *supra* note 5 (discussing various military orders).

9. *Milligan* implicated military commissions. *See* Dickinson, *supra* note 1, at 1418–21. *See also infra* notes 178–81 and accompanying text. *See generally* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1046–48 (2003) (assessing the constitutionality of military tribunals).

10. *See* U.S. CONST. art. I, § 8, cl. 10; Dickinson, *supra* note 1, at 1419 (citation omitted); Turley, *supra* note 7, at 750.

11. She emphasizes that the Bush Order purports to extend the scope of military tribunals beyond that "upheld in *Quirin*, both to circumstances in which Congress has not declared war or specifically authorized the commissions and to violations far beyond the laws of war." Dickinson, *supra* note 1, at 1421; Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 339–40 (2002), *available at* http://www.jstor.org/.

contravene the Geneva Conventions.[12] Dickinson admonishes that the United States' earlier use of military tribunals predated these treaty obligations and the "modern development of due process standards in international humanitarian law."[13]

Dickinson claims that proponents (especially within the Administration) of detentions and military commissions couch their arguments mainly in practical, not legal, terms, finding law an inconvenience, and even dangerous, while they argue that several reasons warrant suspending the principles that usually govern adjudication of criminal responsibility.[14] Because Dickinson concludes that rule-of-law ideas will not persuade those who articulate realist concerns, the second part directly addresses these notions by developing arguments about the value of international legal process, as this will advance near- and long-term American strategic interests.[15] She draws primarily on President Franklin D. Roosevelt's Administration's recognition that the establishment of international war-crimes tribunals would foster the United States' interests by compiling a historical record, showing American commitment to legal process and promoting respect for the rule of law overseas.[16] Dickinson concomitantly finds that the new sociopolitical circumstances that result from global terrorism make international legal process more imperative, and she enumerates its benefits.[17]

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12. *See Dickinson*, *supra* note 1, at 1421–23. *See also* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. V, 75 U.N.T.S. 135, 141–42. *See generally* Cole, *supra* note 8, at 979–80 (stating that the Bill of Rights outlines global concepts of basic human rights).

13. *See* Dickinson, *supra* note 1, at 1431 (citation omitted). The two most critical examples of military-tribunal trials took place before the above-referenced treaty obligations and granted much more procedural protection than the Bush initiative. Thus, she finds little precedent or legal support for the present initiative. *See id.* at 1432; Turley, *supra* note 7, at 719–20.

14. These include the amount of time required for civilian trials, expense, risk to judges and jurors, the needlessness of protecting terrorists' rights, the fact that the evidence available does not satisfy strict evidentiary rules and much must be kept secret for national security reasons, and detentions and military tribunals afford needed government control. *See* Dickinson, *supra* note 1, at 1433–34.

15. *See id.* at 1435; Turley, *supra* note 7, at 743–48. *See, e.g.*, Viet D. Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 405 (2002); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328 (2002), *available at* http://www.jstor.org/.

16. *See* Dickinson, *supra* note 1, at 1437–45. *See also* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE, THE POLITICS OF WAR CRIMES TRIBUNALS (2000); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS (1992).

17. The benefits include cementing the global coalition that the United States needs to combat terrorism efficaciously; strengthening intergovernmental endeavors that prevent terrorism in the long term; fostering terrorists' apprehension, arrest, and trial, and protection of American citizens overseas; establishing the crime's global nature and isolating Al Qaeda from the rest of the world; facilitating

Because some critics assert that international tribunals are impractical due to problems in creating them and political opposition, Dickinson treats those ideas.[18] After she concedes that certain international options might defy smooth implementation, she maintains that expansion of present international tribunals' jurisdiction could be felicitously achieved.[19] Her similar admission that establishing an international tribunal may be politically unacceptable in the United States leads her to offer two approaches that might be more palatable and retain some benefits of an international process.[20] These are an internationalized military commission that could include judges from America and other nations,[21] and a hybrid domestic/international court that would receive the United Nations' assistance and be attached to the peacekeeping force in Afghanistan where it would sit.[22]

Dickinson concludes by responding to the law skeptics in a comparatively theoretical manner.[23] She finds that the international-relations realist critique resembles that of critical legal theorists who have not completely abandoned legal process or judicial adjudication, and explores why the critical legal scholars have yet to jettison these notions.[24] She draws on pathbreaking work by Robert Cover on adjudicatory processes' import[25] and finds that his ideas lend additional support to the use of legal process even during politically uncertain times.[26]

In sum, Dickinson significantly advances understanding of detentions, military commissions, and terrorism, mentioning certain applicable domestic case law throughout. The Bush Administration, however, has placed undue reliance on specific opinions, particularly *Quirin*, when detaining suspects, establishing tribunals, and conducting terrorism litigation. Moreover, a growing number of courts have agreed with this

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development of international norms for terrorism; and increasing the perceived legitimacy of actions by the United States government. *See* Dickinson, *supra* note 1, at 1445–66.

18. *See id.* at 1466–67. Dinh and Wedgwood, *supra* note 15, apparently hold these views.

19. *See* Dickinson, *supra* note 1, at 1466–68. For an analysis of international tribunals, see TAYLOR, *supra* note 16, at 43–115; Koh, *supra* note 11, at 342–44.

20. *See* Dickinson, *supra* note 1, at 1466–68. *See generally* Turley, *supra* note 7, at 743–48 (assessing similar approaches).

21. *See* Dickinson, *supra* note 1, at 1468–72. *See also* TAYLOR, *supra* note 16, at 571–611. *See generally* R. JOHN PRITCHARD, THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS (1989).

22. *See* Dickinson, *supra* note 1, at 1472–77.

23. *See id.* at 1477–90.

24. *See id.* at 1478.

25. *See* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 4th ed. 1995).

26. *See* Dickinson, *supra* note 1, at 1478–90. *See also* STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000) (assessing the relationship between conflict and the law).

emphasis. These developments necessitate greater consideration of precisely how the executive and judicial branches have invoked the precedent, as well as exposition of why that dependence lacks support. Part II undertakes this effort.

II. ANALYSIS OF DOMESTIC CASE PRECEDENT

A. RELIANCE ON THE PRECEDENT

1. Military Commissions

On November 13, 2001, President Bush issued an Executive Order that authorized the creation of military tribunals and purportedly denied federal court access to individuals tried before them.[27] His Administration, in essence, premised that Order and its ostensible nullification of federal court jurisdiction on *Ex parte Quirin*, powers delegated by Article II in the Constitution, and Congress' September 2001 "Authorization for Use of Military Force" Joint Resolution.[28] President Bush, cabinet members, and numerous other high-ranking public officials have variously invoked *Quirin*. For example, when the President justified the November Order, he mentioned *Quirin* by recounting how Roosevelt had instituted a similar World War II military commission. He characterized "[n]on-U.S. citizens who plan and/or commit mass murder [as] unlawful combatants," saying they could be tried in military commissions if this promoted the "national security interest."[29] On November 14, Vice President Dick Cheney similarly alluded to *Quirin* and military-tribunal use since the founding as the principal justifications for commissions and stated that the U.S. should try those responsible for the terrorist attacks—those who do not "deserve the same guarantees" as American citizens "going through the normal judicial process."[30]

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27. *See* Bush Order, *supra* note 5, at 57,833.

28. *See id.*; DOD ORDER, *supra* note 5, at 1–2, 13–14. *See also* U.S. CONST. art. II; S.J. Res. 23, 107th Cong. (2001).

29. *See* Mike Allen, *Bush Defends Order for Military Tribunals; President Hosts Ramadan Iftar Dinner*, WASH. POST, Nov. 20, 2001, at A14 (affording the allusion); Wayne Washington, *FDR Move Cited in Tribunals*, BOSTON GLOBE, Dec. 2, 2001, at A1 (affording the quotation). President Bush later justified the creation of tribunals by requesting that Americans remember that those who would be tried "are killers" who "don't share the same values [that] we share." Exchange with Reporters in Alexandria, Virginia, 38 WEEKLY COMP. PRES. DOC. 469 (Mar. 25, 2001).

30. Vice President Richard Cheney, Remarks to the U.S. Chamber of Commerce (Nov. 14, 2001). *See also* Interview by 60 Minutes II with Vice President Richard Cheney (Nov. 14, 2001). *See generally* Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in*

That day, Attorney General John Ashcroft proffered quite analogous concepts by invoking tribunals' long tradition and High Court recognition, most relevantly in *Quirin*. He stated that commissions are legitimate and argued that "foreign terrorists who commit war crimes against the United States . . . are not entitled to" our constitutional protections.[31] On December 6, Ashcroft testified that *Quirin* approved tribunal use "in the United States against enemy belligerents," and the Court exercised "habeas corpus jurisdiction to decide" the validity of tribunals and the issue of "whether the belligerents were actually eligible for trial under the commission."[32] DOJ Assistant Attorneys General with major war-on-terrorism duties have relied on *Quirin*. For instance, the then-Assistant Attorney General for the Criminal Division, Michael Chertoff, defended the Bush Order by asserting that its terms were "virtually identical" to those in the Roosevelt Order and Proclamation. He detailed the venerable history of tribunals and stated that the justices acknowledged their constitutionality in *Quirin*.[33] The Assistant Attorney General for the Office of Legal Policy, Viet Dinh, has invoked the lengthy pedigree of commissions. He mentioned how Roosevelt had applied the entities and relied on *Quirin* to claim that the "Court has unanimously upheld" their legitimacy.[34] Defense Secretary Donald Rumsfeld substantiated the Bush and DOD Orders by saying tribunals have been used in wartime since the nation's founding: Roosevelt had employed them and the "Supreme Court upheld" the entities' validity in *Quirin*.[35] The DOD General Counsel, William Haynes II, depended on *Quirin* to support the

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Historical Perspective, 38 CAL. W. L. REV. 433, 434 (2002) (criticizing Vice President Cheney's remarks).

31. Press Release, U.S. Department of Justice, Attorney General John Ashcroft & INS Commissioner Ziglar Announce INS Restructuring Plan (Nov. 14, 2001), *available at* http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_14.htm (last visited Sept. 4, 2003). *See* Jonathan Turley, *Military Tribunal Rules Put Our Values to Test*, BALT. SUN, Mar. 25, 2002, at 7A.

32. The Attorney General again recounted the venerable history of military commissions. *See Department of Justice Oversight: Preserving Freedoms While Fighting Terrorism: Hearings Before the Senate Committee on the Judiciary*, 107th Cong. 327 (2001) (statement of John Ashcroft, United States Attorney General, U.S. Department of Justice), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:81998.pdf (last visited Sept. 4, 2003).

