2004

Punishment and the War on Terrorism

Carl W. Tobias
University of Richmond, ctobias@richmond.edu

PUNISHMENT AND THE WAR ON TERRORISM

Carl Tobias[*]

INTRODUCTION

Certain features of the war on terrorism impose novel and controversial punishment schemes. For example, President George W. Bush has unilaterally invoked executive authority to detain thousands suspected of terrorism over protracted times and to create military tribunals. The government has imprisoned two American citizens, denying them access to counsel for more than a year, and it has incarcerated 650 individuals without process at Guantánamo Bay. Bush administration officials recently announced that they would try some Guantánamo detainees in military commissions; however, these bodies will accord fewer protections than the civilian system or even courts-martial under the Uniform Code of Military Justice.

The federal judiciary has differed about the government's power to confine those incarcerated. A three-judge panel on the United States Court of Appeals for the Fourth Circuit sustained one citizen's detention and acquiesced in the President's designation of him as an enemy combatant. However, two Second Circuit judges ruled that the executive possessed insufficient authority for holding another citizen so designated. A D.C. Circuit panel unanimously found the court lacked jurisdiction over many Guantánamo detainees, yet two Ninth Circuit panel members entertained a petition for a writ of habeas corpus which one prisoner filed. The Supreme Court recently granted certiorari on the Second, Fourth, and D.C. Circuit opinions, and it may well review the Ninth Circuit appeal, even though the Justices declined to hear several cases that involve the war on terrorism.

Indefinite detentions and military tribunals warrant legal, policy, and theoretical criticism. As general matters, the practices undermine the rule of law domestically by violating fundamental tenets in the United States Constitution and overseas by flouting established international law precepts. The actions specifically contravene separation of powers among the federal government's tripartite branches,

[*] Williams Professor, University of Richmond School of Law. I wish to thank Raquel Aldana, Chris Bryant, and Peggy Sanner for valuable suggestions; Judy Canter and Pam Smith for processing this piece; and Russell Williams for generous, continuing support. Errors that remain are mine.

as well as infringe on essential rights of persons held and the defendants whom military commissions will try. The conduct also resembles other nations' behavior that America has vociferously criticized. The war on terrorism, thus, has fostered the creation of disputed punishment regimes that do not account for their impacts and that overemphasize security vis-à-vis liberty. These ideas, especially Supreme Court willingness to address the most important litigation pitting national security against civil liberties in half a century, illustrate that punishment and the war on terrorism merit scrutiny, which this Article undertakes.

The first section descriptively assesses the new, contested punishment systems the Bush administration has used to fight the war on terrorism. I then explore the benefits and costs of the measures whose principal functional justification is national security, but determine that the techniques are not responsive to their adverse consequences. For instance, the regimes may have enhanced security yet have undercut detainees' civil liberties and will compromise the rights of individuals prosecuted before the military tribunals. In short, the detriments, namely which relate to civil liberties, outweigh the advantages, particularly the ones that implicate security. The war on terrorism's continuation will exacerbate this ratio, as the government detains, and military commissions try, more people. The third section, accordingly, proffers recommendations for the future. Illustrative is using federal courts or international tribunals, not military commissions, to prosecute defendants accused of terrorism. These options would reduce authority's concentration in the Executive Branch, will undermine civil liberties and global relationships less, and could protect security as much.

I. DESCRIPTIVE ASSESSMENT

The origins and development of the unique and controversial punishment schemes that the Bush administration has implemented while responding to the September 11, 2001, terrorist strikes deserve limited treatment here, in part as that background has received analysis elsewhere.[1] Nonetheless, a comparatively thorough evaluation is warranted because this should increase appreciation of

[1] *See, e.g.*, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (analyzing the different treatment by the Bush administration of non-citizens and citizens in the wake of September 11); 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) (discussing the Bush administration's response to September 11 in terms of domestic and international law); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002) (analyzing the Bush administration's approach to the September 11th attacks in a historical context).

significant phenomena. First, it will improve understanding of the realist critique, which holds that compliance with the letter of international law would erode United States and world security interests and, therefore, justifies suspending the requirements that traditionally apply. Second, the assessment should improve comprehension of how detentions and military tribunals violate the rule of law at home as well as globally.

A. Military Commissions and Federal Court Jurisdiction

On November 13, 2001, President Bush promulgated an Executive Order which authorized creation of military tribunals and ostensibly denied federal court access to individuals tried before them.[2] The President and upper-echelon administration officials relied substantially on pragmatic ideas, while they asserted that many reasons support discontinuing the strictures which typically govern criminal responsibility's adjudication. These include federal court trials' expense, time and risks for judges and jurors, the lack of necessity to protect terrorists' rights, the available evidence not meeting stringent evidentiary requirements and security mandating it be kept secret, and detentions and commissions according government necessary control.[3] To the extent the Bush administration has invoked law, the November order and its attempted elimination of federal court jurisdiction are based on *Ex parte Quirin*, the Second World War case implicating the Nazi saboteurs;[4] powers delegated by Article II in the Constitution;[5] and Congress's September 2001 Authorization for Use of Military Force Joint Resolution.[6]

---

[2] *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, 57,835–36 (Nov. 16, 2001) [hereinafter Bush Order] ("With respect to any individual subject to this order—(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding . . . [in] any court of the United States . . . ."); *see also* DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (2002) [hereinafter DOD ORDER] (listing crimes that may be tried by military commissions and establishing military commission jurisdiction over these crimes), *available at* http://www.dtic.mil/whs/directives/corres/mco/mco1.pdf.

[3] *See, e.g.*, Cole, *supra* note 1, at 977 ("[T]hey permit the use of classified evidence, presented *ex parte* and *in camera*, to convict suspects . . . ."); Dickinson, *supra* note 1, at 1437; Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328 (2002); *see also infra* notes 7–22 and accompanying text. *But see* Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002).

[4] *Ex parte* Quirin, 317 U.S. 1 (1942) (holding military tribunals constitutional); *see* Bush Order, *supra* note 2 (citing *Quirin*); DOD ORDER, *supra* note 2 (citing *Quirin*).

[5] U.S. CONST. art. II.

[6] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). *See generally* LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW (2003) (providing a comprehensive analysis of *Quirin* and the joint resolution).

President Bush, cabinet members, and numerous other high-ranking public officials have variously depended on *Quirin*, as well as practical concepts involving national security. For example, when the President substantiated the Executive Order, he mentioned *Quirin* in recounting how President Franklin D. Roosevelt ("FDR") had instituted a World War II commission, and President Bush described "[n]on-US citizens who plan and/or commit mass murder" as "unlawful combatants," asserting military commissions should try them if this promoted the "national-security interest."[7] On November 14, 2001, Vice President Dick Cheney similarly alluded to *Quirin* and the use of military tribunals since the founding as the entities' principal justifications and stated they could try those responsible for the terrorist attacks, who do not "deserve the same guarantees" as American citizens "going through the normal judicial process."[8]

That day, Attorney General John D. Ashcroft offered analogous notions by invoking the commissions' long tradition and High Court recognition, most pertinently in *Quirin*, that these tribunals are legitimate. He also argued that "foreign terrorists who commit war crimes against the United States . . . are not entitled to" our constitutional protections.[9] On December 6, Ashcroft testified that *Quirin* approved commission use "in the United States against enemy belligerents," and the Court exercised "habeas corpus jurisdiction to decide" on its validity and "whether the belligerents were actually eligible for trial under the commission."[10] The Department of Justice ("DOJ") Assistant Attorneys General, who led the war on terrorism, have relied upon *Quirin*. For instance, the Assistant Attorney General for the Criminal Division, Michael Chertoff, defended the Bush

---

[7] Wayne Washington, *FDR Move Cited in Tribunals*, BOSTON GLOBE, Dec. 2, 2001, at A1; *see* Mike Allen, *Bush Defends Order for Military Tribunals*, WASH. POST, Nov. 20, 2001, at A14 (affording the allusion). President Bush later supported tribunals by asking Americans to remember that those who would be tried "are killers. They don't share the same values we share." President's Exchange with Reporters in Alexandria, Virginia: Military Tribunals, 38 WEEKLY COMP. PRES. DOC. 469 (Mar. 25, 2002), *available at* http://www.gpoaccess.gov/wcomp/v38no12.html; *see* Jonathan Turley, *Military Tribunal Rules Put Our Values to Test*, BALT. SUN, Mar. 25, 2002, at 7A.

[8] Vice President Richard Cheney, Address to the United States Chamber of Commerce (Nov. 14, 2001) (transcript available at http://www.whitehouse.gov/news/releases/2001/11/20011114-6.html); *see also 60 Minutes II* (CBS television broadcast, Nov. 14, 2001) (transcript available at http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011114.html). *See generally* Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433 (2002) (examining the legality and wisdom of the Bush administration's use of military tribunals to combat terrorism).

[9] Attorney General John Ashcroft & INS Commissioner Ziglar Announce INS Restructuring Plan (Nov. 14, 2001), http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_14.htm.

[10] *Anti-Terrorism Policy: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of John Ashcroft, U.S. Attorney General, recounting the commissions' venerable history), 2001 WL 1559002.

Order by claiming that its language was "virtually identical" to that in the Roosevelt proclamation and order, tribunals enjoy a long history, and the Court found them constitutional in *Quirin*.[11] The Assistant Attorney General for the Office of Legal Policy, Viet Dinh, has relied on commissions' pedigree, mentioned how FDR had convened the bodies, and invoked *Quirin* to argue the "Court has unanimously upheld" their legitimacy.[12] Department of Defense ("DOD") Secretary Donald Rumsfeld supported the Bush and DOD Orders by remarking that tribunals have been used in wartime since the nation's origins, Roosevelt had adopted them, and the "Supreme Court upheld" the entities' validity in *Quirin*.[13] The DOD General Counsel, William J. Haynes, II, depended on *Quirin* to justify the March 2002 Department Order, and he observed that the federal judiciary had affirmed executive power to employ tribunals.[14]

White House Counsel Alberto R. Gonzales has relied on *Quirin* for the notion that the Justices have "consistently upheld" military commission use, and he stated that the Bush Order's terms were derived from those of the Roosevelt proclamation and order, words the Court interpreted to allow habeas corpus scrutiny.[15] The White House Counsel also urged that any "habeas corpus proceeding in a federal court" which challenges actions under the Bush Order authorizing trial of non-United States citizens by military tribunals would be limited to scrutinizing "the lawfulness of the commission's jurisdiction."[16]

---

[11] *See Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism, Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 8–20 (2001) [hereinafter *DOJ Oversight*] (statement of Michael Chertoff, Assistant U.S. Attorney General); *see also infra* notes 15–16 and accompanying text.

[12] Viet D. Dinh, *Foreword: Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 405–06 (2002). *See* Eric Lichtblau & Adam Liptak, *On Terror, Spying and Guns, Ashcroft Expands Reach*, N.Y. TIMES, Mar. 15, 2003, at A1. Dinh and Chertoff have since recanted. *See* Richard B. Schmitt, *Patriot Act Author Has Concerns*, L.A. TIMES, Nov. 30, 2003, at A1 (discussing reconsideration of the issues by Dinh and Chertoff).

[13] *Defense Department and Military Tribunals: Hearing Before the Senate Comm. on Armed Services*, 107th Cong. (2001) (joint statement of Donald Rumsfeld, U.S. Secretary of Defense, and Paul Wolfowitz, Deputy U.S. Secretary of Defense, discussing the appropriateness of military tribunals), 2001 WL 1587683.

[14] "The Fourth Circuit recently reaffirmed" these propositions in *Hamdi*. Letter from William Haynes, II, General Counsel, DOD, to Neal Sonnett, Chair, ABA Task Force on Enemy Combatants (Sept. 23, 2002) (on file with author). *See generally* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1 (2002) (discussing the Supreme Court's role in developing the military system of governance).

[15] Alberto R. Gonzales, Op-Ed, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 (supporting the use of military commissions and defending their constitutionality); *see also* Christopher Bryant & Carl Tobias, Youngstown *Revisited*, 29 HASTINGS CONST. L.Q. 373, 394 n.85 (2002) (discussing Gonzales' claim that judicial review is preserved under the Bush Order).

[16] Gonzales, *supra* note 15, at A27. Senators' views similar to the administration's are in the hearings cited *supra* notes 10–11, 13.

B. Detentions

The federal government has indefinitely detained thousands of people it suspects are engaged in terrorism, and many officials have justified the effort with practical contentions—mostly national and global security concerns—and with legal arguments that resemble the ones detailed for military tribunals. Since the September 2001 terrorist attacks, the officers have followed Ashcroft's directive that they use "every available law enforcement tool" to incapacitate those "who participate in, or lend support to, terrorist activities" by arresting and holding persons in custody over long periods through criminal charges, material witness warrants for individuals in America legally, and immigration charges for people in the United States illegally.[17] A specific policy of racial profiling mainly targeted at the Arab and Muslim communities in America, as well as a veil of secrecy which frustrates efficacious outside scrutiny, characterizes these detentions.[18]

The United States has indefinitely detained a few of its citizens by labeling them enemy combatants. For example, during 2001, President Bush so certified Yaser Hamdi, who remained in naval brigs without counsel until last December, while in June 2002, Deputy Attorney General Larry Thompson asserted Jose Padilla was imprisoned "under the laws of war as an enemy combatant" and cited *Quirin* as "clear Supreme Court" authority.[19]

---

[17] OFFICE OF THE INSPECTOR GEN., DOJ, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003) [hereinafter OIG REPORT], *available at* http://www.usdoj.gov/oig/special/0306/full.pdf. For full analysis of detentions the government premised on alleged immigration law violations and material witness warrants, see Cole, *supra* note 1.

[18] *See* Jonathan K. Stubbs, *The Bottom Rung of America's Race Ladder: After The September 11 Catastrophe Are American Muslims Becoming America's New N . . . s?*, 19 J.L. & RELIGION (forthcoming 2004). Most courts have maintained this veil. *See, e.g.*, Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003) (holding that the government was justified in withholding information regarding detainees under an exception in the Freedom of Information Act), *cert. denied*, 124 S. Ct. 1041 (2004) (mem.); N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (holding that newspapers did not have a First Amendment right of access to deportation proceedings that affected national security), *cert. denied*, 123 S. Ct. 2215 (2003) (mem.). *But see* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (holding that there is a First Amendment right of access to deportation proceedings).

[19] News Transcript, Deputy Secretary [of Defense] Wolfowitz at Justice Department Press Conference (June 10, 2002) (statement by Larry Thompson, Deputy Attorney General), http://www.defenselink.mil/news/Jun2002/t06102002_t0610dsd.html; *see also* Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 CORNELL INT'L L.J. 59 (2003); *infra* note 23 (showing Hamdi's three Fourth Circuit appeals and one Supreme Court appeal).

The United States has also held approximately 650 non-citizens at Guantánamo Bay.[20] Observers have reported terrible conditions under which many have labored, the use of abusive tactics to extract confessions or other material from some, and numerous attempted suicides.[21] Virtually all detainees have received no process, although the government stated last July that it would try a few in military commissions and recently granted others access to counsel.[22]

C. War on Terrorism Litigation

The DOJ and the DOD depended substantially on the pragmatic arguments related to national security and on *Quirin*, in part, for broad deference to the executive during national crises when the agencies litigated major terrorism cases which implicated detention, and numerous judges have agreed with these views. Moreover, *Quirin* figured prominently in all of the Fourth Circuit *Hamdi v. Rumsfeld* decisions[23] and in the *Padilla ex rel. Newman v. Bush* district court ruling.[24] The DOJ lodged its strongest contention when pursuing a *Hamdi* appeal, stating that because judges have a "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."[25] The appellate panel denigrated the argument by first recasting it[26] and then rejecting the

---

[20] *See* Carlotta Gall & Neil A. Lewis, *Captives: Tales of Despair from Guantánamo*, N.Y. TIMES, June 17, 2003, at A1 (approximating 680 men); OIG Report, *supra* note 17; *infra* notes 38–39 and accompanying text (assessing the three major challenges to the detentions); sources cited *infra* note 43.

[21] *See* Nicholas M. Horrock & Anwar Iqbal, *Waiting for Gitmo*, MOTHER JONES, Jan./Feb. 2004, at 15; Raj Persaud, *Mental Anguish Likely to Be Most Damaging*, INDEPENDENT (London), Mar. 12, 2004, at 18, *available at* 2004 WL 70808198; David Rose, *Even Death Row Is Preferable to This*, OBSERVER (London), Feb. 22, 2004, at 17.

[22] *See* Richard Cohen, *Lawless in Guantánamo*, WASH. POST, Jan. 20, 2004, at A19; Jerry Markon, *Terror Suspect, Attorneys Meet for 1st Time*, WASH. POST, Feb. 4, 2004, at B3.

[23] This case was first brought in the Eastern District of Virginia and has received three Fourth Circuit opinions. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (citing *Quirin* several times), *cert. granted*, 124 S. Ct. 981 (2004) (mem.); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (citing *Quirin* to support judicial deference to the executive branch); Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002).

[24] This case was brought in the Southern District of New York. *See* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (citing *Quirin* in discussion of prisoners of war and detention). The Second Circuit recently held that the government lacked power to detain Padilla and ordered his release. *See* Padilla *ex rel.* Newman v. Rumsfeld, 352 F.3d 695, 715 (2d Cir. 2003) (rejecting *Quirin* as establishing "President's authority to exercise military jurisdiction over American citizens"), *cert. granted*, 124 S. Ct. 1353 (2004) (mem.).

[25] *Hamdi*, 296 F.3d at 283.

[26] *Hamdi*, 296 F.3d at 283 ("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.").

government's motion.[27] Despite this rebuke, the Fourth Circuit essentially agreed with the government's claim. For instance, the panel cited *Quirin* extensively for ideas, 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."[28] Moreover, the Fourth Circuit effectively adopted the DOJ's perspective because the court grounded its executive acquiescence on *Quirin*, did not closely analyze the support for detaining Hamdi, and refused him access to counsel.[29] The three *Hamdi* decisions also underemphasized the substantial growth in habeas corpus and international law since *Quirin* issued.[30]

District court treatment of the *Padilla* matter resembled, and drew on, that in *Hamdi*.[31] For example, the trial judge determined that the "logic of *Quirin* bears strongly on this case" and broadly invoked the opinion, which recognized the "distinction between . . . lawful and unlawful combatants" and declared that "[u]nlawful combatants are likewise subject to capture *and detention*."[32] The court analogized from the World War II precedent and held that President Bush had authority to detain unlawful combatants.[33] The judge also observed that the Justices did intimate FDR'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 while acknowledging the Court found it unnecessary to resolve whether the "President as Commander in Chief ha[d] constitutional power to create military commissions without the support of congressional legislation."[34] Moreover, the judge displayed great deference when he espoused a

---

[27] The court 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.*

[28] *Id.* at 282. *See generally Ex parte* Quirin, 317 U.S. 1 (1942) (finding that the President has authority to order trial by a military commission).

[29] *See* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (finding that Hamdi's detention was constitutional). Hamdi remains in custody but recently was accorded access to counsel. *See* Vanessa Blum, *As Pressure Mounts, U.S. Strategy Shifts: Administration Move to Allow Counsel for Detainees Comes As Supreme Court Prepares to Take up Issue*, LEGAL TIMES, Dec. 8, 2003, at 1.

[30] *See infra* Part II.A.2.b. *But see Hamdi*, 316 F.3d at 468–69 (rejecting application of the Geneva Convention).

[31] Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); *see also supra* notes 25–30 and accompanying text.

[32] *Padilla*, 233 F. Supp. 2d at 594–95 (quoting *Quirin*, 317 U.S. at 30–31) (emphasis added); *see also supra* notes 28–30 and accompanying text.

[33] *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.

[34] *Id.*; *see Quirin*, 317 U.S. at 28–29 (recognizing the powers of the President as Commander in Chief).

quite lenient proof burden of "some evidence," which the United States must meet to justify a presidential determination that an individual is an unlawful combatant.[35] The court also relied on *Youngstown Sheet & Tube Co. v. Sawyer* for the notion that the chief executive was "operating at maximum authority" in the "decision to detain Padilla as an unlawful combatant."[36] However, the Second Circuit ordered Padilla's release and depended on *Youngstown*'s analytical framework for the critical ideas that (1) "the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat;" (2) "the Non-Detention Act serves as an explicit congressional 'denial of authority' within the meaning of *Youngstown*, thus placing us in *Youngstown*'s third category;" and (3) "because the Joint Resolution does not authorize the President to detain American citizens seized on American soil, we remain within *Youngstown*'s third category."[37]

Three major cases have challenged the indefinite detentions at Guantánamo Bay. The D.C. Circuit essentially rejected petitioners' habeas corpus writs because none were U.S. citizens who had established their presence in America, relying heavily on the 1950 precedent of *Johnson v. Eisentrager*, and the court found that Guantánamo was not United States territory, even though the country maintains a naval facility there.[38] Yet, the Ninth Circuit held that *Eisentrager* did not preclude its assertion of jurisdiction over the habeas petition or

---

[35] *See Padilla*, 233 F. Supp. 2d at 605–10 (discussing the deference given to the President's determination). 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.

[36] *Id.* at 606–07; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring) (describing the three categories of presidential authority); MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977) (assessing "the influence [of *Youngstown*] on the theory and practice of presidential power and on the doctrine of separation of powers"); *infra* notes 90–110 and accompanying text. The court did reject the government claim that Padilla should not have access to counsel. *See Padilla*, 233 F. Supp. 2d at 564, 599–605 (directing U.S. Secretary of Defense Donald Rumsfeld to allow Padilla to consult with counsel).

[37] Padilla *ex rel.* Newman v. Rumsfeld, 352 F.3d 695, 712 (2d Cir. 2003) (ordering a writ of habeas corpus and Padilla's release). "[T]he third category [of *Youngstown*] includes those situations where the President takes measures incompatible with the express or implied will of Congress." *Id.* at 711. *See also* 18 U.S.C. § 4001(a) (2000) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); *infra* notes 90–104 (describing *Youngtown*'s analytical framework).

[38] *See* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir.), *cert. granted in part*, 124 S. Ct. 534 (2003) (mem.); *see also* Johnson v. Eisentrager, 339 U.S. 763 (1950) (finding that non-resident aliens do not have access to courts). For more analysis of these cases, see Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. 985, 1010 (2002) (citing the D.C. Circuit decision in *Al Odah v. United States* as rejecting the argument that Guantánamo Bay is U.S. territory), and Cole, *supra* note 1, at 983–84 (discussing the *Eisentrager* holding).

necessitate sovereignty rather than territorial jurisdiction, which clearly existed, while the court determined that the lease, the "continuing Treaty as well as the practical reality of the U.S.'s exercise of unrestricted dominion and control over the Base[,] compel the conclusion that, for the purposes of habeas jurisdiction, Guantánamo is sovereign U.S. territory."[39] Finally, the government's prosecution of Zacarias Moussaoui in federal court has realized little success, notwithstanding the trial judge's concerted efforts to decide the matter fairly and promptly.[40]

II. CRITICAL AND COST-BENEFIT ANALYSES

A. Why Reliance Is Misplaced as a Matter of Law

1. *Military Commissions and Federal Court Jurisdiction*

It could appear preferable to discuss briefly the administration's misplaced reliance on *Quirin* when issuing the Bush and DOD Orders.[41] The government has prosecuted no one in military tribunals, and scholars have explored their legitimacy.[42] However, other ideas require more assessment. Commissions will soon try defendants[43] and provoke litigation contesting their validity. Thorough evaluation will also improve appreciation of *Quirin*'s use, *Youngstown* as the most relevant precedent, and why the latter opinion and the Constitution do not allow the President to vitiate federal court jurisdiction, even

---

[39] Gherebi v. Bush, 352 F.3d 1278, 1300 (9th Cir. 2003). An earlier Ninth Circuit opinion resolved the first challenge on procedural grounds when it found that plaintiffs lacked the standing to proceed. *See* Coalition of Clergy v. Bush, 310 F.3d 1153 (9th Cir. 2002) (finding the coalition lacked standing to bring claim), *cert. denied*, 123 S. Ct. 2073 (2003) (mem.).

[40] *See* United States v. Moussaoui, No. 03-4792, 2004 WL 868261, at *21 (4th Cir. Apr. 22, 2004) (affirming the district court's conclusion that Moussaoui should be granted access to exculpatory witnesses, but remanding the case to the district court to "craft substitutions under certain guidelines."); *see also* John Gibeaut, *Prosecuting Moussaoui*, A.B.A. J., July 2002, at 36 (describing the prosecution of Moussaoui); Seymour M. Hersh, *The Twentieth Man*, NEW YORKER, Sept. 30, 2002, at 56 (same); Philip Shenon, *Judge Rules Out a Death Penalty for 9/11 Suspect*, N.Y. TIMES, Oct. 3, 2003, at A1 (same).

[41] *See supra* notes 7–22 and accompanying text; *see also supra* note 2 and accompanying text.

[42] *See* Dickinson, *supra* note 1; *see also* Bryant & Tobias, *supra* note 15. *See generally* Cole, *supra* note 1; 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. 1 (2002).