33. *See id.* (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice); *infra* notes 37–38 and accompanying text.

34. Dinh, *supra* note 15, at 405–06. *See also* Eric Lichtblau and Adam Liptak, *Threats and Responses: On Terror, Spying and Guns, Ashcroft Expands Reach*, N.Y. TIMES, Mar. 15, 2003, at A1.

35. *Military Commissions: Hearing Before the Senate Committee on Armed Services*, 107th Cong. (2001) (statement of Secretary of Defense Donald Rumsfeld, U.S. Department of Defense), *available at* http://armed-services.senate.gov/statemnt/2001/011212wolf&rums.pdf (last visited Sept. 4, 2003).

March 2002 DOD Order, and he contended that federal judges have affirmed presidents' authority to convene military tribunals.[36]

White House Counsel Alberto Gonzales has relied on *Quirin* for the notion that the High Court has "consistently upheld" military-commission use and stated that the phrasing in the Bush Order was derived from the terms of Roosevelt's Proclamation and Order—phrasing that the Court interpreted to allow habeas corpus scrutiny.[37] He also claimed that any "habeas corpus proceeding in a federal court" that questions actions under the Bush Order (authorizing the use of military tribunals for non-United States citizens) would be restricted to scrutinizing "the lawfulness of the commission's jurisdiction."[38]

2. Detentions

Influential legal officials have similarly justified indefinite detention of suspected terrorists. For example, in June 2002, Deputy Attorney General Larry Thompson argued that Jose Padilla was detained "under the laws of war as an enemy combatant," citing *Quirin* as "clear Supreme Court" authority.[39] DOD's General Counsel also supported detentions by asserting, "Presidents have detained enemy combatants in every major conflict in the Nation's history."[40]

3. War-on-Terrorism Litigation

The DOJ and DOD have relied greatly on *Quirin*, in part for broad deference to the executive in national crises, when litigating major terrorism cases that involve detention. Moreover, the courts depended on

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36. "The Fourth Circuit recently confirmed" these propositions in *Hamdi*. *See* Press Release, U.S. Department of Defense, DOD Responds to ABA Enemy Combatant Report (Oct. 2, 2002) (quoting Letter from William J. Haynes II, General Counsel, Department of Defense, to Neal R. Sonnett, Chair, ABA Task Force on Treatment of Enemy Combatants (Sept. 23, 2002)) [hereinafter Haynes Letter], *available at* http://www.defenselink.mil/news/Oct2002/b10022002_bt497-02.html (last visited Sept. 4, 2003). *See generally* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 8–9 (2002) (assessing military tribunals as one aspect of the military pocket republic).

37. *See* Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27. *See also* Christopher Bryant & Carl Tobias, Youngstown *Revisited*, 29 HASTINGS CONST. L.Q. 373, 394–95 n.85 (2002) (assessing the Gonzales article).

38. Gonzales, *supra* note 37. *See also* Tom Brune, *Military Courts to Vary on Rules*, NEWSDAY, Dec. 1, 2001, at A2 (assessing the Gonzales article). Senators' views that are similar to the Administration's are in the hearings cited at *supra* notes 31, 33, 35.

39. Larry Thompson, Paul Wolfowitz & Bob Mueller, U.S. Department of Justice Briefing (June 10, 2002).

40. *See* Haynes Letter, *supra* note 36.

Quirin to resolve *Hamdi v. Rumsfeld*[41] and *Padilla ex rel. Newman v. Bush*.[42] Most aggressive was the government's claim in one *Hamdi* appeal that given their "'constitutionally limited role . . . in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such.'"[43] The Fourth Circuit criticized this assertion first by recasting it[44] and then denying the motion to dismiss.[45] Despite this rebuke, the court basically subscribed to the idea when it cited *Quirin* extensively for notions such as: "[During] World War II, the Court stated in no uncertain terms that the President's wartime detention decisions are to be accorded great deference from the courts."[46] Moreover, the Fourth Circuit essentially accepted the government's view because it relied on *Quirin* in acquiescing to the executive, did not scrutinize the justification for detaining Hamdi, and gave him no access to counsel.[47] The three *Hamdi* opinions also deemphasized the vast expansion of habeas corpus and international law since *Quirin* was issued.[48]

District court treatment of the *Padilla* litigation resembled *Hamdi* and relied on *Hamdi's* resolution.[49] For example, the trial judge ascertained that the "logic of *Quirin* bears strongly on this case" and broadly invoked the case precedent, which "recognized the distinction between lawful and unlawful combatants," and further held that "[u]nlawful combatants are

41. This was first brought in the Eastern District of Virginia and has received three Fourth Circuit opinions. *See* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *reh'g denied en banc*, 337 F.3d 335 (4th Cir. 2003). *See also* Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002); Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002).

42. This was brought in the Southern District of New York, and the trial judge recently certified an interlocutory appeal to the Second Circuit. *See* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). *See also* Padilla *ex. rel.* Newman v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003) (certifying an interlocutory appeal).

43. *See Hamdi*, 296 F.3d at 283.

44. According to the court: "The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word." *Id.*

45. It elaborated: "In dismissing, we ourselves would be summarily embracing a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Id.*

46. *Id.* at 282.

47. *See* Hamdi v. Rumsfeld, 316 F.3d 450, 472–75 (4th Cir. 2003). Hamdi remains in custody.

48. *See supra* note 41. *See also supra* notes 12–13 and accompanying text; *infra* notes 198–205 and accompanying text (discussing the vast expansion of habeas corpus in international law). *But see Hamdi*, 316 F.3d at 468–69 (according a narrow reading to international law).

49. *See* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 592–93 (S.D.N.Y. 2002); *supra* notes 43–48 and accompanying text.

likewise subject to capture *and detention* . . . ."[50] Using *Quirin*, the court drew an analogy and held that President Bush had the power to detain unlawful combatants.[51] The judge also said that the High Court suggested that Roosevelt's "decision to try the saboteurs before a military tribunal rested at least in part on an exercise of Presidential authority under Article II," even though it found no need to resolve whether the "President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation."[52] Moreover, the judge exhibited great deference, articulating the quite lenient "some evidence" burden of proof that the government must satisfy to support a presidential finding that a detainee is an unlawful combatant.[53] Furthermore, the court invoked *Youngstown* for the notion that President Bush was "acting at maximum authority . . . in the decision to detain Padilla as an unlawful combatant."[54] Finally, Padilla had not yet met with his lawyer when the judge certified an interlocutory appeal on this issue.[55]

B. WHY RELIANCE ON THE PRECEDENT IS MISPLACED

1. Military Commissions

It may seem best to address tersely the Administration's misplaced reliance on *Quirin* when it issued the Bush and DOD Orders[56] because

50. *Padilla*, 233 F. Supp. 2d at 594–95 (citing *Ex parte* Quirin, 317 U.S. 1, 30–31 (1942)) (emphasis in *Padilla*); *supra* notes 46–48 and accompanying text.

51. *See Padilla*, 233 F. Supp. 2d at 594–96. If the Supreme Court "regarded detention alone as a lesser consequence than . . . trial by military tribunal—and it approved even that greater consequence, then our case is *a fortiori* from *Quirin* as regards the lawfulness of detention." *Id.* at 595.

52. *Id. See also infra* note 167 and accompanying text (providing the Supreme Court's analysis of this issue in *Quirin*). *See generally Quirin*, 317 U.S. at 28–29.

53. *See Padilla*, 233 F. Supp. 2d at 605–10. The court apparently premised this deference on its limited authority and competence to decide the question and on the president's substantial authority in this context.

54. *See id.* at 606–07. *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952); *infra* notes 106–17 and accompanying text. *But see supra* note 10; *infra* notes 122–25 and accompanying text.

55. The court did reject the government's claim that Padilla should not have access to counsel. *See Padilla*, 233 F. Supp. 2d at 564, 599–605. The judge seemed to find the government's reconsideration motion a dilatory tactic. *See* Padilla *ex rel.* Newman v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003). One recent terrorism opinion did mention *Quirin* once at its outset, but the decision relied primarily on another World War II case. *See* Al Odah v. United States, 321 F.3d 1134, 1136, 1138–45 (D.C. Cir. 2003). *See also* Johnson v. Eisentrager, 339 U.S. 763, 763 (1950) (affording the World War II case on which the D.C. Circuit relied).

56. *See supra* notes 27–38 and accompanying text. *See also supra* note 5 and accompanying text.

military tribunals have tried no one[57] and a few scholars, including Dickinson, have assessed their validity.[58] Other ideas require much scrutiny, however. Commissions will soon try defendants[59] and inexorably prompt litigation contesting the entities' legitimacy. Thorough analysis will also improve comprehension of *Quirin* and its use, *Youngstown* and why it is the most relevant precedent, and why *Youngstown* and the Constitution bar presidential abolition of federal court jurisdiction, even though tribunals might be valid in some contexts (e.g., overseas prosecutions that arise from declared wars).

a. Why *Youngstown* and the Constitution Are Controlling

Constitutional Text and History. The Constitution's text and history, as well as case law, show that Congress, not the executive, is the federal government's political branch that is authorized to prescribe federal court jurisdiction. Article I states, "Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court,"[60] and Article III says, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[61] The first Congress created the lower federal courts and provided for their jurisdiction.[62] Article I also states that Congress is to "define and punish . . . Offences against the Law of Nations."[63] Moreover, landmark cases, such as *Sheldon v. Sill*,[64] have held that the "disposal of the judicial power (except in a few specified instances) belongs to Congress."[65]

57. The government did publicly acknowledge that it would use tribunals. *See* Vanessa Blum, *The Outlines of Justice*, LEGAL TIMES, May 26, 2003, at 1; Neil A. Lewis, *Six Detainees Soon May Face Military Trials*, N.Y. TIMES, July 4, 2003, at A1; Adam Liptak, *Tribunals Move from Theory to Reality*, N.Y. TIMES, July 4, 2003, at A12.

58. *See* Dickinson, *supra* note 1. *See also* Bryant & Tobias, *supra* note 37, at 424–31. *See generally* Cole, *supra* note 8; Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Youngstown *at Fifty: A Symposium*, 19 CONST. COMMENT. (2002).

59. *See, e.g.*, DEPARTMENT OF DEFENSE, MILITARY COMMISSION INSTRUCTION NOS. 1–8 (Apr. 30, 2003); Vanessa Blum, *DOD Readies Teams for Terror Trials*, LEGAL TIMES, Apr. 14, 2003, at 1; Neil A. Lewis, *Tribunals Nearly Ready for Afghanistan Prisoners*, N.Y. TIMES, Apr. 8, 2003, at 11; Roland Watson, *September 11 Trial Near Collapse*, TIMES OF LONDON, Apr. 5, 2003, at 25.