[43] *See* DOD, MILITARY COMMISSION INSTRUCTION NO. 2 (2003), *available at* http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf; Blum, *supra* note 29; Dan Eggen, *FBI Chief Says Tribunals May Try 9/11 Suspects*, WASH. POST, Jan. 15, 2004, at A1 (stating that the September 11 conspirators will be tried in military tribunals instead of criminal courts); Adam Liptak, *The Legal Context: Tribunals Move from Theory to Reality*, N.Y. TIMES, July 4, 2003, at A12 (stating that President Bush designated six Guantánamo prisoners to be tried before military commissions).

though tribunals might be legitimate in some contexts—overseas prosecutions that arise from declared wars.

a. *Why* Youngstown *and the Constitution Are Controlling*

i. Constitutional Text and History

The Constitution's text and history as well as case law demonstrate that Congress, not the Executive, is the federal government's political branch authorized to create federal court jurisdiction. Article I states "Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court,"[44] 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."[45] The first Congress established the lower federal courts and prescribed their jurisdiction.[46] Article I also states Congress is to "define and punish . . . Offences against the Law of Nations."[47] Moreover, landmark cases, such as *Sheldon v. Sill*,[48] held that the "disposal of the judicial power (except in a few specified instances) belongs to Congress."[49]

ii. Post-September 11, 2001, Legal Developments

Despite the Constitution's text and history, President Bush issued the November Order, which in section 7(b) provides that the military commissions "shall have exclusive jurisdiction with respect to offenses by" anyone subject to the Order, who "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 behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."[50] This expansive wording imposes the proscription on *all* courts—federal, state, or international—apart from the military tribunals it creates.[51] As to the order's critical issues, detentions and federal

---

[44] U.S. CONST. art. I, § 8, cl. 9.

[45] U.S. CONST. art. III, § 1.

[46] *See* Judiciary Act of 1789, 1 Stat. 73.

[47] U.S. CONST. art. I, § 8, cl. 10; *see* Cole, *supra* note 1, at 977; Dickinson, *supra* note 1, at 1419.

[48] 49 U.S. 441, 8 How. 453 (1850).

[49] Sheldon v. Sill, 49 U.S. at 449, 8 How. at 462; *see* Bryant & Tobias, *supra* note 15, at 384–86 (discussing *Sheldon v. Sill*).

[50] Bush Order, *supra* note 2, § 7(b).

[51] I stress jurisdiction stripping and do not assess whether the Bush Order can deprive state or international courts or tribunals of power to afford relief. The Supreme Court sharply limited state court ability to grant people in federal officers' custody relief in *Tarble's Case*, 80 U.S.

court jurisdiction stripping, the administration initially requested Congress's approval, which lawmakers denied, and then arrogated to itself through the directive 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.[52] Sections 202 and 203 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 non-citizen whom that official "ha[d] reason to believe may commit, further, or facilitate acts" of terrorism, defined quite broadly.[53] Section 203 would have granted the District of Columbia federal courts exclusive authority over federal habeas corpus review of section 202 detentions.[54] Republicans and Democrats in both Houses, as well as interest groups,[55] strongly opposed these sections.[56] The statute Congress ultimately passed imposed several major restrictions on the Attorney General's detention authority.[57] First, it modified the threshold standard from "reason to believe" to "reasonable grounds to believe" that the

---

(13 Wall.) 397 (1871). *See also* McClung v. Silliman, 19 U.S. 598, 6 Wheat. 268 (1821) (denying state courts power to issue writs of mandamus to federal officers); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 46, at 298 (6th ed. 2002) (assessing *McClung v. Silliman*).

[52] A version of the proposed Anti-Terrorism Act of 2001 can be found at Electronic Privacy Information Center, http://www.epic.org/privacy/terrorism/ata2001_text.pdf (last visited May 7, 2004) [hereinafter ATA]; *see also* Editorial, *American Values on Trial*, L.A. TIMES, Mar. 22, 2002, at B16.

[53] *See* ATA, *supra* note 52, § 202; *see also Terrorism Investigation and Prosecution: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (including statement of Senator Specter quoting § 202 of the Bush administration draft legislation), 2001 WL 1132689. *See generally* Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 34–36 (2002) (describing the steps taken by the government following the September 11 attacks).

[54] *See* ATA, *supra* note 52, § 203; *see also* Editorial, *Winging It at Guantánamo*, N.Y. TIMES, Apr. 23, 2002, at A22 ("[P]ublic confidence . . . demands a return to . . . independent court review.").

[55] *See* Jonathan Krim, *Anti-Terror Push Stirs Fears for Liberties: Rights Groups Unite To Seek Safeguards*, WASH. POST, Sept. 18, 2001, at A17 (discussing a "coalition of public interest groups from across the political spectrum [that] has formed" in opposition to the administration's anti-terrorism legislation because of its effects on "Americans' privacy and civil rights."); Walter Pincus, *Caution is Urged on Terrorism Legislation: Measures Reviewed To Protect Liberties*, WASH. POST, Sept. 21, 2001, at A22 (stating that the legislation "has quickly drawn opposition from some members of Congress, as well as a diverse collection of interest groups."); *see also* Editorial, *No Rush on Rights*, WASH. POST, Sept. 20, 2001, at A34.

[56] For a thorough exposition of this opposition, see Bryant & Tobias, *supra* note 15, at 388–91.

[57] *See* The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA PATRIOT Act]; *see also* Eric Lichtblau, *Republicans Want Terrorism Law Made Permanent*, N.Y. TIMES, Apr. 9, 2003, at B1 (outlining the sunset provisions of the USA PATRIOT Act).

suspect would engage in or assist terrorist acts.[58] Second, the Act significantly limited the officer's power to detain non-citizens suspected of terrorism.[59] Third, the Act 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.[60] These restrictions are in the USA PATRIOT Act, which President Bush signed on October 26, 2001.[61]

Although Congress denied the Attorney General the indefinite detention power sought, the order prescribed eighteen days later 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.[62] Section 2 defines such an individual 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.[63] The 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

---

[58] USA PATRIOT Act § 412(a) (codified at 8 U.S.C. § 1226a (2004)); *see* John Lancaster, *Hill Puts Brakes on Expanding Police Powers*, WASH. POST, Sept. 30, 2001, at A6 (noting that in the "days after Sept. 11 . . . [opinion][p]olls showed that Americans overwhelmingly favor[ed] stronger police powers, even at the expense of personal freedom."); *see also* Bryant & Tobias, *supra* note 15, at 390.

[59] USA PATRIOT Act § 412(a) ("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.*"). Senator Patrick Leahy (D-Vt.) emphasized: "if an alien is found not to be removable, he must be released from custody." 147 CONG. REC. S10,558 (daily ed. Oct. 12, 2001) (statement of Sen. Leahy).

[60] USA PATRIOT Act § 412(a); *see also* 147 CONG. REC. S10,558 (daily ed. Oct. 12, 2001) (statement of Sen. Leahy) (observing that "the Attorney General's certification of an alien under [section 412] is subject to judicial review").

[61] The USA PATRIOT Act also changed the administration's venue proposal. *See supra* note 54. Original habeas corpus petitions can be filed in any U.S. district court with jurisdiction, thus satisfying administration concerns about inconsistent authority with the less onerous stricture that all *appeals* be heard by the D.C. Circuit and with Supreme Court and D.C. Circuit cases as the "rule of decision." USA PATRIOT Act § 412(a); *see also* Koh, *supra* note 53, at 34 (characterizing procedural safeguards in the USA PATRIOT Act as "minimal").

[62] Bush Order, *supra* note 2, § 3.

[63] *Id.* § 2. The Order only covers those whom the President deems "it is in the interest of the United States . . . be subject to this order." *Id.* Although this grants discretion to not apply the order, such discretion is unbridled, so executive power to apply it against anyone deemed an international terrorist or one who aids or abets such conduct remains unrestrained.

courts.[64] Yet, the Bush Order eliminates all judicial scrutiny that might be sought by or on behalf of "any individual subject to [the] order,"[65] 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.[66] The DOD Order dispels doubt about judicial scrutiny's preclusion—even a federal court exercise of habeas corpus jurisdiction—when it expressly states:

> 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.[67]

The Bush and DOD Orders, thus, suggest that the administration intends to retain suspected terrorists much longer than the USA PATRIOT Act authorizes.[68]

---

[64] *See supra* text accompanying note 54; *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 and statutory authority for the Order); Molly McDonough, *Tribunals vs. Trials*, A.B.A. J., Jan. 2002, at 20 (outlining criticism of the Order "that tribunals can be held in secret[,] ... do not require a unanimous verdict[,] are not held before juries[, and] may limit defendants' opportunities to challenge evidence brought against them"); *supra* note 61 (showing that Congress rejected the idea and treated fears about conflicting authority of administration with a less onerous habeas corpus venue provision).

[65] Bush Order, *supra* note 2, § 7(b).

[66] DOD ORDER, *supra* note 2, § 6(H); *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 (concluding that "[t]he Bush [A]dministration has settled on a complex set of military tribunal regulations more advantageous to al Qaeda and Taliban defendants than the guidelines President Bush originally issued"); Deborah L. Rhode, Editorial, *Terrorists and Their Lawyers*, N.Y. TIMES, Apr. 16, 2002, at A27 (discussing the DOJ's "unilateral assertion of ... authority to monitor lawyer-client communications" in certain terrorist-related cases). For analysis of the Order's specific provisos, see DOD ORDER, *supra* note 2, § 6(H)(4), Bryant & Tobias, *supra* note 15, at 393 (describing confirmation of the plain meaning of section 7(b) of the Bush Order by the DOD Order), and Richard A. Serrano, *U.S. Readies Plans for Terror Tribunals*, L.A. TIMES, Mar. 21, 2002, at A1 (discussing the relaxed safeguards in military tribunals).

[67] DOD ORDER, *supra* note 2, § 6(H)(2); *see also* Mintz, *supra* note 66 (stating that the original order barred appeals after conviction); Serrano, *supra* note 66 (noting that the order included no appeals to federal courts or the U.S. Supreme Court).

[68] Given the Orders' prohibitions on federal court review, I find deficient White House Counsel's claim that the Bush Order preserves civilian court review: "anyone 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 15, at A27. This otherwise promising concession does not override the many indications that certification under Bush's Order precludes federal court review of detention, imprisonment, or other punishment, including death, that it authorizes. First, Gonzales limited his promise of review in civilian courts to those "arrested, detained[,] or tried in the United States" and to challenges to "lawfulness of a commission's *jurisdiction*." *Id.* (emphasis added). Depending on the administration's view of "jurisdiction," it may argue a federal habeas court can only confirm the President had found in writing a detainee "subject to" his Order. Bush Order, *supra* note 2, § 2. Second, Gonzales justified his informal view by citation to *Quirin*, not the Order's text, which seems to proscribe judicial review. Gonzales, *supra* note 15, at A27. But

Congress, and in particular 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.[69] Certain members of the administration contended that President Bush's authority as "Commander in Chief"[70] of the armed forces included the power to issue the order,[71] 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's province[72] or violated Bill of Rights guarantees.[73] The hearings and later actions, mainly the administration's lack of solicitude for legislative requests "to review and be consulted about the draft [DOD] regulations[,]"[74] led Senator Patrick Leahy (D-Vt.), the Judiciary Committee Chair, to act.[75] 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,"[76] because the President does not have power to create the entities unilaterally.[77] 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

---

the *Quirin* Court reached the merits only after the DOJ elected "not to contest the Supreme Court's jurisdiction." Lloyd Cutler, Column, *Rule of Law: Lessons On Tribunals—From 1942*, WALL ST. J., Dec. 31, 2001, at A9. The administration might do so, relying on the Orders' terms and, thus, have the courts reach the constitutional issues avoided in 1942. Even if Gonzales had clearly found that the Bush Order protected judicial review through habeas corpus, this view does not bind the administration in later litigation. I assume Counsel's integrity and good faith, but his article does not commit President Bush to the close federal court review to which he should acquiesce.

[69] *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).

[70] U.S. CONST. art. II, § 2, cl. 1.

[71] *See, e.g., DOJ Oversight, supra* note 11, at 314 (statement of John Ashcroft, U.S. Attorney General) ("[T]he President's authority to establish war crimes commissions arises out of his power as commander-in-chief.").

[72] *See* 147 CONG. REC. S13,277 (daily ed. Dec. 14, 2001) (statement of Sen. Leahy) (summarizing testimony of a number of legal experts who found that the Bush Order invaded the powers of Congress).

[73] *See, e.g., DOJ Oversight, supra* note 11, at 93–94 (statement of Neal Katyal, Professor of Law, Georgetown University) (stating how the Bush Order would violate protections in the Bill of Rights).

[74] 148 CONG. REC. S742 (daily ed. Feb. 13, 2002) (statement of Sen. Leahy).

[75] *See id.* at S741.

[76] *Id.*

[77] *Id.* ("The Attorney General testified at our hearing on December 6 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.*") (emphasis added).

system is well-equipped to handle such cases"[78] and subjects detentions to the supervision of the D.C. Circuit.[79]

President Bush, thus, relied on his power as President and Armed Forces Commander in Chief to issue the order requiring that military tribunals try certain persons who violate the laws of war and other applicable laws and depriving these individuals of federal court access and the judiciary of jurisdiction. However, Senate and House Republicans and Democrats questioned the directive's constitutionality, conducted hearings and introduced proposed legislation, which would curtail the authority President Bush claimed and expressly preserve federal court review. These indicia of disapproval, together with legislative denial of administration requests for the broad power the order claims, suggest that its effort to abolish jurisdiction contravenes legislative will.

iii. *Youngstown*

In reviewing this attempted elimination of judicial jurisdiction, one must remember that the constitutional text, history, and High Court opinions show that Congress has practically total authority to establish the federal courts and provide their jurisdiction. President Harry Truman's 1952 assertion of power to seize steel mills and the *Youngstown* decision that he lacked the authority 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.[80] Truman based the Order on powers the Constitution and statutes vested in him as President and Armed Forces Commander in Chief. Justice Hugo Black, writing for the majority, held that Truman did not have seizure authority.[81] However, four Justices—Felix Frankfurter, Robert Jackson, William O. Douglas, and Harold Burton—who

---

[78] *Id.* at S742; *see also* Military Tribunal Authorization Act of 2002, S. 1941, 107th Cong. § 3. On March 20, 2002, House members introduced an identical bill. *See* H.R. 4035, 107th Cong. (2002). A year later, House members sponsored new bills. *See* Detention of Enemy Combatants Act, H.R. 1029, 108th Cong. (2003); Military Tribunals Act of 2003, H.R. 1290, 108th Cong.

[79] *See* S. 1941, § 5(d); *supra* note 73 and accompanying text; *infra* notes 81, 84 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).

[80] *See* Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952). *See generally* MARCUS, *supra* note 36 (discussing the impact of the *Youngstown* decision on the exercise of presidential power and the doctrine of separation of powers).

[81] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See generally* WILLIAM H. REHNQUIST, THE SUPREME COURT 189–92 (2001) (discussing factors that played a role in the Supreme Court's decision).

joined Black[82]—authored separate opinions.[83] Black stated that power, if any existed, for adopting the order must be in a federal law or the Constitution.[84] He found neither statutes explicitly authorizing the President to seize private property nor Acts from which this prerogative could fairly be implied.[85] Black surveyed whether the Constitution granted inherent power to issue the Order and canvassed potential sources from which the authority might derive.[86] He initially proclaimed that characterizing seizure as an exercise of Truman's military power as Armed Forces Commander in Chief would not suffice and described the initiative as a "job for the Nation's lawmakers, not for its military authorities."[87] Black then ascertained that the several constitutional provisos which endow the President with executive power furnished little support, principally because the document's structure and language assign Congress lawmaking authority, which is not subject to "presidential or military supervision or control."[88]

The Justices who joined Black might have concurred for reasons similar to those Frankfurter espoused.[89] The only concurrence which deserves textual analysis is Justice Jackson's opinion, as its tripartite scheme for resolving separation of powers issues is now an icon.[90] 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 crudely distinguish the

---

[82] *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).

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

[84] *Youngstown*, 343 U.S. at 585.

[85] *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, while Congress had clearly rejected this approach. *Id.* at 585–86.

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

[87] *Youngstown*, 343 U.S. at 587. He found theater of war an expanding concept, but could not hold the President's Executive Order constitutional. *Id.*

[88] *Id.* at 588; *see also* U.S. CONST. art. I, §§ 1, 8, cl. 18; art. II, § 3.

[89] Black's separation of powers analysis 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 emphasis and nuance which one decision could not capture, thus requiring individual articulation to reach a common result. *See Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring).

[90] *See id.* at 634 (Jackson, J., concurring); *see also* 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) (claiming the concurrence as the most persuasive opinion in the Court's history); Katyal & Tribe, *supra* note 42, at 1274 (characterizing Jackson's analytical construct as "three now-canonical categories that guide modern analysis of separation of powers"). *See generally* Bryant & Tobias, *supra* note 15, at 406–18 (analyzing the concurrences). The lower courts that resolved *Padilla* also relied heavily on *Youngstown*. *See supra* notes 36–37 and accompanying text.

legal effects created by this relativity factor.[91] The three categories designate contexts in which executive power is largest, least substantial, and somewhere between those polar extremes. The jurist maintained that the President exercises the most authority when proceeding with Congress's express or implied approval because the power includes all that the officer has and all that the lawmakers delegate.[92] He described the second category as an intermediate one where the Chief Executive proceeds absent an explicit legislative grant or denial and can rely on the President's own authority alone, although there is a "zone of twilight" where the Chief Executive and Congress might have concurrent power or authority's distribution remains unclear.[93] In these situations, thus, legislative "inertia, indifference or quiescence," as practical matters, could occasionally allow, and perhaps encourage, independent presidential efforts, while actual tests of power may reflect the "imperatives of events and contemporary imponderables, [not] abstract theories of law."[94] 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.[95] Jackson admonished that here judges must closely assess executive assertions and honor exclusive power solely if courts disable legislators from acting on particular matters.[96] When 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,"[97] and the second, because lawmakers had not found seizure an open issue.[98] 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's purview.[99] Jackson pledged to read flexibly the President's enumerated constitutional authority, and he

---

[91] *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

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

[93] *Id.* at 637 (citation omitted).

[94] *Id.* (citation omitted).

[95] *See id.*

[96] *Id.* at 637–38. A claim so conclusive and preclusive requires scrutiny, as the constitutional system's equilibrium is at stake. *Id.* at 638; *see also* Woods v. Miller Co., 333 U.S. 138, 146 (1948) (Jackson, J., concurring) (scrutinizing "war power").

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

[98] *See id.* at 639.

[99] *See id.* at 640.

surveyed the power claimed by reviewing the Executive Article's three clauses.[100] However, the jurist concluded that the steel seizure effort originated in the President's will and was an "exercise of authority without law."[101]

Application of *Youngstown*'s evaluative framework to the Bush Order suggests that the Order's authorization for indefinite detention and elimination of federal court review are unconstitutional.[102] The provisions fail the *Youngstown* test mainly because they violate recent expressions of legislative will regarding both matters.[103] The Constitution's text and history also show that Congress, not the Executive, is the political branch with the power to prescribe federal court jurisdiction.[104] Accordingly, the Bush Order's indefinite detention and jurisdiction-stripping features invade even more than the steel seizure action legislative prerogatives.

b. *A Word About* Quirin

The foregoing analysis finds that *Youngstown* would govern constitutional challenges to major provisos of the Bush Order. That assessment implies that *Quirin* is not controlling and, indeed, has limited relevance, even though the administration depended substantially on the case. This reliance is misplaced for reasons in addition to the determination of unconstitutionality that Articles I and III and *Youngstown* compel. The administration justifies military tribunals in part because they are premised on the Roosevelt analogue, whose legitimacy the *Quirin* Court validated.

These arguments, however, lack force. Earlier commissions, which afforded such drastically cabined procedural safeguards as the Bush Order, were used only when Congress had expressly approved them or declared war.[105] Lawmakers have instituted neither action,

---

[100] *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.*

[101] *Id.* at 655. For *Youngstown*'s later invocation, especially in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), see Bryant & Tobias, *supra* note 15, at 420–23.

[102] The Black opinion's laconic nature and the numerous and diverse concurrences frustrate precise characterization of the holding. *See* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 4-7, at 671–73 (3d ed. 2000); *see also* Bryant & Tobias, *supra* note 15, at 425–26 (articulating *Youngstown*'s analytical framework).

[103] *See supra* Part II.A.1.a.ii. Indeed, the congressional developments since September 11, 2001, are even more powerful than those in *Youngstown* because they are clearer and quite recent. For additional application of the analytical framework in *Youngstown*, see Bryant & Tobias, *supra* note 15, at 425–31.

[104] *See supra* notes 45–49 and accompanying text.

[105] *See* Dickinson, *supra* note 1, at 1420; *see also* Koh, *supra* note 3, at 340 ("In *Quirin*, Congress had formally declared war, which it has not done here, and had specifically authorized the use of military commissions in its Articles of War." (citation omitted)).

thus restricting *Quirin*'s application.[106] Moreover, the Roosevelt proclamation was narrowly confined to "sabotage, espionage[,] or other hostile or warlike acts."[107] In striking contrast, the Bush Order broadly prescribes the offenses for which tribunals may try defendants to encompass violations of the "laws of war and other applicable laws,"[108] thereby extending the entities' scope beyond what *Quirin* approved.[109] In 1996, Congress also passed the War Crimes Act, which contemplates that persons who commit statutorily-defined war crimes will receive civilian trials.[110]

2. *Detentions*

a. Quirin

The Executive has asserted that *Quirin* justifies indefinite detentions as well as broad judicial deference to administration decisionmaking regarding the detentions and military tribunals, while federal judges have upheld detentions and acquiesced. However, the *Quirin* opinion cannot support these notions. Many phenomena, including the extraordinary wartime context, should limit the case's reach. Furthermore, *Quirin*'s author, Chief Justice Harlan Fiske Stone, intentionally wrote a restricted opinion, which some observers claim must be read narrowly.

i. The *Quirin* Facts

Quirin's facts warrant much analysis, as they are so peculiar and deserve a confined reading.[111] After the United States declared war,

---

[106] In 1941, Congress had declared war and had approved tribunals in its Articles of War. *See Quirin*, 317 U.S. at 30 (1942); *see also* 10 U.S.C. § 821 (1994). *But see* Goldsmith & Bradley, *supra* note 64, at 250 ("Although the [Bush Order] was not preceded by a congressional declaration of war, such a declaration is not constitutionally required in order for the President to exercise his constitutional or statutory war powers, including his power to establish military commissions.").

[107] *See* Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942); *see also Quirin*, 317 U.S. 22–23 (quoting same regulation).

[108] Bush Order, *supra* note 2, § 1(e).

[109] Congress has not declared war or authorized the use of tribunals for violations exceeding the laws of war. *See* Dickinson, *supra* note 1, at 1421; *see also infra* notes 184–91 and accompanying text (suggesting *Quirin* may also be limited because federal habeas corpus, international, and human rights laws were underdeveloped in 1942).

[110] 18 U.S.C. § 2441 (1996); *see* Dickinson, *supra* note 1, at 1420–21. I combine below analysis of misplaced reliance on *Quirin* both for detentions and in litigation over terrorism issues. In the major terrorism cases reviewed above, the DOJ relied heavily on *Quirin*; however, the cases attacking detentions and the judges deciding them also cited *Quirin*. Some ideas in this paragraph show why *Quirin* cannot support broad notions, namely indefinite detention.

[111] For the facts of the case, see *Quirin*, 317 U.S. at 20–22. *See generally* FISHER, *supra* note 6; EUGENE RACHLIS, THEY CAME TO KILL: THE STORY OF EIGHT NAZI SABOTEURS IN AMERICA

Adolf Hitler mandated prompt action against America on its soil.[112] Germany developed a plan with military and propaganda constituents by requiring the destruction of American bridges, factories, railroad stations, and department stores.[113] In spring 1942, experts instructed the saboteurs on detonators, explosives, and related measures at a training camp near Berlin.[114] Two teams of four saboteurs each then boarded a submarine that deposited one group, with explosives, at a Long Island beach under cover of darkness on June 13, 1942 and the other team in northern Florida on June 17.[115] Both teams' members landed, dressed wholly or partly in German Marine Infantry uniforms, but then journeyed to major cities in civilian clothes.[116] Two saboteurs concluded that they would be caught yet might be saved by betraying the others, so one of them fully confessed to the Federal Bureau of Investigation ("FBI").[117] On June 27, all the saboteurs were in custody, and the FBI Director, J. Edgar Hoover, announced their capture.[118]

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"; thus, the "death penalty is called for by usage and by the extreme gravity of the war aim and the [nation's] very existence"; and they should "be tried by court martial."[119] Biddle, after consulting the Secretary of War, Henry Stimson, and the Army Judge

---

(1961); 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 (1996).

[112] *See Quirin*, 317 U.S. at 21; *see also* Danelski, *supra* note 111, at 61. *See generally* FISHER, *supra* note 6, at 4; Cyrus Bernstein, *The Saboteur Trial: A Case History*, 11 GEO. WASH. L. REV. 131–32 (1943) (discussing the orders given to the saboteurs).

[113] *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 111, at 61, 63.

[114] *See Quirin*, 317 U.S. at 21; Danelski, *supra* note 111, at 63. *See generally* FISHER, *supra* note 6, at 1–23 (detailing the saboteurs' arrival and activities in America).

[115] *See Quirin*, 317 U.S. at 21; Cushman, *supra* note 113, at 54; Danelski, *supra* note 111, at 63–64.

[116] *See* sources cited *supra* note 115. *See generally* FISHER, *supra* note 6, at 26–28, 35.

[117] *See* Belknap, *supra* note 111, at 62; Bernstein, *supra* note 112, at 136-37; Danelski, *supra* note 111, at 64–65.