60. U.S. CONST. art. I, § 8, cl. 9.

61. U.S. CONST. art. III, § 1.

62. *See* Judiciary Act of 1789, ch. XX, 1 Stat. 73 (1789); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 9–11 (4th ed. 2003); FELIX FRANKFURTER & JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 4–14 (1927).

63. U.S. CONST. art. I, § 8, cl. 10. *See* Dickinson, *supra* note 1, at 1419; *supra* note 10 and accompanying text.

64. 49 U.S. 441 (1850). *See also* CHEMERINSKY, *supra* note 62, at 192–93.

65. *See Sheldon*, 49 U.S. at 448 (citation omitted); Bryant & Tobias, *supra* note 37, at 384–86.

Post-September 11, 2001 Legal Developments. Despite the Constitution's text and history, President Bush issued the November Order. Section 7(b) provides that military commissions "shall have exclusive jurisdiction with respect to offenses by" anyone subject to the Bush Order, and those subject to the Order

> shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's bebalf, in (i) any court of tbe United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.[66]

This expansive wording imposes the proscription on *all* courts—federal, state, or international—apart from the military tribunals the Order creates.[67] As to the Bush Order's critical issues, detentions and federal court jurisdiction stripping, the Administration initially requested Congress' approval, which lawmakers denied. It then arrogated to itself the power sought.

On September 19, 2001, President Bush sent Congress proposed legislation, titled the Anti-Terrorism Act of 2001 ("ATA"), which addressed numerous law enforcement, immigration, and counterterrorism matters.[68] Sections 202 and 203 of the ATA had greatest relevance for the issues that the Order would later address. Section 202 would have authorized the Attorney General to detain indefinitely any United States noncitizen who that official "has reason to believe may commit, further, or facilitate acts" of terrorism, which was defined quite broadly.[69] Section 203 would have granted District of Columbia federal courts exclusive authority over federal habeas corpus review of section 202 detentions.[70]

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66. Bush Order, *supra* note 5, at 57,835–36.

67. My emphasis here is on jurisdiction stripping. I am not assessing whether the Bush Order can deprive state or international courts or tribunals of power to provide relief. The Supreme Court sharply limited state-court ability to grant people in federal custody relief in *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411–12 (1871). *See also* McClung v. Silliman, 19 U.S. 598, 603–04 (1821) (denying state courts the power to issue federal officers writs of mandamus); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 157–64 (2d ed. 1990); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 298 (6th ed. 2001).

68. Anti-Terrorism Act of 2001, 107th Cong. (2001) (unintroduced draft house resolution), *available at* http://www.epic.org/privacy/terrorism/ata2001_text.pdf (last visited Sept. 4, 2003) [hereinafter ATA]; *American Values on Trial*, L.A. TIMES, Mar. 22, 2002, at B16.

69. *See* ATA, *supra* note 68, § 202. *See also Terrorism Investigation and Prosecution: Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (2001) [hereinafter *Sept. 25 Senate Judiciary Committee Hearing*] (statement of Sen. Specter) (quoting § 202 of the Bush Administration's draft legislation). *See generally* Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 34–36 (2002) (assessing the proposed language).

70. ATA, *supra* note 68, § 203; *Winging It at Guantanamo*, N.Y. TIMES, Apr. 23, 2002, at 22.

Republicans and Democrats in both chambers,[71] as well as interest groups,[72] strongly opposed these sections.[73] The statute Congress did pass imposed several major restrictions on the Attorney General's detainment authority.[74] First, it modified the threshold standard from "reason to believe" to "reasonable grounds to believe" that the suspect would engage in or assist terrorist acts.[75] Second, the legislation significantly limited the officer's power to detain noncitizens suspected of terrorism.[76] Third, the statute explicitly prescribed federal judicial review through habeas corpus proceedings of "any action or decision relating to [section 412,] including judicial review of the merits of" the Attorney General's certification.[77] These restrictions were in the USA PATRIOT ACT ("PATRIOT ACT"), which President Bush signed on October 26, 2001.[78]

Although Congress denied the Attorney General the indefinite detention power sought, the Bush Order, prescribed eighteen days later,

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71. *See Sept. 25 Senate Judiciary Committee Hearing*, *supra* note 69 (statement of Sen. Specter); 148 CONG. REC. S742 (daily ed. Feb. 13, 2002) (statement of Sen. Leahy); Jonathan Krim, *Anti-Terror Push Stirs Fears for Liberties; Rights Groups Unite To Seek Safeguards*, WASH. POST, Sept. 18, 2001, at A17.

72. *See No Rush on Rights*, WASH. POST, Sept. 20, 2001, at A34 (editorial); Walter Pincus, *Caution Is Urged on Terrorism Legislation: Measures Reviewed to Protect Liberties*, WASH. POST, Sept. 21, 2001, at A22.

73. For a thorough explanation of this opposition, see Bryant & Tobias, *supra* note 37, at 388–91.

74. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 351 (2001) [hereinafter USA PATRIOT ACT]; Eric Lichtblau, *A Nation at War: Liberty and Security; Republicans Want Terrorism Law Made Permanent*, N.Y. TIMES, Apr. 9, 2003, at B1.

75. John Lancaster, *Hill Puts Brakes on Expanding Police Powers*, WASH. POST, Sept. 30, 2001, at A6 (noting that in the "days after September 11, [opinion polls showed] Americans overwhelmingly favor[ed] stronger police powers, even at the expense of personal freedom"). *See also* Bryant & Tobias, *supra* note 37, at 390 (analyzing the modification of the threshold standard).

76. According to the legislation:

> The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, *the Attorney General shall release the* alien.

USA PATRIOT ACT, 107th Cong. § 412, *reprinted in* 147 CONG. REC. S10,547, S10,622 (daily ed. Oct. 11, 2001) (emphasis added). Senator Patriek Leahy (D-Vt.) emphasized: "[I]f an alien is found not to be removable, he must be released from custody." *Id.* at S10,558.

77. 147 CONG. REC. S10,558, 10,622 (statement of Sen. Leahy). *See also id.* (subjecting the Attorney General's certification to judicial review).

78. *See supra* note 74. The USA PATRIOT ACT also changed the Administration's venue proposal. *See supra* note 70. According to the Act, original habeas corpus petitions can be filed in any U.S. district court with jurisdiction, thereby satisfying the Administration's concerns about inconsistent authority with the less onerous stricture that all *appeals* be heard by the D.C. Circuit, whieh would apply Supreme Court and D.C. Circuit cases as the "rule of decision." USA PATRIOT ACT, *supra* note 74, at 352.

ostensibly granted the Defense Secretary that authority. Section 3 empowers and directs the Secretary to take into custody and "detain[] at an appropriate location . . . outside or within the United States" any "individual subject to" the directive,[79] whom section 2 defines as any person "who is not a United States citizen with respect to whom [the President] determine[s] from time to time in writing that . . . there is reason to believe that such individual" is an international terrorist dangerous to the United States or is someone who "has knowingly harbored one or more" such people.[80] The Bush Order, in fact, claims much greater power than had been requested, as the most aggressive stance in Congress was that federal habeas corpus review of detentions should be limited to the District of Columbia federal courts.[81] Yet the Bush Order purportedly eliminates all judicial scrutiny that might be sought by or on behalf of "any individual subject to [the] order,"[82] the plain meaning of which the DOD Order later confirmed by strictly proscribing federal judicial review of any feature of a proceeding under the Order.[83] The DOD Order dispels doubt about the preclusion of judicial scrutiny—even the exercise of habeas corpus jurisdiction in federal court—in expressly stating that

> [a] Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon . . . . Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly.[84]

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79. *See* Bush Order, *supra* note 5, at 57,834.

80. *Id.* According to the Bush Order, if the President deems that "it is in the interest of the United States" to subject someone to it, then and only then does it apply. *Id.* This grants discretion to not apply the Bush Order, but it is unbridled, so executive power to apply it against anyone deemed an international terrorist, or one who aids or abets such conduct, is not restrained.

81. *See* Krim, *supra* note 71. *See also* Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249, 252–54 (2002) (assessing the constitutional authority for the Bush Order); Molly McDonough, *Tribunals vs. Trials*, 88 A.B.A. J. 20 (Jan. 2002); *supra* note 78 (showing that Congress rejected the idea that federal habeas corpus review be limited).

82. Bush Order, *supra* note 5, at 57,835–36.

83. DOD ORDER, *supra* note 5, at 13–14. *See also* John Mintz, *U.S. Adds Legal Rights in Tribunals: New Rules Also Allow Leeway on Evidence*, WASH. POST, Mar. 21, 2002, at A1; Deborah L. Rhode, *Terrorists and Their Lawyers*, N.Y. TIMES, Apr. 16, 2002, at 27. For an analysis of the Bush Order's specific provisos, see *supra* note 5 and accompanying text; Bryant & Tobias, *supra* note 37, at 393; Richard A. Serrano, *U.S. Readies Plans for Terror Tribunals Law*, L.A. TIMES, Mar. 21, 2002, at A1.

84. DOD ORDER, *supra* note 5, § 6(H)(2), at 13; Mintz, *supra* note 83; Serrano, *supra* note 83.

The Bush and DOD Orders thus suggest that the Administration intends to retain suspected terrorists much longer than the PATRIOT ACT authorized.[85]

Congress, particularly senators, quickly and forcefully responded to the Bush Order. The Senate Judiciary Committee held several hearings in which many government officials and constitutional scholars with diverse political viewpoints testified.[86] Certain persons, namely members of the Administration, contended that President Bush's authority as Commander-in-Chief[87] of the armed forces included the power to issue the Order,[88] but no witness analyzed whether the President could unilaterally abrogate federal court jurisdiction. Yet others voiced serious concerns about the Order's legitimacy because it invaded Congress' province[89] or violated Bill of Rights guarantees.[90] The hearings and later actions, mainly

85. Given the Bush Order's proscriptions on federal court review, I find inadequate White House counsel's claim that the Bush Order preserves civilian-court review: "[A]nyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court." Gonzales, *supra* note 37. This otherwise promising concession does not offset the many indications that certification under the Bush Order precludes federal court review of detention, imprisonment, or imposition of other punishment, including death. First, Gonzales sharply limited his promise of review in civilian courts to those "arrested, detained or tried in the United States." Even then, a federal habeas corpus proceeding would only treat challenges to "lawfulness of a commission's *jurisdiction*." *Id.* (emphasis added). Depending on the Administration's view of "jurisdiction," it may argue that a federal habeas court can only confirm that the President had found a detainee "subject to" his Order. *See* Bush Order, *supra* note 5, at 57,834. Second, Gonzales justified his informal view by citing to *Quirin*, not the Bush Order's text, which seems to preclude judicial review. *See* Gonzales, *supra* note 37. The *Quirin* Court reached the merits, however, only after the DOJ elected "not to contest the Supreme Court's jurisdiction." Lloyd Cutler, *Lessons on Tribunals—From 1942*, WALL ST. J., Dec. 31, 2001, at A9. The Bush Administration might contest jurisdiction, relying on the Bush and DOD Orders' plain terms, and thereby have the courts treat the constitutional issues avoided in 1942. Even had Gonzales clearly found that the Bush Order affirmatively protected judicial review through habeas corpus proceedings, this view may not be the last word. I do not question Gonzales' integrity or good faith, but his opinion piece fails to bind the Administration in later litigation. His article does not commit President Bush to the close federal court review to which he should acquiesce.