[118] *See* sources cited *supra* note 107; *see also* Belknap, *supra* note 111, at 62–63 (stating that Americans reacted as if there had been a major victory in the war when Hoover announced their capture); Danelski, *supra* note 111, at 64–65 (explaining that the FBI's issuance of misleading press releases, which suggested that its diligence led to the arrests, began the "government control on information about the Saboteurs' [c]ase and the government's successful use of the case for propaganda purposes.").

[119] Danelski, *supra* note 111, at 65 (quoting Memorandum from President Roosevelt to Francis Biddle, Attorney General (June 30, 1942), 1940–44 PSF FDR Papers, FDR Library). *See generally* Jonathan Turley, Quirin *Revisited*, NAT'L. L.J., Oct. 28, 2002, at A17 (suggesting the *Quirin* case raised questions about the Court's susceptibility to bias and threats in wartime).

Advocate General, Myron Cramer, urged that a military commission be convened to try the saboteurs.[120] 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 commission judgment or sentence.[121] The Order departed from Articles of War strictures by: authorizing admission of evidence with probative value for a reasonable person; conviction and a death penalty sentence's imposition on a two-thirds, not a unanimous, vote; and direct transmittal of the record, judgment, and sentence to the Chief Executive for review.[122] 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 commit sabotage, espionage . . . or violations of the laws of war."[123] 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; as well as conspiracy to commit these offenses.[124] Five days later, the tribunal commenced the secret trial in a DOJ assembly room, and it continued for three weeks.[125] The saboteurs' counsel, Army Colonels Cassius Dowell and Kenneth Royall, believed 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

---

[120] *See* Danelski, *supra* note 111, at 66 (citing Memorandum from Francis Biddle, Attorney General, to President Roosevelt (June 30, 1942), OF 5036, FDR MSS). Biddle thought this approach would be rather expeditious, make it easier to prove the charge of violating the law of war, and permit the death penalty's imposition. *See* FISHER, *supra* note 6, at 48–50; Belknap, *supra* note 111, at 63–64; Danelski, *supra* note 111, at 66. He also harbored secrecy concerns, that there not be revelations about the ease with which the saboteurs had landed on American soil and the inept FBI behavior at the Second World War's outset. *See* Belknap, *supra* note 111; Danelski, *supra* note 111, at 66; Katyal & Tribe, *supra* note 42, at 1280–81.

[121] Exec. Order No. 9185, 7 Fed. Reg. 5101, 5103 (July 7, 1942); *see also* Danelski, *supra* note 111, at 67 (detailing FDR's decision to issue the order).

[122] Exec. Order No. 9185, 7 Fed. Reg. at 5103; *see also* Danelski, *supra* note 111, at 67. Biddle told Roosevelt the deviations "should save a considerable amount of time" but would also facilitate the saboteurs' conviction and imposition of the death penalty. Danelski, *supra* note 111, at 66 (quoting Memorandum from Francis Biddle, Attorney General, to President Roosevelt (June 30, 1942), OF 5036, FDR MSS).

[123] Proclamation No. 2561, 7 Fed. Reg. at 5101 (July 2, 1942); *see also Ex parte* Quirin, 317 U.S. 1, 22–23 (1942). *See generally* FISHER, *supra* note 6, at 50–53 (discussing Roosevelt's Proclamation).

[124] *Quirin*, 317 U.S. at 23; *see also* Bernstein, *supra* note 112, at 142–43; Danelski, *supra* note 111, at 67 (listing the charges).

[125] The government stated that the Commission was conducting the trial in secret for security reasons. *See* Belknap, *supra* note 111, at 66; *Espionage: 7 Generals v. 8 Saboteurs*, TIME, July 20, 1942, at 15.

corpus."[126] In late July, Biddle and Royall convinced the Supreme Court to hear the case, and Stone convened a special session.[127] The Court heard oral arguments for over nine hours on July 29 and 30.[128] Before the initial argument, all of 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 their appeals' disposition.[129] The Court quickly decided the case, assembling less than a day after arguments to issue a terse per curiam order.[130] Stone recounted the litigation's history and said that the Justices would announce their disposition and later file a full opinion that explained the reasoning.[131] The order found 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*."[132]

The commission, which had recessed while the saboteurs appealed, promptly resumed.[133] 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 suggestions.[134] On August 8, the United States electrocuted six of the petitioners.[135] The President then sealed the case record for World War II's remainder.[136]

Stone agonized over the draft's full opinion for more than six weeks.[137] On September 25, he circulated it with a memorandum,

---

[126] FRANCIS BIDDLE, IN BRIEF AUTHORITY 331 (1962); Danelski, *supra* note 111, at 68.

[127] FISHER, *supra* note 6, at 67–68; RACHLIS, *supra* note 111, at 246. The lower court procedural history appears in *Quirin*, 317 U.S. at 19–20.

[128] Belknap, *supra* note 111, at 75. For summaries of the arguments proffered by the United States and by the petitioners, see *id.* at 70–75; Danelski, *supra* note 111, at 68–69. *See generally* FISHER, *supra* note 6, at 89–108 (discussing the arguments presented by both sides in their respective briefs as well as those proffered at oral argument).

[129] Danelski, *supra* note 111, at 69.

[130] Belknap, *supra* note 111, at 76.

[131] Danelski, *supra* note 111, at 68–72; RACHLIS, *supra* note 111, at 272.

[132] *Quirin*, 317 U.S. at 18–19; RACHLIS, *supra* note 111, at 272. The Court, thus, dismissed the petitioners' applications for habeas writs and affirmed the district court. *Quirin*, 317 U.S. at 18–19.

[133] Danelski, *supra* note 111, at 71.

[134] The record was 3000 pages. President Roosevelt did commute death sentences recommended for the two saboteurs who defected. Belknap, *supra* note 111, at 77; Danelski, *supra* note 111, at 72.

[135] Belknap, *supra* note 111, at 77. Roosevelt reportedly hoped that the military commission would propose death by hanging. WILLIAM D. HASSETT, OFF THE RECORD WITH FDR, 1942–1945, at 97 (1958); Danelski, *supra* note 111, at 72.

[136] *See* Bernstein, *supra* note 112, at 188–89 (detailing a White House announcement summarizing the results of the case); Danelski, *supra* note 111, at 71–72.

[137] *See* Danelski, *supra* note 111, at 72 ("He would devote more than six weeks to the task, which he described as a 'mortification of the flesh.'"). Chief Justice Stone posited an intuitive rationale for a decision, but his law clerks found "little authority" for this, and Stone could only

intimating that certain issues the defense counsel had raised in July had not been before the Court, yet urging that they be decided against the saboteurs.[138] For several weeks, Stone negotiated changes which would satisfy a few Justices' concerns.[139] Stone then focused on the Articles of War provisos over which the Court was evenly divided and for which he had written two drafts.[140] Justice Frankfurter unsuccessfully pursued support for the second.[141] However, on October 16, Justice Jackson circulated a memorandum that resembled a concurrence, which troubled other members, who had earlier agreed that unanimity was critical.[142] He believed the Court exceeded its powers "in reviewing the legality of the President's Order [and that] experience shows the judicial system is unfitted to deal with matters in which we must present a united front to a foreign foe."[143] That action jeopardized unanimity and led Frankfurter to pen a "Soliloquy."[144] This imaginary exchange criticized the dead saboteurs for appealing and for igniting a divisive three-branch fight.[145] Once Jackson read

---

cite analogous cases at numerous crucial points. *Id.*; *see also id.* (citing Letter from Chief Justice Harlan Fiske Stone to Bennett Boskey (Aug. 9, 1942)).

[138] He 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." *Id.* (citing Memorandum from Chief Justice Stone to the Court (Sept. 25, 1942), Box 68, Harlan Fiske Stone MSS, Manuscript Division, Library of Congress).

[139] *See id.* at 75–76 (discussing Stone's changes to the opinion to satisfy Justices Roberts, Black, and Douglas).

[140] *Id.*

[141] This draft stated that the Articles of War did not bind the Chief Executive. *See id.* at 76 (citing Memorandum from Justice Felix Frankfurter to Justices Owen Roberts, Stanley Reed, and James Byrnes (Aug. 1942)); *id.* (citing Paige Box 12, Frankfurter Papers, Harvard Law School; Justice Stanley Reed to Justice Felix Frankfurter (received Sept. 13, 1942), Paige Box 12, Frankfurter Papers, Harvard Law School).

[142] Justices Stone, Frankfurter, and Black were troubled by the memorandum. *See id.* (citing Memorandum from Justice Robert H. Jackson (Oct. 23, 1942), Box 124, Robert H. Jackson Papers, Library of Congress).

[143] *See id.* (quoting Memorandum from Justice Robert H. Jackson (Oct. 23, 1942), Box 124, Robert H. Jackson Papers, Library of Congress); Belknap, *supra* note 111, at 79.

[144] The document has attained considerable notoriety. *See* Felix Frankfurter, *F.F.'s Soliloquy* (Oct. 23, 1942), *reprinted in* 5 GREEN BAG 2D 438 (2002); *see also* G. Edward White, *Felix Frankfurter's "Soliloquy" in* Ex parte Quirin, 5 GREEN BAG 2D 423 (2002) (introducing the soliloquy by summarizing the facts leading to its writing).

[145] *See* Frankfurter, *supra* note 144, at 439 ("You've done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime."); *see also* Danelski, *supra* note 111, at 77 (showing that Frankfurter implored the Justices with a patriotic plea against precipitating an abstract constitutional debate while America was at war). Frankfurter quotes an imaginary soldier as saying:

> Haven't you got any more sense than to get people by the ear on one of the favorite American pastimes—abstract constitutional discussions. . . . Just relax and don't be too engrossed in your own interest in verbalistic conflicts because the inroads on energy and national unity that such conflict inevitably produce, is a pastime we had better postpone until peacetime.

Frankfurter, *supra* note 144, at 440.

the missive, he decided against a concurrence,[146] while Justice Roberts urged compromise.[147] Stone continued "patient negotiations"[148] and announced the Court's decision on October 29, 1942.[149]

ii. Analysis of the *Quirin* Opinion

The Court intentionally resolved the case on the narrowest grounds, so stating expressly, and declined to address many factual and legal questions. For example, Stone neither thoroughly scrutinized the claims against, and defenses proffered by, the saboteurs, nor the processes which tested them. This review derived in essence from party agreement that rigorous scrutiny exceeded the Court's capacity, given the time restraints. Most relevant facts were actually stipulated and undisputed,[150] while Stone did not address petitioners' "guilt or innocence."[151] The Justices also left undecided some legal questions, such as whether Roosevelt alone might create the tribunal or whether Congress could limit presidential authority to treat enemy belligerents, mainly because it had "authorized trial of offenses against the law of war before such commissions."[152]

The Court first assessed the government 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.[153] Notwithstanding the document's specific words, which purported to eliminate judicial scrutiny, the Justices reviewed the petitioners' habeas writs.[154] Stone admonished that

---

[146] *See* Danelski, *supra* note 111, at 78 (citing Notes exchanged by Justices Felix Frankfurter and Robert Jackson (Oct. 1942), Paige Box 12, Frankfurter Papers, Harvard Law School).

[147] *See id.* (citing Justice Owen Roberts to Justice Felix Frankfurter (n.d.)).

[148] *See id.* at 79 (citing Chief Justice Harlan Fiske Stone to Roger Nelson (Nov. 30, 1942), Box 69, Stone Papers).

[149] *Ex parte* Quirin, 317 U.S. 1 (1942). Chief Justice Stone ultimately secured a resolution in which his colleagues agreed to disagree about the rationale. *See* Danelski, *supra* note 111, at 78–79 (detailing the compromises the Justices' made); *see also infra* notes 169–72 and accompanying text (discussing compromises).

[150] *See Quirin*, 317 U.S. at 20 (presenting the facts as undisputed except where noted). I reproduce many of the facts above. *See supra* notes 112–19 and accompanying text.

[151] *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 (noting that because "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of belligerency," determination of that issue was irrelevant).

[152] *Id.* at 29, 47 (declining to address petitioners' contention that if Congress authorized their trials "it ha[d] by the Articles of War prescribed the procedure by which the trial [was] to be conducted").

[153] *Id.* at 24–25; *see also supra* notes 112–18 and accompanying text.

[154] *Quirin*, 317 U.S. at 25 ("[T]here is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case."); *see In re* Yamashita, 327 U.S. 1, 9 (1946) (stating that Congress has "not withdrawn [jurisdiction], and the Executive" could not unless habeas corpus were suspended).

federal courts could overturn petitioners' trial and detention—which the President had ordered by exercising Commander-in-Chief authority in wartime—only if clearly convinced they violated the Constitution or statutes.[155] The Court canvassed Article I and II powers that provide for the common defense and found that the President has broad authority to wage war as declared by Congress and to effectuate all statutes which prescribe war's conduct as well as to define and punish "offenses against the law of nations."[156] 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," ascertaining "[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."[157] Unlawful combatants, such as the enemy "who without uniform comes secretly through [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."[158] 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, [the] trial of which" was within the commission's jurisdiction.[159] The Court said 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.[160]

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.[161] "[L]ong-continued and consistent interpretation" meant the provisos did not extend "the right to

---

[155] *Quirin*, 317 U.S. at 25.

[156] *Id.* at 25–29; *see* U.S. CONST. arts. I–II. 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 also* TRIBE, *supra* note 102, § 4-6, at 670 ("In time of war . . . this executive authority swells . . . [justified by] the President's position as Commander in Chief.").

[157] *Quirin*, 317 U.S. at 29–31.

[158] *Id.* at 31 (citation omitted).

[159] *See id.* at 36 ("The specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions.").

[160] *Id.* at 37–38 (finding "[m]odern warfare is directed at the destruction of enemy war supplies . . . as much as at the armed forces."). "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 purpose." *Id.* at 38; *see also* TRIBE, *supra* note 102, § 3-5, at 300 n.185 (stating that jurisdiction extended even to American citizens for sabotage).

[161] *Quirin*, 317 U.S. at 38–45.

demand a jury to trials by military commission, or [require] that offenses against the law of war not triable by jury at common law be tried only in the civil courts."[162] The Court assumed that some of those offenses are "constitutionally triable only by a jury,"[163] a view it had articulated in *Ex parte Milligan*.[164] 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."[165] 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.[166]

The Court did not designate meticulously the tribunal jurisdiction's ultimate scope as the saboteurs, "*upon the conceded facts*, were plainly within those boundaries."[167] The Justices, thus, held only that the behavior at issue was an "offense against the law of war which the Constitution authorize[d] to be tried by military commission."[168] 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[,]"[169] but lacked a majority who agreed on the "appropriate grounds for decision."[170] Certain Justices thought "Congress did not intend the Articles of War to govern a Presidential military commission convened for [resolving] questions relating to admitted enemy invaders,"[171] even as others believed specific Articles covered this tribunal, but neither precluded the measures Roosevelt prescribed nor those used.[172]

My analysis shows many factors warrant limiting *Quirin*. For example, the case evinces the speed with which the government

---

[162] *Id.* at 40.

[163] *Id.* at 29.

[164] 71 U.S. (4 Wall.) 2 (1866); *see* REHNQUIST, *supra* note 81, at 75–77 (stating the result would have been identical even if Congress provided for a court martial); Katyal & Tribe, *supra* note 42, at 1287 (characterizing *Milligan* as holding congressional authorization necessary but not sufficient for military tribunal).

[165] *Milligan*, 71 U.S. at 121; *see also Quirin*, 317 U.S. at 45 (quoting *Milligan*).

[166] *See Quirin*, 317 U.S. at 45–46 (deciding it was sufficient that the pleaded facts plainly established petitioners were alleged to be enemy belligerents under stated laws). *See generally* RICHARD H. FALLON JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 408–15 (5th ed. 2003); Belknap, *supra* note 111, at 85 (arguing Stone concluded *Milligan* was not "associated with the armed forces of the enemy"); Katyal & Tribe, *supra* note 42, at 1277–87 (discussing the *Milligan* and *Quirin* decisions).

[167] *Quirin*, 317 U.S. at 46 (emphasis added).

[168] *Id.* at 46.

[169] *Id.* at 47.

[170] *Id.*

[171] *Id.*

[172] *See id.* at 47–48 (noting that some Justices did not limit available procedures to those applicable under the Articles of War).

proceeded, the Court's ratification of the commission 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.[173] Stone described his justificatory effort as a "mortification of the flesh,"[174] while the Court differed on the result's reasoning.[175] *Quirin* manifests the wartime setting when, for instance, national security interests have eroded, and often trumped, civil liberties.[176] The opinion also reflects improper exogenous pressures, most critically from Roosevelt, to legitimize rapid trial, prompt conviction, and grave punishment,[177] as well as internal ones, mainly from Justice Frankfurter,[178] who later admitted *Quirin* was "not a happy precedent."[179] Twenty years after the case issued, Justice Douglas bemoaned the experience as showing "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."[180] Moreover, the decision was exceptional, very narrow, and should be restricted to its unusual facts.[181] Many observers have suggested that *Quirin* be sharply

---

[173] *Id.* at 18.

[174] ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 659 (1956); *see also* Danelski, *supra* note 111, at 72.

[175] *See supra* notes 171–73 and accompanying text.

[176] *See generally* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION (1990) (analyzing the tension between national security and civil liberties); TRIBE, *supra* note 102, § 4-6, at 670 (declaring that presidential authority broadens during times of war); Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 191–93 (1962) (discussing briefly that decisions in wartime are often "abhorrent" in view of normal judicial, peace-time decisions). Justice Jackson even said the Court had exceeded its authority. *See* Danelski, *supra* note 111 (citing Memorandum from Justice Robert H. Jackson (Oct. 23, 1942), Box 124, Robert H. Jackson Papers, Library of Congress).

[177] *See, e.g.*, FISHER, *supra* note 6, at 50–53 (describing Roosevelt's various responses to military tribunals); Katyal & Tribe, *supra* note 42, at 1291 (arguing that the pressures on the Court warranted reconsideration); *supra* notes 119–34 (recounting President Roosevelt's opinion regarding swift punishment of the "saboteurs").

[178] Most notable was Frankfurter. *See supra* note 144 (indicating his concern about the *Quirin* case); *see also* sources cited *supra* note 144.

[179] Danelski, *supra* note 111 at 80 (quoting Memorandum of Justice Felix Frankfurter (June 4, 1953), Box 65, Felix Frankfurter Papers, Harvard Law School); *see also id.* (commenting on criticisms of the *Quirin* decision); White, *supra* note 144, at 436 (examining Frankfurter's qualms about *Quirin*).

[180] Interviews by Walter F. Murphy with Justice William O. Douglas, U.S. Supreme Court (June 9, 1962) (transcript on file with Seeley G. Mudd Manuscript Library, Princeton Univ.) (discussing the "patient negotiation" that accompanied the *Quirin* decision); *see also* Danelski, *supra* note 111, at 80.

[181] *See Ex parte* Quirin, 317 U.S. 1, 45–46 (1942) ("We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission."). Other opinions have articulated the precept that the Court should draft opinions narrowly. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (discussing the judicial practice of "dealing with the largest questions in the most narrow way");

confined, and a few have analogized the opinion to *Korematsu v. United States*,[182] the discredited ruling which validated internment of Japanese Americans.[183]

b. *Additional Reasons for Limiting* Quirin

There are other major ways in which *Quirin* is limited, essentially warranting the determination's consignment to an archaic Second World War relic, which offers minimal support for the recently-instituted punishment regimes. It is important to understand that the time period in which the Supreme Court resolved *Quirin* antedated the dramatic growth of federal habeas corpus jurisprudence, criminal procedure safeguards, and international and human rights law.

i. Habeas Corpus

Careful evaluation of *Quirin* and its historical context undermines the assertion by numerous Bush administration officials that the Justices only scrutinized whether the military tribunal's *jurisdiction* was lawful.[184] The Court framed the issues vis-à-vis commission jurisdiction over the saboteurs and the alleged offenses, but the Justices clearly exercised jurisdiction and proceeded to resolve 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 obviated any need for judicial inquiry regarding those facts or their proof.[185] However, even if the *Quirin* Court merely treated jurisdiction in the narrowest sense,[186] the decision could not justify analogous confinement of federal

---

Dames & Moore v. Regan, 453 U.S. 654, 660–61 (1981) (commenting on the necessity to determine the validity of presidential action on the narrowest possible grounds).

[182] 323 U.S. 214 (1944) (affirming an order excluding people of Japanese ancestry from a military area during World War II because of the threat to national security).

[183] *See* Katyal & Tribe, *supra* note 42, at 1290–91 (comparing *Quirin* to *Korematsu* to demonstrate why the case should be discounted as precedent); Turley, *supra* note 119, at A17 (discussing how *Quirin* is the "sister case" to *Korematsu*); *see also* Warren, *supra* note 176, at 193–94 n.33 (comparing *Quirin* and *Abel v. United States*, 362 U.S. 217 (1960) (regarding a Russian army colonel apprehended in New York who was granted a full civilian trial and the protections of the Bill of Rights, in terms of military jurisdiction).

[184] *See supra* notes 150–83 and accompanying text (analyzing the Court's decision in *Quirin* and explaining the various issues addressed by the Court).

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

[186] 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 150–51 and accompanying text (describing the Court's capacity, given the time restraints).

judicial review, which scrutinizes detention or punishment under the Bush Order. Assuming arguendo that *Quirin* mandated circumscribed review, this feature must be updated to reflect the substantial evolution of federal habeas corpus jurisprudence in the six decades following *Quirin*'s issuance.

The law which governed the scope of federal habeas corpus scrutiny in 1942, the year *Quirin* issued, cabined review.[187] Federal courts, in habeas proceedings then and since the nation's founding, essentially undertook a "jurisdictional inquiry," so conviction by a court with valid jurisdiction ended the dispute.[188] It was not until the 1950s that the Justices abandoned this restricted habeas corpus jurisprudence and began its profound expansion,[189] which means today the writ is generally available for remedying constitutional mistakes which infect convictions.[190]

ii. International Legal Developments

The second principal way that *Quirin* is limited reflects the strikingly underdeveloped condition of international law, as well as of

---

[187] *See* FALLON ET AL., *supra* note 166, at 1364–68 (assessing debate over the writ's scope). Leading, and often diverse, views 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).

[188] There are several lead cases for the "jurisdictional rule" in *Ex parte Watkins*, 28 U.S. 193, 203, 3 Pet. 119, 126 (1830). *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938) (remanding a denial of a habeas petition to determine if the right to counsel was waived); Moore v. Dempsey, 261 U.S. 86 (1923) (reversing a denial of a habeas petition); *Ex parte* Siebold, 100 U.S. 371 (1879) (holding jurisdiction over a writ because the petition was appellate in nature).

[189] Typical is *Brown v. Allen*, 344 U.S. 443 (1953), which affirmed denial of petitions for habeas relief. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 10.4–10.5, at 682–86 (4th ed. 2003) (tracing the history of habeas corpus law); Eric M. Freedman, *Milestones in Habeas Corpus: Part III–*Brown v. Allen: *The Habeas Corpus Revolution That Wasn't*, 51 ALA. L. REV. 1541 (2000) (providing an historical analysis of habeas corpus jurisprudence). *Waley v. Johnston*, 316 U.S. 101 (1942), which allowed for the use of writs in cases where conviction violated the accused's constitutional rights and the writ is the only effective means of preserving rights, may have departed from *Watkins*, but case law and commentary at the time suggest otherwise. *See* Sunal v. Large, 332 U.S. 174 (1947) (denying habeas corpus petition and adhering to jurisdictional approach); Alexander Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U. L. REV. 26, 40–46 (1945) (discussing how, although the Supreme Court expanded the scope of habeas petitions, it adhered to certain fundamental principles).

[190] A classic example is *Fay v. Noia*, 372 U.S. 391 (1963), which held that failure to appeal a conviction did not require a denial of a habeas petition. *See also* CHEMERINSKY, *supra* note 189, § 10.5.2, at 690.

global human rights law, when the determination issued.[191] For instance, the World War II-era opinion predates the International Covenant of Civil and Political Rights ("ICCPR") and the Geneva Conventions, treaties to which the United States is a party, as well as long-established doctrines of customary international law respecting due process. These factors show that the detentions and military commission rules ignore numerous procedural safeguards in the ICCPR, may violate the Geneva Conventions, and could infringe upon due process strictures in human rights law.

c. *Guantánamo Bay Detention Cases*

Judges might have improperly resolved some litigation which challenged the Guantánamo Bay detentions, or at most the cases warrant narrow application. In *Al Odah v. United States*,[192] the D.C. Circuit broadly read *Johnson v. Eisentrager*,[193] which should be confined to its unusual facts that implicated a declared war and military tribunals Congress specifically authorized for prosecutions in a war zone, while the mid-twentieth century time frame preceded the vast growth of international and humanitarian law canvassed above.[194] However, the Ninth Circuit's determinations that *Eisentrager* did not preclude its exercise of jurisdiction over the habeas corpus petition or mandate sovereignty, rather than territorial jurisdiction, as well as its findings that the Guantánamo lease, the treaty, and pragmatic realities mean the base is sovereign territory for habeas purposes,[195] apparently comport better with modern understandings of habeas corpus, international, and human rights law.[196]

---

[191] *See* Cole, *supra* note 1; Dickinson, *supra* note 1, at 1421–32 (detailing international laws regarding procedural protections that secret detentions and proposed procedures for military commissions ignore); Koh, *supra* note 3, at 338–39 (arguing that the military order undermines the concept of separation of powers).

[192] 321 F.3d 1134 (D.C. Cir.), *cert. granted in part*, 124 S. Ct. 534 (2003) (mem.) (rejecting habeas petitions for lack of citizenship).