86. *See* 147 CONG. REC. S13,275–77 (daily ed. Dec. 14, 2001) (statement of Sen. Leahy) (reviewing the Senate Judiciary Committee hearings related to the Bush Order).

87. U.S. CONST. art. II, § 2, cl. 1.

88. *See, e.g.*, *supra* note 32, at 325 ("The President has ordered—and it is a Military Order to the Department of Defense. It is out of his responsibility as Commander-in-Chief of a nation in conflict that he ordered that the Department of Defense develop a framework that would provide full and fair proceedings.").

89. *See* 147 CONG. REC. S13,277 (daily ed. Dec. 14, 2001) (statement of Sen. Leahy) (summarizing the testimony of several legal experts who found that the Bush Order invaded the powers of Congress), *available at* http://www.senate.gov/~judiciary/print_testimony.cfm?id=121&wit_id=72 (last visited Sept. 4, 2003).

90. *See, e.g.*, *supra* note 32, at 93–110 (testimony of Neal Katyal, Visiting Professor, Yale Law School) (stating how the Bush Order would violate protections in the Bill of Rights).

the Administration's lack of solicitude for legislative requests "to review and be consulted about the draft [DOD] regulations" led Senator Patrick Leahy (D-Vt.), the Chair of the Judiciary Committee, to act.[91] He sponsored a February 2002 bill that "would provide the executive branch with the specific authorization it now lacks to use extraordinary tribunals to try members of the al Qaeda terrorist network and those who cooperated with them"[92] because the President does not have power to create the entities unilaterally.[93] This proposal would restrict detainment and military trials much more, and accord greater procedural protections than did the Bush Order. For example, the bill exempts "individuals arrested while present in the United States, since our civilian court system is well equipped to handle such cases,"[94] and subjects detentions to the supervision of the United States Court of Appeals for the District of Columbia Circuit.[95]

Thus, President Bush relied on his power as President and Commander-in-Chief of the armed forces to issue the Order (1) requiring that military tribunals try certain persons who violate the laws of war and other applicable laws, and (2) depriving these individuals of federal court access in particular and the judiciary of jurisdiction in general. Senate and House Republicans and Democrats, however, questioned the Bush Order's constitutionality, conducted hearings, and introduced proposed legislation that would curtail the authority President Bush claimed and expressly preserve federal court review. These indicia of disapproval, together with Congress' denial of the Administration's requests for the broad power the Order claims, suggest that the Administration's effort to abolish jurisdiction contravenes legislative will.

Youngstown. In reviewing this attempt to abrogate judicial jurisdiction, one must remember that the constitutional text and history and

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91. 148 CONG. REC. S742 (daily ed. Feb. 13, 2002) (statement of Sen. Leahy).

92. *See id.*

93. According to Senator Leahy: "The Attorney General testified at our ... December 6 [hearing] that the President does not need the sanction of Congress to convene military commission[s], but I disagree. Military tribunals may be appropriate under certain circumstances, *but only if they are backed by specific congressional authorization.*" *Id.* at S741 (emphasis added).

94. *Id.* at S742. *See also* Military Tribunal Authorization Act of 2002, S.1941, 107th Cong. § 3 (2002). On March 20, 2002, House members introduced an identical bill. *See* H.R. 4035, 107th Cong. (2002).

95. *See* Military Tribunal Authorization Act of 2002, S.1941, § 5(d). *See also* 28 U.S.C. § 41 (1994); *supra* notes 69, 77, 80 and accompanying text. *See generally* CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT (1999); JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT (2001).

High Court opinions show that Congress has practically total authority to establish the federal courts and provide for their jurisdiction. President Harry Truman's 1952 assertion of power to seize steel mills and the *Youngstown* decision that held he lacked the authority to do so are the controlling precedents. The Court assessed presidential issuance of an executive order that seized the steel mills because he thought an impending strike by the steelworkers' union would disrupt the Korean War effort.[96] Truman based the order on powers that the Constitution and statutes vested in him and as President and Commander-in-Chief of the armed forces. Justice Hugo Black, writing for the majority, held that Truman did not have seizure authority.[97] The four justices who joined Black—Felix Frankfurter, Robert Jackson, William Douglas, and Harold Burton[98]—authored separate opinions, however.[99] Justice Black stated that power, if any existed for adopting the order, must be in a federal law or the Constitution.[100] He found neither statutes explicitly authorizing the president to seize private property nor acts from which this prerogative could fairly be inferred.[101] Justice Black surveyed whether the Constitution granted inherent power to issue the order and canvassed potential sources from which the authority might derive.[102] He initially proclaimed that characterizing seizure as an exercise of Truman's military power as Commander-in-Chief of the armed forces would not suffice, and described the initiative as a "job for the Nation's lawmakers, not for its military authorities."[103] Justice Black then ascertained that the several constitutional provisos that endow the president with executive power furnished little support, principally because the

96. *See* Exec. Order No. 10,340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952). *See generally* MARCUS, *supra* note 4, at 75–82, 149–77 (assessing the Executive Order).

97. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588–89 (1952). *See generally* WILLIAM H. REHNQUIST, THE SUPREME COURT 189–92 (Alfred A. Knopf 2001) (assessing the *Youngstown* Case).

98. *See Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring); *id.* at 634 (Jackson, J., concurring); *id.* at 629 (Douglas, J., concurring); *id.* at 655 (Burton, J., concurring).

99. Justice Tom Clark concurred in the judgment but not in the opinion. *See id.* at 660 (Clark, J., concurring).

100. *Id.* at 585. *See generally* JOHN P. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS (1949) (affording a contemporaneous analysis of Justice Black); ROGER K. NEWMAN, HUGO BLACK (1994) (affording a subsequent analysis of Justice Black).

101. *See Youngstown*, 343 U.S. at 585. No law in express terms allowed the chief executive to use seizure as a tool for addressing labor disputes; indeed, Congress had clearly rejected this approach. *Id.* at 585–86.

102. The government did not argue that the grant was express. *See id.* at 587.

103. *Id.* Black found "theater of war" an expanding concept, but he could not conclude that the executive order was constitutional. *See id.*

document's structure and language assign Congress lawmaking authority, which is not subject to "presidential or military supervision or control."[104]

The justices who joined Justice Black might have concurred for reasons similar to those Justice Frankfurter espoused.[105] The only concurrence that deserves textual analysis is Justice Jackson's opinion, as its tripartite scheme for resolving separation-of-powers issues is now a classic.[106] Justice Jackson opened his framework for evaluating federal governmental authority by describing it as a rather oversimplified classification of practical situations in which the president could doubt, or others might challenge, the official's authority, and by crudely distinguishing the legal effects created by this relativity factor.[107] The three categories designate contexts in which executive power is largest, least substantial, and somewhere between those polar extremes. Jackson maintained that the president exercises the most authority when proceeding with Congress' express or implied approval because the power includes all that the officer has and all that lawmakers delegate.[108] He described the second category as an intermediate one, where the chief executive proceeds absent an explicit legislative grant or denial, but where the president can rely on his or her actual authority alone. There is, however, a "twilight zone" where the chief executive and Congress might have concurrent power or the distribution of authority remains unclear.[109] In these situations, legislative "inertia, indifference or quiescence," as practical matters, could occasionally allow, and perhaps encourage, independent presidential efforts, and actual tests of power may reflect the "imperatives of events and contemporary imponderables," not "abstract theories of

104. *See id.* at 587–88. *See also* U.S. CONST. art. I, §§ 1, 8; U.S. CONST. art. II, § 3.

105. Black's application of separation of powers led Frankfurter to join the majority opinion, but he found the principle more complex and flexible than it seemed, and stated that varying views might have suggested different emphases and nuances that one decision could not capture; and thus, individual articulation was required to reach a common result. *See Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring).

106. *See* Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 187, 202–04 (Peter Brooks & Paul Gewirtz eds., 1996) (praising Jackson's *Youngstown* concurrence as the greatest opinion in the Court's history); Bryant & Tobias, *supra* note 37, at 406–18 (analyzing the concurrences); Katyal & Tribe, *supra* note 58, at 1274 (characterizing Jackson's analytical construct as "three now-canonical categories that guide modern analysis of separation of powers").

107. *See Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

108. *See id.* at 635. The president personifies the concept of federal sovereignty, so invalidation of an action undertaken would mean that the "Federal Government as an undivided whole lacks power." *Id.* at 636–37.

109. *See id.* at 637 (Jackson, J., concurring).

law."[110] The third grouping includes executive initiatives that conflict with express or implied legislative will. Presidential authority is at its nadir because the chief executive can invoke only the official's explicit powers in the Constitution minus any applicable congressional authority.[111] Justice Jackson admonished that, here, judges must closely assess executive assertions and honor exclusive power solely if courts have disabled legislators from acting on particular matters.[112] When Justice Jackson applied his three-pronged framework to the seizure, he quickly excluded the first category, as the government "conceded that no congressional authorization exists for this seizure,"[113] and the second, for lawmakers had not left seizure an open issue.[114] Thus, the initiative must be sustained under the third classification's severe restraints, and the justices could affirm the endeavor only by finding that seizure was within executive power and beyond Congress' purview.[115] Justice Jackson pledged to read flexibly the president's enumerated constitutional authority, and he surveyed the power claimed by reviewing the Executive Article's three clauses.[116] He concluded, however, that the steel-seizure effort originated in the president's will and was an "exercise of authority without law."[117]

Application of the analytical framework in *Youngstown* to the Bush Order suggests that the latter's authorization for indefinite detention and elimination of federal court review is unconstitutional.[118] The provisions fail the *Youngstown* test mainly because they violate recent expressions of legislative will regarding both matters.[119] The Constitution's text and

110. *Id.*

111. *See id.* at 637–38.

112. *See id.* (citation omitted). A claim so conclusive and preclusive requires scrutiny, as the constitutional system's equilibrium is at stake. *See id.* at 638. *See also* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 146–47 (1948) (Jackson, J., concurring) (scrutinizing "war power").

113. *Youngstown*, 343 U.S. at 638. This concession would also remove the support of many declarations and precedents that were proffered in relation to this category "and must be confined[] to this category." *Id.* (citation omitted).

114. *See id.* at 639.

115. *See id.* at 640.

116. *See id.* He rejected a "niggardly construction," as some clauses could become nearly unworkable and immutable by indulging no "latitude of interpretation for changing times." *Id.*

117. *See id.* at 655. For later invocation of *Youngstown*, especially in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), see Bryant & Tobias, *supra* note 37, at 420–23.

118. The Black opinion's laconic nature and its numerous, diverse concurrences complicate precise identification of the holding. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 671–73 (3d ed. 2000); Bryant & Tobias, *supra* note 37, at 425. *See also id.* at 425–26 (articulating the analytical framework in *Youngstown*).

119. *See supra* notes 66–95 and accompanying text. Indeed, the congressional developments since September 11, 2001 are even more powerful than those in *Youngstown* because they are clearer

history also show that Congress, not the executive, is the political branch with the power to prescribe federal court jurisdiction.[120] Accordingly, the Bush Order's indefinite detention- and jurisdiction-stripping features invade legislative prerogatives even more than the steel-seizure action.

b. A Word About *Quirin*

The evaluation above finds that *Youngstown* is the governing precedent for constitutional challenges to major provisos of the Bush Order. That analysis implies that *Quirin* is not controlling, and, indeed, has limited relevance, despite great reliance on it by the Administration. The Administration's dependence is misplaced for reasons in addition to the determination of unconstitutionality that Articles I and III and *Youngstown* compel. The Administration justifies military tribunals partly because they are modeled on the Roosevelt analogue, the legitimacy of which the Court sustained in *Quirin*. These arguments lack force. Earlier commissions that afforded such drastically cabined procedural protections as the Bush Order were used only when Congress had expressly approved them or declared war.[121] Here, lawmakers have instituted neither action. Thus, *Quirin* has restricted application.[122]

Moreover, the Roosevelt Proclamation was extremely limited to "sabotage, espionage or other hostile or warlike acts."[123] In sharp contrast, the Bush Order broadly prescribes offenses that tribunals may try as including violations of the "laws of war and other applicable laws,"[124] thereby extending the entities' scope beyond what *Quirin* approved.[125] In 1996, Congress also passed the War Crimes Act, which contemplates that

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and quite recent. For additional application of the analytical framework in *Youngstown*, see Bryant & Tobias, *supra* note 37, at 425–31.

120. *See supra* notes 61–64 and accompanying text.

121. *See* Dickinson, *supra* note 1, at 1420. *See also* Koh, *supra* note 11, at 339–40.

122. In 1941, Congress had declared war and had approved tribunals in its Articles of War. *See Ex parte* Quirin, 317 U.S. 1, 30 (1942). *See also* 10 U.S.C. § 821 (2000) (authorizing military tribunals). *But see* Bradley & Goldsmith, *supra* note 81, at 254–55 (finding sufficient authority to support modern tribunals).

123. *See* Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942). *See also Quirin*, 317 U.S. at 22–23.

124. Bush Order, *supra* note 5, at 57,833.

125. Congress has not declared war or authorized violations exceeding the laws of war. *See* Dickinson, *supra* note 1, at 1421; *supra* notes 10–11; *infra* notes 198–205 and accompanying text (suggesting that *Quirin* may also be limited because federal habeas corpus, international, and human-rights law were underdeveloped in 1942).

persons who commit statutorily defined war crimes will receive civilian trials.[126]

2. Detentions and War-on-Terrorism Litigation

a. *Quirin*

The executive branch and federal courts cite *Quirin* to support critical ideas that it cannot support, such as indefinite detention of United States citizens and broad judicial deference. Numerous phenomena, including the extraordinary wartime context, should limit the case's reach. Moreover, its author, Chief Justice Harlan Fiske Stone, intentionally wrote a restricted opinion, which some observers claim must be read narrowly.

The Facts of Quirin. The facts warrant much analysis, as they are so peculiar and deserve a confined reading.[127] After the United States declared war, Adolph Hitler mandated prompt action against America on its soil.[128] Germany developed a military- and propaganda-based plan that first required the destruction of bridges, factories, railroad stations, and department stores.[129] In spring 1942, experts instructed saboteurs on the use of detonators, explosives, and related measures at a training camp near Berlin.[130] Two teams of four saboteurs each then boarded submarines that deposited one group at a Long Island beach under cover of darkness on June 13, 1942, and the other in northern Florida on June 17.[131] Both teams' members landed, dressed wholly or partly in German Marine Infantry uniforms, and journeyed to major cities in civilian clothes.[132] Two

126. *See* 18 U.S.C. § 2441 (1996); Dickinson, *supra* note 1, at 1421. I combine below analysis of misplaced reliance on *Quirin* to support detentions and to litigate terrorism issues. In several major terrorism cases reviewed above, the DOJ and DOD placed much reliance on *Quirin*, while the cases challenging detentions and the judges deciding them cited *Quirin*. Some ideas reviewed in this textual paragraph show why *Quirin* cannot support broad notions, especially indefinite detention. There has also been no direct challenge to the Bush Order's constitutionality, for a military tribunal has yet to convene. I assessed related, relevant issues in treating *Youngstown* above.

127. *See Quirin*, 317 U.S. at 20–22; FISHER, *supra* note 2, at 1–42; RACHLIS, *supra* note 2, at 7–120; Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 62–63 (1980); David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 61–69 (1996).

128. *See Quirin*, 317 U.S. at 21. *See also* Danelski, *supra* note 127, at 61 (assessing Hitler's mandate). *See generally* FISHER, *supra* note 2, at 4; Cyrus Bernstein, *The Saboteur Trial: A Case History*, 11 GEO. WASH. L. REV. 131, 132 (1943) (assessing Germany's actions).

129. *See Quirin*, 317 U.S. at 21; Robert E. Cushman, *Ex parte* Quirin *et al—The Nazi Saboteur Case*, 28 CORNELL L.Q. 54, 55 (1942); Danelski, *supra* note 127, at 61, 63.

130. *See Quirin*, 317 U.S. at 21; Danelski, *supra* note 127, at 63. *See generally* FISHER, *supra* note 2, at 1–23.

131. *See Quirin*, 317 U.S. at 21; Cushman, *supra* note 129, at 54; Danelski, *supra* note 127, at 63.

132. *See supra* note 131. *See generally* FISHER, *supra* note 2, at 25–32.

saboteurs concluded that they would be saved by betraying the others, while one fully confessed to the Federal Bureau of Investigation ("FBI").[133] On June 27, all the saboteurs were in custody, and FBI Director J. Edgar Hoover announced their capture.[134]

On June 30, Roosevelt informed the Attorney General, Francis Biddle, that the saboteurs "are just as guilty as it is possible to be," and "offenses such as these are probably more serious than any offense in criminal law"; relatedly, Roosevelt stated that the "death penalty is called for by usage and by the extreme gravity of the war aim and the [nation's] very existence," and proposed that they "be tried by court martial."[135] Biddle, after consulting the Secretary of War, Henry Stimson, and the Army Judge Advocate General, Myron Cramer, urged that a military commission be convened to try the saboteurs.[136] Roosevelt issued a July 2 Executive Order creating a military tribunal, appointing the judges, prosecutors, and defense counsel, and prescribing procedures, as well as review of the trial record and any judgment or sentence by the commission.[137] The Order departed from Articles of War strictures by authorizing (1) admission of evidence with probative value for a reasonable person; (2) conviction and the imposition of a death-penalty sentence on a two-thirds (versus unanimous) vote; and (3) direct transmittal of the record, judgment, and sentence to the chief executive for review.[138] The same day, the President issued a Proclamation, ostensibly closing the federal courts to "persons who are subjects, citizens or residents of any nation at war with the United States . . . and are charged with committing, or attempting or preparing to

133. *See* Belknap, *supra* note 127, at 62; Bernstein, *supra* note 128, at 136–37; Danelski, *supra* note 127, at 64–65.

134. *See supra* note 133. The Federal Bureau of Investigation ("FBI") issued misleading press releases that suggested its diligence led to the arrests. This incident began "government control on information about" the case and its successful use for propaganda purposes. *See* Danelski, *supra* note 127, at 64–65. *See also* Belknap, *supra* note 127, at 62–63.

135. *See* Jonathan Turley, 'Quirin' *Revisited*, NAT'L L.J., Oct. 28, 2002, at A17.

136. *See* FISHER, *supra* note 2, at 48–50. Biddle thought that this approach would be rather expeditious, making it easier to prove the charge of violating the law of war and impose the death penalty. *See id.*; Belknap, *supra* note 127, at 63–64; Danelski, *supra* note 127, at 66. He also harbored secrecy concerns and wished to prevent the public from learning about the ease with which the saboteurs had landed on American soil and the FBI's inept behavior at the outset of World War II. *See* Danelski, *supra*, at 67. For more analysis of Biddle's concerns, see Belknap, *supra*, at 67–68; Katyal & Tribe, *supra* note 58, at 1280–81.

137. Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 2, 1942); Danelski, *supra* note 127, at 67.

138. Exec. Order No. 9185, *supra* note 137. *See* Danelski, *supra* note 127, at 67. Biddle told Roosevelt that the deviations "should save a considerable amount of time" but would also facilitate the saboteurs' conviction and imposition of the death penalty. *See* Danelski, *supra*, at 67.

commit sabotage, espionage . . . or violations of the law of war."[139] On July 3, Cramer filed charges with the military commission, stating that the eight saboteurs had violated the laws of war; Article 81 of the Articles of War, which involved relieving the enemy; Article 82, which implicated spying; and conspiracy to commit these offenses.[140] Five days later, the tribunal commenced the secret trial in a DOJ assembly room, and it continued for three weeks.[141] The saboteurs' counsel, Army Colonels Cassius Dowell and Kenneth Royall, believed that the Order and Proclamation lacked validity, and informed Roosevelt that they would seek habeas review, prompting his enraged response: "I won't hand them over to any United States marshal armed with a writ of habeas corpus."[142]

In late July, Biddle and Royall convinced the Supreme Court to hear the case, and Stone convened a special session.[143] The Court heard oral arguments over eight hours on July 29 and 30.[144] Before the initial argument, all the justices, except Douglas (who was en route), met in conference for a preliminary discussion, and Justice Owen Roberts stated that Biddle thought Roosevelt would execute the saboteurs regardless of the appeals' disposition.[145] The Court quickly decided the case, assembling less than a day after arguments to issue a terse per curiam order. Stone recounted the litigation's history and said that the justices would announce their disposition and later file a full opinion that explained their reasoning.[146] The order found that Roosevelt had constitutional power to create a military tribunal and try the saboteurs, who had "not shown cause for being discharged by writ of habeas corpus."[147]

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139. *See* Proclamation No. 2561, *supra* note 123. *See also Ex parte* Quirin, 317 U.S. 1, 22–23 (1942). *See generally* FISHER, *supra* note 2, at 50–53.