[193] 339 U.S. 763, 785 (1950) (holding that a habeas petition was properly dismissed because "the Constitution does not confer a right of personal security or an immunity from military trials and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States").

[194] *See supra* notes 38, 191 and accompanying text (discussing the *Eisentrager* case and the state of international and humanitarian law). Because Coalition of Clergy v. Bush, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2073 (2003) (mem.), did not reach detainment's merits, it warrants no additional treatment here. *See supra* note 39 and accompanying text.

[195] Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003); *Coalition of Clergy*, 310 F.3d 1153.

[196] *See supra* notes 39, 187–91 and accompanying text (detailing the jurisprudence of habeas corpus, international and human rights law). The district judge thus far has resolved the vexing *Moussaoui* case rather well. *See* United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003), *aff'd in part and vacated in part*, No. 03-4792, 2004 WL 868261 (4th Cir. Apr. 22, 2004); *supra* note 40 and accompanying text.

d. *Summary*

Indefinite detentions and military tribunals undermine the rule of law at home by flouting basic constitutional protections and, globally, by eroding international law tenets. For example, the commission proceedings will limit defendants' rights in terms of what the Constitution normally guarantees for civilian trials while affording fewer safeguards than courts martial. Illustrative are the lack of provision for jury trials and the privilege against self-incrimination, lenient rules governing evidentiary burdens, proof and verdicts, and the potential to close trials. The detentions concomitantly have violated, and tribunals will undercut, major treaties to which the United States is a signatory[197] and essential aspects of customary international law, such as due process requirements. Moreover, indefinitely detaining individuals and trying suspects in commissions resemble behavior for which America has castigated others and, thus, damage global relations by making the United States appear hypocritical.

B. Additional Reasons Why Reliance Is Misplaced

Reliance on indefinite detentions and tribunals is misplaced for numerous reasons which complement and augment the legal ones surveyed earlier. Dependence on practical and policy contentions to suspend the rules, which typically govern adjudication of criminal responsibility, is unwise and may well be counterproductive. Advocates of detentions and tribunals, who find law to be an inconvenience and even dangerous, champion pragmatic ideas.[198] For instance, proponents assert that federal court trials impose too great temporal and monetary expense, as well as risk on judges and jurors, that terrorists deserve no protections, that the evidence available fails to meet strict requirements and must be kept secret for national security purposes, and that detentions and military tribunals accord the government necessary control.

However, compliance with the letter of United States and international law and reliance on domestic and global legal process—in the form of entities, such as federal courts and international tribunals, and procedures, namely, due process and other constitutional safeguards—will advance near- and long-term American strategic interests at home, but especially in the new sociopolitical context

---

[197] *See, e.g.*, Int'l Convention on Civil and Political Rights, adopted, United Nations General Assembly Res. 2200A (XXI), Dec. 16, 1966, in force Mar. 23, 1976.

[198] I rely here and in the remainder of this paragraph on sources cited *supra* notes 2–20 and accompanying text, which examine the circumstances surrounding the *Quirin* case in terms of military commissions and detentions.

produced by world terrorism.[199] Dependence on international legal process will: help galvanize the world coalition the United States needs to resist terrorism effectively; promote terrorists' apprehension, arrest, and prosecution; foster protection of Americans overseas; establish the crime's international nature and isolate al Qaeda; facilitate development of global norms for terrorism; and increase the perceived legitimacy of United States governmental actions.

Use of detentions and tribunals is also unwarranted because it imposes both disadvantages that resemble those identified earlier and additional detriments. Most significantly, the practices have not accounted for their harmful consequences. Detaining thousands of Muslim and Arab men in the United States and 650 individuals absent process at Guantánamo Bay has seriously infringed civil rights, and trials before commissions promise to have similar effects. The measures' impacts have been, and will be, visited principally on communities of color. Without trivializing this enormous human toll, the detention of many individuals for protracted times has been financially onerous. Moreover, the President's unilateral reliance on detentions and creation of tribunals grants excessive authority to a single governmental branch. The mechanisms, thus, have societal costs for America domestically, because they erode treasured values, including freedom and separated powers, and overseas, because they jeopardize relations with other countries.

C. Summary by Way of Cost-Benefit Analysis

Proffering a reliable cost-benefit evaluation is difficult. Certain phenomena, such as individual liberty and national security, are so abstract that they defy quantification, while others, which seem more tangible, cannot be reduced to precise amounts. Were calibration of detriments and advantages easier, problems would still remain. Some include identifying cause and effect linkages between these costs and benefits, as well as between detentions and tribunals, guaranteeing the accuracy of the yardsticks used, and striking a balance that involves commensurables. For example, if the measure of success is preventing attacks within the United States since September 11, the devices have apparently been effective. However, when the yardstick

---

[199] *See* Dickinson, *supra* note 1, at 1435, 1445–66 (examining the United States' role in international law in light of the increased emphasis on terrorism); Koh, *supra* note 3 (indicating skepticism about the international community's ability to overcome political obstacles and the effectiveness of military commissions); Turley, *supra* note 1, at 743–48 (analyzing the bases for the use of military tribunals in the war on terrorism); *see also* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (describing the United States' response to the September 11th attacks in a historical context and the use of the criminal system and its safeguards in dealing with terrorism).

applied is stopping terrorism worldwide or in the Middle East, or fostering civil liberties, success appears less clear. Nonetheless, the major disadvantages and benefits can be estimated and compared.

The novel and controversial punishment regimes have offered a few advantages. For instance, the systems may have partially realized their chief functional justifications; namely, protecting national and global security, deterring terrorist activities, and making progress in the war on terrorism. The measures could have helped preclude strikes on American territory since September 11 and might have stopped or reduced terrorism elsewhere, particularly in Afghanistan and Iraq, although these notions are contested.

Even if the schemes have afforded certain benefits, including the prevention of terrorist attacks within the United States, the regimes have entailed substantial detriments, many of which I considered above. The systems have not attended to their deleterious impacts. Holding thousands with little process has violated the individuals' rights, and these detentions have required gigantic fiscal expenditures. Prosecutions before military commissions will similarly affect defendants' civil liberties, while unilateral executive institution of the detentions and tribunals has accorded one branch too much power. The mechanisms concomitantly disadvantage the United States at home, by undermining cherished ideals, and abroad, by threatening relationships with many states. Numerous assessed propositions, therefore, show that the regimes' costs outweigh their benefits, while the schemes have minuscule future viability and could warrant elimination or at least sharp curtailment.

In sum, basic aspects of the war on terrorism, namely detentions and military tribunals, comprise unique and disputed punishment systems. The regimes' adverse impacts, especially vis-à-vis civil liberties, outstrip the techniques' benefits, particularly those that involve security. A number of Bush administration officials and judges correspondingly misplaced reliance on domestic precedent, such as *Quirin*, when they instituted or approved the measures. This Article's final section, thus, offers recommendations to address the issues that the schemes and concomitant terrorism litigation have presented and will raise.

III. SUGGESTIONS FOR THE FUTURE

Because the detriments imposed by the novel, controversial punishment regimes eclipse their advantages, President Bush and Congress should terminate, or substantially restrict, the use of indefinite detentions and military commissions. If the administration and lawmakers find these suggestions unpalatable because, for example, they deem national and global security interests more compelling than civil liberties, executive and judicial branch officials should accord

relevant case law the kind of nuanced treatment surveyed earlier and particularized below.

A. Reconsidering the Punishment Systems

1. *Bush Administration*

a. *Military Tribunals*

Many ideas canvassed above demonstrate that the President must seriously reconsider his unilateral assertion of executive power to detain thousands of individuals for lengthy periods and to create military tribunals. The administration might proceed in ways that would basically rescind these devices, circumscribe the techniques, or more narrowly tailor the approaches to various factual scenarios. A threshold issue that deserves exploration is whether the commissions trench so much on fundamental American values of liberty and separated powers that the tribunals warrant abrogation. Information reviewed earlier arguably suggests that commissions should be disbanded, although numerous observers, most pertinently in the executive and legislative branches, may consider this solution radical and unrealistic.

It is impossible to offer guidance that definitively treats the broad spectrum of circumstances that will arise, while properly balancing the multifarious relevant phenomena. However, in general, the administration should deploy a finely-calibrated evaluation, which attempts to maximize national security, civil liberties, separation of powers, and financial economies. One more specific illustration would be a presumption that requires federal court trials for individuals suspected of terrorism except when these prosecutions would clearly jeopardize national security and, thus, warrant the use of a military tribunal.[200] Related ideas include the availability and ostensible efficacy of techniques, such as document redaction and in camera hearings, which would minimize the worst aspects of the forum choice. Other examples are the myriad, innovative approaches devised by the trial judges who had responsibility for the federal court proceedings that implicated Hamdi, Moussaoui and Padilla.[201]

---

[200] The government might be required to convince an Article III judge that the government needs to proceed in a military tribunal and to satisfy a test that is stricter than the "some evidence" standard applied in terrorism litigation to date. *See supra* text accompanying note 35; *infra* note 233 and accompanying text (demonstrating the deferential standard in *Padilla*). I am not impugning the integrity of this administration or future ones that may understandably have greater concern for national security than civil liberties.

[201] *See supra* notes 31–36, 40, 196; *infra* notes 232–37 and accompanying text (recounting the reasoning behind the *Hamdi*, *Moussaoui*, and *Padilla* decisions). I appreciate that the Fourth

Insofar as the administration chooses to try defendants before military commissions, which federal judges hold valid, it should reassess the strictures the Bush and DOD Orders prescribed[202] and reformulate them in ways that will enhance safeguards such as due process, as well as the rights to counsel and against self-incrimination, which the Constitution affords and which are recognized by international or human rights law.[203] Two valuable sources inform these mandates' reexamination and possible recalibration. One is Fourth, Fifth, and Sixth Amendment guarantees that modern federal courts articulate as well as proof burdens, evidentiary requirements, and other protections which they now impose. A second source includes bills introduced during 2002 and 2003 that specifically authorize military tribunals.[204] Limiting commission invocation and elaborating the safeguards granted would help address United States and international concerns related to civil liberties and domestic ones about separated powers.

b. *Detentions*

The Bush administration must also consider and implement mechanisms which rectify or temper the harmful effects of detaining numerous individuals for prolonged times. Executive Branch officials should use a carefully-tuned assessment which implicates the risks to national security, civil liberties, separated powers, and fiscal integrity in proceeding, as well as the availability and effectiveness of measures that remedy or confine those dangers.[205] For instance, the DOJ might evaluate trying Hamdi and Padilla in federal courts or, perhaps, before military tribunals,[206] although these ideas'

Circuit rejected the district judge's approach in *Hamdi*, 316 F.3d 450 (4th Cir. 2003). Moreover, the tortured *Moussaoui* litigation may undercut my ideas, but the case is extraordinary, and the district judge seems fair and diligent. This overall approach is based on federal courts' comparative advantage, especially vis-à-vis protecting civil liberties, over military tribunals, but it recognizes that national security concerns may trump them, when necessary.

[202] *See supra* note 2 and accompanying text (documenting the DOD Order).

[203] *See supra* note 191 and accompanying text (examining international and human rights law).

[204] *See supra* note 78 and accompanying text (analyzing a proposal that would accord greater protections than did the Bush Order). Insofar as the Bush and DOD Orders' prescriptions do not bind military tribunal judges, they should implement this guidance.

[205] I envision refined application of the analysis presented *supra* note 200 and accompanying text, which requires a stricter evidentiary standard for individuals charged with terrorism. Of course, insofar as the administration is using practices that violate the rule of law, it must cease doing so. *See supra* notes 17–20 and accompanying text (documenting the recent issues regarding detention after September 11).

[206] The Bush Order's terms, which apply to non-citizens, may not permit this, as Hamdi and Padilla are United States citizens. *See* sources cited *supra* note 2 (describing the DOD Order); *see also supra* notes 19, 23–36 and accompanying text (explaining the *Hamdi* and *Padilla* cases).

effectuation will await High Court resolution of their cases.[207] The government should think about continuing with the trial of Moussaoui, as limited by the district judge, in federal court, or attempt to prosecute the defendant before a military commission.[208]

The administration must correspondingly institute efforts that will facilitate treatment of many others whom it has detained. The government could use an analogous evaluation of risks and ameliorative techniques.[209] For example, the DOD and the DOJ should determine the appropriateness of prosecuting numerous additional individuals held at Guantánamo before military tribunals or even federal courts, while enhancing detainees' safeguards, namely, greater access to counsel. The DOJ must also invoke a similar analysis to process more expeditiously the thousands of Muslims and Arabs it has held by deciding whether they should be charged and tried and, if so, in what forum.