140. *See Quirin*, 317 U.S. at 23; Bernstein, *supra* note 128, at 142–43; Danelski, *supra* note 127, at 67.

141. The government stated that the commission was conducting the trial in secret for security reasons. *See* Belknap, *supra* note 127, at 66; *Espionage: 7 Generals v. 8 Saboteurs*, TIME, July 20, 1942, at 15.

142. *See* FRANCIS BIDDLE, IN BRIEF AUTHORITY 331 (1962); FISHER, *supra* note 2, at 56–59, 65–66; Danelski, *supra* note 127, at 68.

143. *See* FISHER, *supra* note 2, at 67–68; RACHLIS, *supra* note 2, at 188–89, 192, 243–46. The procedural history in the lower federal courts appears in *Quirin*, 317 U.S. at 19–20.

144. *See* Belknap, *supra* note 127, at 75. For a summary of the arguments proffered by the United States and by the petitioners, see *id.* at 70–75; Danelski, *supra* note 127, at 68–69, 70–71. *See generally* FISHER, *supra* note 2, at 89–108.

145. *See* Danelski, *supra* note 127, at 69.

146. *See id.* at 71. *See also* Belknap, *supra* note 127, at 76.

147. *Quirin*, 317 U.S. at 19; RACHLIS, *supra* note 2, at 212–13. The Court thus dismissed the petitioners' applications for habeas writs and affirmed the district court. *See Quirin*, 317 U.S. at 18–19.

The commission, which had recessed while the saboteurs appealed, promptly resumed.[148] On August 1, it heard closing arguments, and two days later, found all defendants guilty and recommended death sentences. The tribunal submitted the record directly to Roosevelt, who accepted most of the suggestions.[149] On August 6, the United States electrocuted six of the petitioners.[150] The President then sealed the case record for the remainder of the war.[151]

Stone agonized over the draft full opinion for two months.[152] On September 25, he circulated it and a memorandum, intimating that certain issues defense counsel raised in July had not been before the Court, yet urging that they be decided against the saboteurs.[153] For several weeks, Stone negotiated changes that would satisfy a few justices' concerns.[154] Stone then focused on the Articles of War provisos, over which the Court was evenly divided and regarding which he had written two drafts.[155] Justice Frankfurter unsuccessfully pursued support for the second.[156] On October 16, however, Justice Jackson circulated a memorandum that resembled a concurrence which troubled other members who had earlier agreed that unanimity was critical.[157] He believed the Court exceeded its powers "in reviewing the legality of the President's Order and that experience shows the judicial system unfitted to deal with matters in which we must present a united front to a foreign foe."[158] That action jeopardized unanimity and led Justice Frankfurter to pen his *Soliloquy*.[159] This

148. *See* RACHLIS, *supra* note 2, at 209, 212–13; Danelski, *supra* note 127, at 71.

149. The record was nearly 3000 pages. FISHER, *supra* note 2, at 181. President Roosevelt did commute the sentences proposed for the two saboteurs who defected. *See* Belknap, *supra* note 127, at 77; Danelski, *supra* note 127, at 72.

150. *See* Danelski, *supra* note 127, at 77. Roosevelt reportedly hoped that the military commission would recommend death by hanging. *See* WILLIAM D. HASSETT, OFF THE RECORD WITH F.D.R. 1942–1945, at 90, 97, 99 (1958).

151. *See* Bernstein, *supra* note 128, at 188–89; Danelski, *supra* note 127, at 72.

152. *See* Danelski, *supra* note 127, at 72–75. Stone posited an intuitive rationale for a decision, but his law clerks found "little authority" for this, and Stone could only cite analogous cases at numerous crucial points. *See id.* at 72.

153. Stone expressed concern about the Court being "in the unenviable position of having stood by and allowed six men to go to their death without making it plain to all concerned—including the President—that it had left undecided a question on which counsel strongly relied to secure petitioners' liberty." Belknap, *supra* note 127, at 78.

154. *See* Danelski, *supra* note 127, at 75–76.

155. *See id.* at 76–77.

156. Option two stated that the Articles of War did not bind the chief executive. *See id.* at 76.

157. They were Justices Stone, Frankfurter, and Black. *See id.*

158. *See* Belknap, *supra* note 127, at 79.

159. The document has attained considerable notoriety. *See* Memorandum from Felix Frankfurter, F.F.'s Soliloquy, to the justices of the U.S. Supreme Court (Oct. 23, 1942), *reprinted in* 5

imaginary exchange criticized the dead saboteurs for appealing and for igniting a divisive three-branch fight.[160] Once Justice Jackson read the missive, he decided against a concurrence,[161] and Justice Roberts urged compromise.[162] Stone continued "patient negotiations"[163] and announced the Court's decision on October 29, 1942.[164]

Analysis of the Quirin Opinion. The Court intentionally resolved the case on the narrowest grounds, stating as much expressly, and declined to treat many factual and legal questions. For example, Stone neither thoroughly scrutinized the claims against, and defenses proffered by, the saboteurs nor the processes that tested them. This review derived, in essence, from an agreement that rigorous scrutiny exceeded the Court's capacity, given the time constraints. The relevant facts were actually stipulated and undisputed,[165] and Stone did not address petitioners' "guilt or innocence."[166] The justices also left undecided some legal questions, such as whether Roosevelt could create the tribunal and whether Congress could limit the president's authority to treat enemy belligerents, mainly because Congress had "authorized trial of offenses against the law of war before such commissions."[167]

The Court first assessed the government's contention that Roosevelt's Proclamation prevented the saboteurs from seeking federal court review because they were "enemy aliens" who had engaged in the behavior recounted above.[168] Notwithstanding the document's specific words, which purported to eliminate judicial scrutiny, the justices reviewed the petitioners' habeas writs.[169] Stone admonished that federal courts could

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GREEN BAG 2D 438, 438 (2002) [hereinafter F.F.'s Soliloquy]. *See also* G. Edward White, *Felix Frankfurter's "Soliloquy" in Ex parte* Quirin, 5 GREEN BAG 2D 423, 432–36 (2002).

160. *See* F.F.'s Soliloquy, *supra* note 159, at 439. *See also* Danelski, *supra* note 127, at 77–78. The imaginary exchange also beseeched the Court through a patriotic plea against creating an ethereal constitutional debate when America was at total war. *See id.*

161. *See* Danelski, *supra* note 127, at 78. *See generally* EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION (1947) (discussing the concept of "Total War" to which Justices Frankfurter and Jackson alluded).

162. *See* Danelski, *supra* note 127, at 78.

163. *See id.*

164. He ultimately secured a resolution in which his colleagues agreed to disagree about the rationale. *See id.* at 78–79. *See also Ex parte* Quirin, 317 U.S. 1, 1, 18 (1942); *infra* notes 184–87.

165. *See Quirin*, 317 U.S. at 20; *supra* notes 128–35 and accompanying text.

166. *Quirin*, 317 U.S. at 25. For example, the Supreme Court did not resolve the question of whether one of the saboteurs had actually lost his United States citizenship. *See id.* at 37–38.

167. *Id.* at 29, 47.

168. *Id.* at 24–25; *supra* notes 128–35 and accompanying text.

169. According to the Court: "[T]here is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case." *Quirin*, 317 U.S. at 25. *See In re*

overturn petitioners' trial and detention—which the President had ordered by exercising Commander-in-Chief authority in wartime—only if clearly convinced that the Constitution or statutes were violated.[170] The Court canvassed Article I and II powers to provide for the common defense and found that the president has broad authority to wage war declared by Congress and to effectuate all statutes that prescribe war's conduct, as well as define and punish "offenses against the law of nations."[171] Stone then asked "whether any of the acts charged [were] an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial[,]" and he ascertained that "[b]y universal agreement and practice, the law of war" distinguishes lawful and unlawful combatants: "[The former] are subject to capture and detention as prisoners of war by opposing military forces."[172] Unlawful combatants, such as the enemy who without uniform comes secretly across military lines to wage war by destroying life or property, are "offenders against the law of war subject to trial and punishment by military tribunals."[173] The justices so classified the saboteurs, finding the initial allegation's first specification adequate to "charge all the petitioners with the offense of unlawful belligerency, trial of which" was within the commission's jurisdiction.[174] The Court said that they were not "any the less belligerents" because some were United States citizens or had not "actually committed or attempted to commit any act of depredation," or entered an area of active military operations.[175]

Stone next assessed the merits of petitioners' substantive claims that they were entitled to "presentment or indictment of a grand jury" by the Fifth Amendment and to a civil court jury trial by Article III and the Sixth Amendment.[176] "[L]ong-continued and consistent interpretation" meant the provisos did not "extend[] the right to demand a jury to trials by military commission, or . . . require[] that offenses against the law of war

Yamashita, 327 U.S. 1, 9 (1946) (stating that "Congress . . . has not withdrawn [jurisdiction], and the Executive" could not unless habeas corpus were suspended).

170. *See Quirin*, 317 U.S. at 25.

171. *Id.* at 25–29. The Court's survey of the Articles of War found that Congress had expressly accorded military tribunals "jurisdiction to try offenders or offenses against the law of war in appropriate cases." *Quirin*, 317 U.S. at 28. *See* TRIBE, *supra* note 118, at 670; *supra* note 10 and accompanying text.

172. *Quirin*, 317 U.S. at 29–31.

173. *Id.* at 31 (citation omitted).

174. *Id.* at 36.

175. *Id.* at 37–38. According to the Court: "The offense was complete when" each person who was an enemy belligerent passed or went behind American "military and naval lines and defenses [wearing] civilian dress and with hostile purposes." *Id.* at 38. *See* TRIBE, *supra* note 118, at 300 n.185.

176. *See Quirin*, 317 U.S. at 38–45.

not triable by jury at common law be tried only in the civil courts."[177] The Court assumed that some of those offenses are "constitutionally triable only by a jury,"[178] a view it had articulated in *Ex parte Milligan*.[179] Petitioners argued that *Milligan* held that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[180] Because Milligan "was not an enemy belligerent," Stone distinguished this opinion, apparently restricting *Milligan* to its facts and finding the decision inapplicable to the present case.[181]

The Court did not meticulously designate the ultimate scope of the tribunal's jurisdiction because the saboteurs, "*upon the conceded facts*, were plainly within those boundaries . . . ."[182] Thus, the justices held only that the behavior at issue was an "offense against the law of war which the Constitution authorized to be tried by military commission."[183] The Court was "unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ,"[184] but lacked a majority who agreed on the "appropriate grounds for decision."[185] Certain justices thought that "Congress did not intend the Articles of War to govern a Presidential military commission convened for [resolving] questions relating to admitted enemy invaders,"[186] even as others believed that specific Articles covered this tribunal but did not preclude the measures Roosevelt prescribed or used.[187]

My analysis shows many factors that warrant limiting *Quirin*. For example, the case evinces the speed with which the government proceeded and the Court ratified the commission's deliberations, and the difficulties of rationalizing the full opinion once the United States had used a hastily written, laconic per curiam order to execute six petitioners.[188] Stone

177. *Id.* at 40. *See generally* TRIBE, *supra* note 118, at 299–300 (assessing *Quirin* and *Milligan*).

178. *Quirin*, 317 U.S. at 29.

179. For an assessment of *Quirin* and *Milligan*, see REHNQUIST, *supra* note 97, at 75–77; Katyal & Tribe, *supra* note 58, at 1292.

180. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121 (1866). *See also Quirin*, 317 U.S. at 45.

181. *See Quirin*, 317 U.S. at 45–46. *See generally* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 408–15 (5th ed. 2003) [hereinafter HART & WECHSLER]; Belknap, *supra* note 127, at 85; Katyal & Tribe, *supra* note 58, at 1277–87.

182. *See Quirin*, 317 U.S. at 45–46 (emphasis added).

183. *See id.* at 46.

184. *See id.* at 47.

185. *See id.*

186. *See id.*

187. *See id.*

188. *See id.* at 18.

described his justificatory effort as a "mortification of the flesh,"[189] and the Court differed on the result's reasoning.[190] *Quirin* manifests the wartime setting when, for instance, national security interests have eroded, and often trumped, civil liberties.[191] The opinion also reflects improper exogenous pressures, most critically from Roosevelt, to legitimate rapid trial, prompt conviction, and grave punishment;[192] it reflects internal ones, too, mainly from Justice Frankfurter,[193] who later admitted that *Quirin* was "not a happy precedent."[194] Twenty years after the case was issued, Justice Douglas bemoaned the experience, stating that it showed "all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once [we] search for the grounds . . . sometimes those grounds crumble."[195] Moreover, the decision was exceptional and should be restricted to its unusual facts because the Court expressly stated that its holding was very narrow.[196] Many observers have suggested that *Quirin* be sharply confined, and a few have analogized the opinion to *Korematsu v. United States*, the discredited ruling that allowed the internment of Japanese Americans.[197]

b. Other Reasons for Limiting *Quirin*

There are additional, major ways in which *Quirin* is limited, essentially warranting the opinion's relegation to an anachronistic period piece, or at most, an antiquated World War II relic. It is important to understand that the 1942 timeframe when the Supreme Court resolved *Quirin* substantially predated the dramatic expansion of federal habeas corpus jurisprudence, as well as international law and international human-rights law.

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189. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 659 (1956); Danelski, *supra* note 127, at 72.

190. *See supra* notes 186–87 and accompanying text.

191. *See* REHNQUIST, *supra* note 97, at 75; TRIBE, *supra* note 118, at 670; Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 191–93 (1962). Justice Jackson even said that the Court had exceeded its authority. *See* Belknap, *supra* note 127, at 79.

192. *See, e.g.*, FISHER, *supra* note 2, at 50–53; Katyal & Tribe, *supra* note 58, at 1291; *supra* notes 135–39.

193. Most notable was F.F.'s Soliloquy, *supra* note 159; *see supra* note 159.

194. Danelski, *supra* note 127, at 80; White, *supra* note 159, at 436.

195. Danelski, *supra* note 127, at 80.

196. *See Ex parte* Quirin, 317 U.S. 1, 45–46 (1942); *supra* notes 166–67, 182–83 and accompanying text. For similar articulations of the precept that the Court should narrowly draft opinions, see *Dames & Moore v. Regan*, 453 U.S. 654, 660–61 (1981), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

197. *See* Katyal & Tribe, *supra* note 58, at 1290–91; Turley, *supra* note 135. *See also* Korematsu v. United States, 323 U.S. 214, 219 (1944); Warren, *supra* note 191, at 193 n.33.

Habeas Corpus. Close analysis of *Quirin* and its historical setting belies the Administration's repeated contention that the justices only scrutinized whether the military tribunal's *jurisdiction* was lawful.[198] The Court framed the issues vis-à-vis the commission's jurisdiction over the saboteurs and the alleged offenses, but it resolved on the merits petitioners' substantive claims that tribunal procedures violated their Fifth and Sixth Amendment rights and the Articles of War. Moreover, the litigants' broad factual stipulation vitiated any need for judicial inquiry into those facts or their proof.[199] Even if the *Quirin* Court merely addressed the issue of jurisdiction, in the narrowest sense,[200] the opinion could not substantiate the analogous confinement of federal judicial review, which scrutinizes detention or punishment under the Bush Order. Assuming that *Quirin* required circumscribed review, this feature must be modernized to reflect the substantial evolution of federal habeas corpus jurisprudence since 1942.

The law that governed the scope of federal habeas corpus scrutiny the year *Quirin* was issued narrowly cabined review.[201] Federal courts, in habeas proceedings at that time and from the nation's origins, essentially undertook a "jurisdictional inquiry," which meant conviction by a court with valid jurisdiction ended the matter.[202] Only a decade after *Quirin*, when the justices decided cases such as *Brown v. Allen*,[203] did the Court

198. *See supra* notes 165–97 and accompanying text.

199. *See, e.g.*, Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 607 (S.D.N.Y. 2002) (observing that the precedential significance of *Quirin* is limited by the parties' factual stipulation).

200. I recognize that the Court did not scrutinize the substantive claims against, and defenses of, the petitioners or the procedures used to test them, mainly because the parties agreed that such review was beyond the Court's capacity, given the case's temporal context. *See supra* notes 165–66 and accompanying text.

201. *See* HART & WECHSLER, *supra* note 181, at 1364–68 (assessing the debate over the writ's scope). Leading and often conflicting commentaries on this history include WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court As Legal Historian*, 33 U. CHI. L. REV. 31 (1965); Dallin H. Oaks, *Legal History in the High Court: Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993).

202. Leading cases that articulate the "jurisdictional rule" in *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830), include *Johnson v. Zerbst*, 304 U.S. 458, 465–67 (1938), *Moore v. Dempsey*, 261 U.S. 86, 91–92 (1923), and *Ex parte Siebold*, 100 U.S. 371, 375 (1879).

203. 344 U.S. 443 (1953). *See* CHEMERINSKY, *supra* note 62, at 922; Eric M. Freedman, Brown v. Allen*: The Habeas Corpus Revolution That Wasn't*, 51 ALA. L. REV. 1541 (2000) (affording a comprehensive assessment of *Brown v. Allen*). *Waley v. Johnston*, 316 U.S. 101 (1942), may have departed from *Watkins*. Later precedent and contemporaneous commentary suggest otherwise,

abandon this sharply restricted habeas corpus jurisprudence and embark on its dramatic expansion. Now, the writ is generally available to remedy constitutional mistakes that infect convictions.[204]

International Law. The second principal way that *Quirin* is limited concerns the remarkably underdeveloped condition of international law and human-rights law when the determination was issued.[205] For instance, the World War II ruling predates the International Covenant on Civil and Political Rights and the Geneva Conventions (treaties to which the United States is a party), as well as long-established tenets of customary international law that involve due process standards.

In sum, members of the Bush Administration and the federal judiciary have misplaced reliance on certain domestic case law, especially *Quirin*. Part III, therefore, proffers numerous suggestions to address the issues that terrorism litigation will raise, in part, by urging that executive- and judicial-branch officials accord relevant precedent the type of nuanced treatment expressly and implicitly mentioned above.

III. SUGGESTIONS FOR THE FUTURE

A. MILITARY COMMISSIONS

When the Bush Administration decides to prosecute someone in a military tribunal, and that individual challenges the tribunal's constitutionality, the federal judge who entertains this dispute should resolve the matter pursuant to numerous critical principles. Most important, the president does not have authority to eliminate federal court jurisdiction, a determination compelled by the Constitution and *Youngstown*. Military commissions, however, may be valid in particular contexts (e.g., extraterritorial prosecutions that result from declared wars). Articles I and III of the Constitution, in clear terms, provide that Congress, not the executive, is the political branch with power to establish federal courts and prescribe their jurisdiction. *Youngstown* is the controlling precedent. According to the majority opinion, the chief executive lacks authority to legislate in areas specifically delegated to Congress, even in national emergencies, and the major concurrence finds this power at its

however. *See* Sunal v. Large, 332 U.S. 174, 177 (1947); Alexander Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U. L. REV. 26, 40–46 (1945).

204. A classic example is *Fay v. Noia*, 372 U.S. 391, 398–99 (1963). *See also* CHEMERINSKY, *supra* note 62, at 906–07.

205. *See* Dickinson, *supra* note 1, at 1421–32; *supra* notes 12–13 and accompanying text.

nadir when invoked absent an explicit grant and against clearly stated legislative will.

Ex parte Quirin correspondingly warrants quite restricted application. The Court, in express terms, did not resolve whether the president acting alone could create military tribunals, but premised its decision—holding that the Roosevelt commission was valid—substantially on Congress' war declaration and its specific authorization for tribunals in the Articles of War. Many other phenomena, including the case's peculiar facts, its narrow holding, and the wartime context, require sharply limiting *Quirin*. In short, the Constitution and *Youngstown* dictate the conclusion that the chief executive lacks power to nullify federal jurisdiction or to deny individuals accused of terrorism federal court access.