2. *Congress*

Insofar as the Bush administration eschews these recommendations, Senate and House members should assess and implement them. For instance, Congress might directly treat a number of questions that the unilaterally-instituted military tribunals pose. It could enact legislation which would specifically authorize the commissions and introduce new, or augment present, safeguards that implicate areas, such as burdens of proof, evidentiary mandates, and verdicts.[210] Lawmakers could also pass bills which would remedy or ameliorate indefinite detentions' worst features. A related, promising approach would be scrutinizing and eliminating or curtailing those USA PATRIOT Act sections that govern detentions, which most erode civil liberties when Congress reauthorizes the legislation that it hastily adopted in the wake of the September 11, 2001, terrorist attacks.[211]

---

[207] The government recently accorded Hamdi and Padilla access to counsel. *See supra* note 29 (discussing Hamdi's access to counsel); Michael Powell, *Lawyer Visits 'Dirty Bomb' Suspect*, WASH. POST, Mar. 4, 2004, at A10 (noting that Padilla was permitted to meet with counsel for the first time since President Bush declared him an enemy combatant in 2002). Courts might apply the safeguards developed by the district judge in *Padilla*. *See supra* note 36 and accompanying text; *infra* note 237 and accompanying text.

[208] *See supra* notes 40, 196, 201 and accompanying text.

[209] I envision refined application of the analyses presented *supra* notes 200, 205 and accompanying text.

[210] *See supra* note 78 and accompanying text.

[211] *See supra* notes 53–54, 58–60 and accompanying text.

3. *Bush Administration and Congress*

President Bush and Congress should individually and jointly consider alternatives that threaten civil liberties and separated powers less, yet foster national security to the same degree as present procedures. One valuable example would be implementing some type of international tribunal.[212] The United States might advocate the creation of a new institution or the expansion of present tribunal jurisdiction. Related options could be internationalized military commissions or a hybrid domestic/international court that would receive United Nations help and be attached to peacekeeping forces in Afghanistan or Iraq where it would sit.

President Bush as well as Senate and House members may reject these suggestions because, for instance, they think that the recommendations underemphasize national and global security considerations and overstate the need to protect civil liberties. If the chief executive and lawmakers do not adopt these ideas, judges should evaluate and implement the concepts below in resolving litigation which implicates terrorism.

B. Terrorism Litigation

1. *Military Commissions*

When the Bush administration actually prosecutes someone in the military tribunal and that individual challenges its constitutionality, the federal judge who entertains the case should resolve the matter pursuant to numerous principles. Most important, the President does not have authority to eliminate federal court jurisdiction, a judgment compelled by the Constitution and *Youngstown*,[213] although military commissions may be valid in particular contexts, namely, extraterritorial prosecutions that result from declared wars. Articles I and III of the Constitution, in clear terms, state that Congress, not the Executive, is the political branch with power to establish federal courts and prescribe their jurisdiction.[214] *Youngstown* is concomitantly the controlling precedent. The majority opinion concludes that the President lacks authority to legislate in areas specifically delegated to Congress, even in national emergencies,[215] while the major

---

[212] *See* Dickinson, *supra* note 1; Koh, *supra* note 3.

[213] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[214] U.S. CONST. art. I, § 8, cls. 1, 2 ("The Congress shall have the power . . . [t]o constitute Tribunals inferior to the supreme Court."); U.S. CONST. art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.").

[215] *Youngstown*, 343 U.S. at 587–89.

concurrence finds this power at its nadir when invoked absent an explicit grant and against clearly-stated legislative will.[216] *Quirin* correspondingly warrants quite narrow application. The Court did not resolve whether the chief executive acting alone could institute military tribunals but premised its decision that the Roosevelt Commission was valid mainly on Congress's war declaration and its explicit authorization for tribunals in the Articles of War.[217] Other phenomena, including the case's peculiar facts, its confined holding, and the wartime context, require *Quirin*'s sharp limitation. 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 access to federal court.

2. *Detentions and Related War on Terrorism Litigation*

When federal judges address war on terrorism litigation, especially implicating detentions, they should resolve these cases pursuant to several essential tenets. Most important, courts should recognize that the Bush administration and a few judges have invoked *Quirin* for concepts, such as broad judicial deference to Executive Branch detentions, which the opinion does not support, and must cabin its application for numerous reasons. First, *Quirin* involved unique facts that were basically uncontested.[218] Second, a number of phenomena make the determination and its legal analysis vulnerable to criticism.[219] Moreover, Chief Justice Stone, in his majority opinion, intentionally and expressly limited the decision, its legal evaluation, and the holding, while the Justices could not agree on a rationale.[220] Courts should also reject *Quirin*'s expansive invocation for notions, such as judicial acquiescence to presidential detentions. They must recognize that the Court exercised jurisdiction, despite the Roosevelt proclamation which purportedly barred it, while 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 case'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 should clearly reject this antiquated feature of the opinion in treating the federal habeas petitions the Bush Order will generate. Habeas corpus' 60-year

---

[216] *See supra* notes 95–101 (discussing Justice Jackson's *Youngstown* concurrence).

[217] *Ex parte* Quirin, 317 U.S. 1, 28 (1942).

[218] *See id.* at 20–22.

[219] *See supra* notes 173–83 and accompanying text.

[220] *See* 317 U.S. at 47–48.

development, which means the writ issues to prisoners confined under judgments that violate the Constitution, together with the Warren Court's broadened interpretation of federal constitutional protections accorded criminal defendants, substantially alter federal habeas jurisdiction's character and import. Illustrative of contemporary federal habeas' usage are allegations that state-appointed counsel furnished ineffective assistance[221] and that police secured self-incriminating statements in violation of the requirements imposed by *Miranda v. Arizona*.[222]

These examples of the writ's modern application do not necessarily mean that a defendant whom a military tribunal lawfully tries will have those or other constitutional protections. However, a federal court that exercises jurisdiction over a habeas petition of someone tried in a commission does possess the requisite authority for deciding on the merits constitutional challenges to tribunal operation and must not be stymied by an outmoded allusion to *Quirin*. A party, thus, might claim that admission of questionable evidence contravened the individual's Fifth Amendment right to "due process of law,"[223] or that the person's conviction lacked support in constitutionally adequate evidence[224] or was premised on self-incriminating statements procured in a coercive manner.[225] The lax evidentiary criteria that the DOD Order provides mean that litigants promise to raise these issues.[226] However, defendants will pursue many additional questions, while 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 deterred by anachronistic references to *Quirin*.

Quirin, thus, prescribes meaningful federal court review to the greatest extent allowed by relevant habeas corpus law while carefully

---

[221] *See, e.g.*, Williams v. Taylor, 529 U.S. 362 (2000) (finding ineffective assistance in a capital case); Kimmelman v. Morrison, 477 U.S. 365 (1986) (determining respondent had received grossly ineffective assistance).

[222] 384 U.S. 436 (1966) (holding that prosecutors may not use statements made during custodial interrogation unless the defendant was first advised of his privilege against self-incrimination and his right to counsel); *see also, e.g.*, Withrow v. Williams, 507 U.S. 680 (1993) (finding that inculpatory statements were made in violation of *Miranda*).

[223] 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. Administration reliance on ex parte affidavits in *Hamdi* and *Padilla* may presage their use in commissions. *See* Cole, *supra* note 1, at 977.

[224] *See* Fiore v. White, 531 U.S. 225, 229 (2001) (concluding that the defendant's conviction failed to satisfy constitutional demands because the state "presented no evidence whatsoever" to prove a basic element of the crime).

[225] *See Withrow*, 507 U.S. at 708 ("Involuntariness [of self-incriminating statements] requires coercive state action, such as trickery, psychological pressure, or mistreatment.").

[226] *See* DOD ORDER, *supra* note 2, § 6(D)(1) (providing that evidence shall be admitted if it "would have probative value to a reasonable person").

warning against unjustified judicial intrusion in executive national security actions. Notwithstanding the Justices' appreciation of the wartime situation in which they ruled, the Court deemed resolving constitutional attacks on the presidential initiative compatible with its judicial role.

Another reason why federal judges should treat *Quirin* narrowly is that the opinion's 1942 timing preceded the great expansion in international and human rights law that occurred over the subsequent six decades.[227] 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 which have evolved in international humanitarian law since 1942.

The war on terrorism litigation to date provides concrete examples of these ideas. In *Hamdi*, for instance, even the Fourth Circuit, which has most solicitously read *Quirin*, appeared 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."[228] 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,"[229] and then rejected the government's motion to dismiss: "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."[230]

District Judge Robert Doumar, who first entertained the *Hamdi* petition, narrowly viewed *Quirin* and eschewed the DOJ's reliance on it. "[B]efore the government had time to respond to the [habeas] petition, the district court appointed . . . counsel for the detainee[,] ordered the government to allow [him] unmonitored access to Hamdi[,]"[231] and "intimated that the government was possibly hiding disadvantageous information from the court[,]" ordering it to provide considerable material assembled on Hamdi.[232] Judge Doumar

---

[227] *See supra* note 191 and accompanying text. *But see supra* notes 32–33 (discussing the *Padilla* district court's choice nonetheless to apply *Quirin*).

[228] Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002) (quoting from the government's brief).

[229] *Id.*

[230] *Id. But see supra* notes 31–32 and accompanying text (referencing the analysis used by the *Padilla* district court).

[231] Hamdi v. Rumsfeld, 316 F.3d 450, 460 (4th Cir. 2003).

[232] *Id.* at 462. These events occurred during an August 2002 hearing. To be sure, the Fourth Circuit rejected these actions. *Id.* at 476.

also closely reviewed President Bush's designation of Hamdi as an enemy combatant because that label has such dire effects. 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] referr[ing] to information it felt was missing[,]" and issued an opinion which concluded the declaration fell "'far short' of supporting Hamdi's detention."[233] The Fourth Circuit believed these efforts to be overly rigorous; however, the district judge's approach may have been preferable to the appellate scrutiny that was so minimalist as to constitute "no meaningful judicial review."[234]

The Second Circuit treatment of presidential authority to designate United States citizens enemy combatants in *Padilla*, which relied on *Youngtown*'s analytical framework, while honoring, but not acquiescing in, executive prerogatives, concomitantly seemed better than the Fourth Circuit's disposition of the analogous question in *Hamdi*.[235] The trial court that earlier decided *Padilla* correspondingly acknowledged 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."[236] The judge also ruled that Padilla should have access to counsel and imposed conditions, which the court apparently thought were warranted for the protection of national security.[237]

The Ninth Circuit's resolution of the issues presented by the Guantánamo detentions[238] also seemed preferable to the D.C. Cir-

---

[233] *Id.* at 462. A concomitant of Judge Doumar's approach would be imposing a review standard for these designations that is stricter than the quite lenient "some evidence" criterion that the district judge articulated and used in *Padilla*. *See supra* note 35 and accompanying text.

[234] *Hamdi*, 296 F.3d at 283; *see supra* notes 25–30 and accompanying text (discussing the Fourth Circuit's analysis in *Hamdi*).

[235] *See supra* notes 25–30, 37, 229–34 and accompanying text (discussing the courts' varying treatment of defendants Hamdi and Padilla). Differential treatment may reflect critical factual distinctions, as the Second Circuit and Fourth Circuit judges carefully observed. *See* Padilla *ex rel.* Newman v. Rumsfeld, 352 F.3d 695, 711 (2d Cir. 2003) (agreeing with the Fourth Circuit that comparing the "battlefield capture" of Hamdi in Afghanistan "to the domestic arrest" of Padilla at O'Hare Airport in Chicago "is to compare apples and oranges" (quoting Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003))), *cert. granted*, 124 S. Ct. 1353 (2004) (mem.).

[236] 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) (stating that facts were stipulated by counsel).

[237] *Padilla*, 233 F. Supp. 2d at 610 ("Padilla may consult with counsel . . . under conditions that will minimize the likelihood that he can use his lawyers as unwilling intermediaries for the transmission of information to others . . . ."); *see supra* note 36 and accompanying text. This seems preferable to allowing detainees, such as Hamdi, to languish in military prisons pending the conflict's end.

[238] *See* Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003); Coalition of Clergy v. Bush, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2073 (2003) (mem.).

cuit's treatment.[239] For instance, the Ninth Circuit's rather narrow interpretation of *Johnson v. Eisentrager*[240] and its flexible approach to habeas corpus jurisdiction more accurately reflected contemporary habeas' breadth, the dramatic growth of international and human rights law, and pragmatic realities.[241]

CONCLUSION

Specific dimensions of the war on terrorism impose new and controversial punishment systems. The Bush administration's reliance on indefinite detentions and establishment of military tribunals have undermined and will contravene the rule of law domestically and internationally. This dependence inflicts societal costs on the United States both at home, by eroding venerable ideals—namely, separated powers and civil liberties—and abroad, by straining relations with numerous countries. If President Bush and Congress follow the recommendations above, they may threaten civil liberties less and be able to protect national security as well.

---

[239] *See* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir.), *cert. granted in part*, 124 S. Ct. 534 (2003) (mem.); *see also supra* notes 38–39, 194–96 and accompanying text.

[240] 339 U.S. 763 (1950).

[241] *See id.*; *supra* notes 184–91 and accompanying text.