B. WAR-ON-TERRORISM LITIGATION AND DETENTION

When federal judges address war-on-terrorism litigation, they should resolve these cases pursuant to several important tenets. Most significant, courts should recognize that the Bush Administration and a few judges have invoked *Quirin* for propositions (such as broad judicial deference to executive-branch detention decisions) that the opinion cannot support, and courts must cabin its application for numerous reasons. First, *Quirin* involved unique facts that were virtually all uncontested. Second, a number of phenomena make the opinion and its legal analysis vulnerable to criticism.[206] Moreover, Stone intentionally and expressly limited the decision and its holding, and the justices could not agree on a rationale. Courts should also reject expansive invocation of *Quirin* for notions like judicial acquiescence to presidential detention decisionmaking. They must realize that the Court did exercise jurisdiction, despite the Roosevelt Proclamation that purportedly barred it, and the justices resolved on the merits petitioners' substantive claims under the Fifth and Sixth Amendments and the Articles of War.

Quirin also deserves narrow application because the decision's 1942 issuance substantially preceded burgeoning growth in federal habeas corpus law. Federal judges must appreciate that the writ's expansion by the Supreme Court has modified *Quirin*, and they should clearly reject this obsolete feature of the opinion when addressing the federal habeas petitions the Bush Order will engender. Federal habeas corpus law's character and significance have been dramatically expanded over the last sixty years, and

206. *See, e.g., supra* notes 188–97 and accompanying text.

that development included broadened interpretation of federal constitutional protections accorded criminal defendants under the Warren Court. Illustrative of contemporary use of federal habeas corpus law are allegations that state-appointed counsel furnished ineffective assistance[207] and that police secured self-incriminating statements in violation of the requirements imposed by *Miranda v. Arizona*.[208]

These examples of the writ's modern application do not necessarily suggest that a defendant whom a military tribunal lawfully tries will have those or other constitutional protections. A federal court that exercises jurisdiction over a habeas petition of someone tried in a commission, however, does possess the requisite authority for deciding on the merits constitutional challenges to tribunal operation and must not be deterred by an outmoded allusion to *Quirin*. Thus, a party might claim that admission of questionable evidence contravened the individual's Fifth Amendment right to "due process of law,"[209] or that the person's conviction lacked support in constitutionally adequate evidence[210] or was premised on self-incriminating statements procured in a coercive manner.[211] The lenient evidentiary criteria that the DOD Order provides mean that litigants promise to raise these issues.[212] Defendants will pursue many additional questions. Federal judges facing the issues in the context of a habeas corpus petition otherwise within their statutory jurisdiction should resolve them and must not be stymied by anachronistic references to *Quirin*.

In short, *Quirin* prescribes meaningful federal court review to the maximum degree allowed by relevant habeas corpus law, and judiciously admonishes against unwarranted third branch intrusion in executive national security actions. Despite the justices' lucid recognition of the critical wartime situation in which they ruled, the Court resolved constitutional challenges to the presidential initiative consistent with its judicial role.

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207. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 367 (2000); Kimmelman v. Morrison, 477 U.S. 365, 382–83 (1986).

208. *See* Winthrow v. Williams, 507 U.S. 680, 682–83 (1993); Miranda v. Arizona, 384 U.S. 436, 468–74 (1966).

209. U.S. CONST. amend. V. The defendant might specifically claim that the evidence was inherently unreliable or that there was no meaningful opportunity for cross examination. The Administration's reliance on ex parte affidavits in *Hamdi* and *Padilla* may presage their use in commissions. *See* Cole, *supra* note 8, at 977.

210. *See* Fiore v. White, 531 U.S. 225, 228–29 (1999).

211. *See Winthrow*, 507 U.S. at 682–84.

212. DOD ORDER, *supra* note 5, § 6(D)(1), at 9. *See supra* note 11 and accompanying text (suggesting that *Quirin* narrowly applies today because Congress declared war and expressly authorized military tribunals).

Another reason for federal judges to accord *Quirin* narrow treatment is that the opinion's 1942 publication predated the great expansion in international and human-rights law over the ensuing six decades.[213] For example, judges should enforce, when applicable, the obligations imposed by international treaties to which the United States is a party. Courts could also invoke the due process strictures that have evolved in international humanitarian law since 1942.

The war-on-terrorism litigation thus far provides concrete examples of these ideas. For instance, even the Fourth Circuit, which has most broadly read *Quirin*, seemed to denigrate the government's argument that "courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained" because judges have a "constitutionally limited role."[214] The appellate court initially restated the ideas by observing that the United States "submits that we may not review at all its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word,"[215] and then rejected the government's motion: "In dismissing, we ourselves would be summarily embracing a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say so."[216] District Judge Robert Doumar, who first resolved the *Hamdi* case, essentially cabined *Quirin* and apparently rejected all resort to it by the government. For example, "before the government had time to respond to the petition, the district court appointed Public Defender Frank Dunham counsel for the detainee and ordered the government to allow the Defender unmonitored access,"[217] "intimated that the government was possibly hiding disadvantageous information from the court," and "ordered the government to turn over" a significant amount of material it had gathered on Hamdi.[218] Judge Doumar actually used *Quirin* as a foil against the United States.[219] Moreover, District Judge Michael Mukasey,

213. *See supra* notes 12–13, 205 and accompanying text. *But see supra* notes 48–49.

214. Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002) (quoting the Government's brief).

215. *Id.*

216. *Id. Contra supra* notes 46–48 and accompanying text.

217. Hamdi v. Rumsfeld, 316 F.3d 450, 460, 462 (4th Cir. 2003).

218. *Id.* The latter two events occurred during an August 2002 hearing. To be sure, the Fourth Circuit rejected these actions. *See id.* at 476.

219. Judge Doumar asked "what, if any, constitutional protections Hamdi was entitled to," and the government's lawyer "responded that the Constitution applied to the same extent as it did to the individual who was alleged to be an American citizen in the *Quirin* case." *See* Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 532 (E.D. Va. 2002). "Upon further questioning," the attorney conceded that this person "was afforded access to counsel and the opportunity to defend himself before a military

who decided *Padilla*, recognized that *Quirin* offered "no guidance regarding the standard to be applied in making the threshold determination that a habeas corpus petitioner is an unlawful combatant [b]ecause the facts in *Quirin* were stipulated."[220]

C. ADDITIONAL GUIDANCE

Several phenomena frustrate efforts to afford very particularized, affirmative guidance for federal judges who will confront and must resolve the myriad issues future war-on-terrorism litigation will generate.[221] Notwithstanding these complications, it is possible to formulate a number of recommendations principally by extracting ideas from the ways in which federal courts have addressed terrorism cases and by speculating about future litigation.

For instance, the judiciary might defer less to, and scrutinize more carefully, governmental designations of individuals as enemy combatants because that classification has such profound consequences. Judge Doumar's treatment in *Hamdi* is illustrative. The trial court "asserted that it was 'challenging everything in the Mobbs' declaration' and that it intended to 'pick it apart' 'piece by piece[,]'" "repeatedly referred to information it felt was missing," filed an opinion finding that the declaration fell "far short of supporting Hamdi's detention," and ordered the United States to provide information it had collected about the detainee.[222] A concomitant of this approach would be imposing a review standard for these governmental designations that is comparatively rigorous, one that is at least stricter than the quite low "some evidence" criterion articulated and employed in *Padilla*.[223]

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tribunal"; Doumar, however, found it apparent that Quirin received a "significantly broader measure of due process than Hamdi has received thus far," in part by being confined to the Norfolk Naval Brig without counsel. *Id.* at 532–33.

220. *See* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 607 (S.D.N.Y. 2002). *See also Ex parte* Quirin, 317 U.S. 1, 19 (1942).

221. First, one cannot predict what issues will arise, so guidance must necessarily be general. Second, experts more knowledgeable than I can better forecast the issues. Third, some guidance would be the opposite of the earlier admonitions about misplaced reliance, such as applying *Quirin* less broadly, and, thus, are obvious or redundant.

222. *See Hamdi*, 316 F.3d at 462. To be sure, the Fourth Circuit rejected this approach. It had earlier articulated a less deferential view, but ultimately applied such minimalist scrutiny as to constitute "no meaningful judicial review." *See* Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002); *supra* notes 43–48 and accompanying text.

223. *See supra* note 53 and accompanying text.

At a higher level of generality, judges may want to protect with greater vigor individuals' constitutional rights, or at least strike a balance that is calibrated somewhat more toward the civil liberties (versus national security) end of the spectrum. For example, courts might provide detainees access to counsel and impose conditions as warranted, following an approach similar to that charted by the district judge who decided *Padilla*.[224] In this context and others, the bench may wish to reach the merits of substantive claims under the Constitution, particularly the Fourth, Fifth, and Sixth Amendments.[225] Several additional war-on-terrorism cases illuminate the type of balance that judges might consider. For instance, the Sixth Circuit recognized that the First Amendment "confers a public right of access to deportation hearings."[226] District Judge Gladys Kessler similarly found that the Freedom of Information Act required the government to "release the identities of all individuals detained [in its] September 11 investigation," with certain limited exceptions.[227] District Judge Shira Scheindlin issued several opinions that implicated detainee, Osama Awadallah. The most important one held that the "material witness statute" did not authorize his detention for a grand jury investigation, and its violation required suppression of defendant's grand jury testimony.[228]

CONCLUSION

Laura Dickinson significantly enhances understanding of detentions and military tribunals while championing international tribunals. The realpolitik that Dickinson criticizes, however, now seems ascendant, even if misguided, as witnessed most recently in the Iraqi conflict. The present milieu necessitates scrutiny of domestic case precedent and its appropriate invocation and use. My response attempts to show that the Bush Administration and several judges have invoked opinions, such as *Quirin*,

224. *See Padilla*, 233 F. Supp. at 599–605; *supra* note 55 and accompanying text. This seems preferable to allowing detainees, such as Hamdi, to languish in military prisons pending the conflict's end.

225. The *Padilla* court expressly did not premise access to counsel on the Sixth Amendment. *See* 233 F. Supp. 2d at 599–605.

226. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 682–83 (6th Cir. 2002). *But see* North Jersey Media Group v. Ashcroft, 308 F.3d 198, 201 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

227. *See* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 100 (D.D.C. 2002). A three-judge panel of the D.C. Circuit reversed and deferred substantially to the "executive's judgment in prosecuting the national response to terrorism," citing the *Hamdi* and *North Jersey Media Group* cases. *See* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003). Judge David Tatel authored a vociferous dissent. *See id.* at 937. *See also* 5 U.S.C. §§ 551–52 (1994).

228. *See* United States v. Awadallah, 202 F. Supp. 2d 55, 57, 82 (S.D.N.Y. 2002). *But see In re* Application of U.S. for a Material Witness Warrant, 213 F. Supp. 2d 287, 288 (S.D.N.Y. 2002).

for propositions that lack support. Future application of these cases, therefore, must be sharply circumscribed.